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The Public's Right of Access to Pretrial Proceedings Versus The Accused's Right to a Fair Trial

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Introduction

In *Press-Enterprise Co. v. Superior Court of California*¹ (*Press-Enterprise II*), the United States Supreme Court held that the closure of a preliminary hearing in a highly publicized criminal prosecution, as requested by the defendant, infringes on the First Amendment right of the press and the public to have access to the criminal trial process. In so doing, the Court tacitly reversed its prior holding in *Gannett Co. v. DePasquale*² that there is no constitutional requirement "that a pretrial proceeding such as [a pretrial suppression hearing] be opened to the public, [when] the participants in the litigation agree that it should be closed to protect the defendants' right to a fair trial."³ Thus, the Court's decision in *Press-Enterprise II* has severely diluted a criminal accused's ability to persuade a trial judge to restrict press and the public access to pretrial proceedings in order to attenuate prejudicial pretrial publicity.

In a recent case, the United States Court of Appeals for the Armed Forces⁴ (CAAF) adopted the *Press Enterprise II* doc-

trine on press and public access to pretrial proceedings.⁵ The CAAF invoked its extraordinary writ power⁶ and ordered that the Article 32 investigation⁷ in the case of former Sergeant Major of the Army Gene C. McKinney be open to the press and the public.⁸

This article discusses the line of United States Supreme Court cases that address open versus closed pretrial and trial proceedings. The article then details how the CAAF has adopted and applied the Supreme Court's doctrine to courts-martial. Finally, the article poses a scenario in which a defense counsel in a military prosecution is compelled to move for closure of a pretrial proceeding.

Sergeant Major McKinney joined the press in applying for a writ of mandamus to open his Article 32 hearing. However, open pretrial proceedings are not always in an accused's interest. Often, the accused will ask that a pretrial proceeding that is the subject of press or public scrutiny be closed, because evidence that is prejudicial to the accused will be aired prior to a

1. 478 U.S. 1 (1986).

2. 443 U.S. 368 (1979).

3. *Id.* at 385.

4. On 5 October 1994, Congress changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces (CAAF). See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (codified at 10 U.S.C.A. § 941 (West 1998)).

5. See *infra* notes 122-31 and accompanying text.

6. The CAAF and the service courts of criminal appeals, as "courts established by an act of Congress," have the authority to entertain petitions for, and to "issue[,] all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the uses and principles of law." 28 U.S.C.A. § 1651(a) (West 1998).

7. Under Article 32 of the Uniform Code of Military Justice, a court-martial case cannot be referred to a general court-martial unless an investigating officer has first conducted a "thorough and impartial" pretrial investigation to determine, inter alia, whether there is a sufficient factual basis for the charge or charges. See UCMJ art 32 (West 1995). The accused has the right to be present with counsel at the investigation, to cross-examine government witnesses, and to call witnesses on his own behalf. *Id.*

8. See *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (1997). The requirement in 28 U.S.C.A. § 1651(a) that writs be "necessary and appropriate in aid of" a federal court's jurisdiction appears to limit the extraordinary writ power of the CAAF and the service courts of criminal appeals to cases that are already referred to military courts-martial, since the only issues which will come before those military appellate courts by the statutory appellate process will arise from trials by courts-martial. See 28 U.S.C.A. § 1651 (West 1998). However, the CAAF and the service courts of criminal appeals have asserted and established their power to entertain petitions for, and to issue, extraordinary writs in military justice proceedings which have not yet reached the stage of referral to a military court-martial. These courts have reasoned that even cases in the pre-referral stage may potentially reach the military appellate courts. See, e.g., *San Antonio Express News v. Morrow*, 44 M.J. 706, 708-09 (A.F. Ct. Crim. App. 1996) (holding that extraordinary writ power extends to all "tiers" of the military justice process, including pre-referral investigations under Article 32). In the case of Sergeant Major McKinney, the CAAF tacitly assumed that its extraordinary writ power extended to the Article 32 investigation. The court did not discuss the issue. See *ABC*, 47 M.J. at 364 (addressing whether a writ should first be considered by Army Court of Criminal Appeals, not whether extraordinary writ power extends to pre-referral proceedings such as an Article 32 investigation).

trial before members. The scenario that is posed in this article demonstrates how the prevailing standard which promotes press and public access to pretrial proceedings tends to unduly prejudice the accused. Indeed, the prevailing standard virtually mandates open proceedings at all stages of the criminal process, even though prejudicial pretrial publicity is bound to result. The prevailing standard should be modified to strike a reasonable balance between the First Amendment right of public access and the accused's right to a fair trial.

The United States Supreme Court and Public Access to Criminal Proceedings

The Accused's Right to Seek Closure of a Pretrial Proceeding

In 1979, the United States Supreme Court made its first pronouncement on the issue of press and the public access to pretrial criminal proceedings. In *Gannett Co. v. DePasquale*,⁹ two co-defendants in a New York state murder prosecution moved to suppress statements that they had made to the police and the physical evidence that was seized as a result of those statements, including the murder weapon.¹⁰ The co-defendants, concerned that the statements or their contents and the resulting physical evidence might come to the attention of potential jurors, moved that the suppression hearing be closed to the press and the public.¹¹ The prosecutor did not oppose the closure motion, and the trial judge closed the suppression hearing. Members of the press, however, protested and sought a hearing before the judge.¹² The judge made an explicit finding that "an open suppression hearing would pose a reasonable probability of prejudice to these defendants . . . [and therefore] the interest of the press and the public was outweighed in this case by the defendants' right to a fair trial."¹³ Although the suppression

hearing had already taken place, the judge denied the press and the public access to the transcript of the hearing until after the defendants' trials were concluded.¹⁴ The United States Supreme Court upheld the trial judge's closure of the suppression hearing.

The Plurality in Gannett

A four-justice plurality held that the press and the public do not have standing under the Sixth Amendment to demand a public trial.¹⁵ While a criminal defendant cannot receive a closed trial on demand, if "the participants in the litigation agree that it should be closed to protect the defendants' right to a fair trial," no one else has standing to protest.¹⁶ In the alternative, the four justices held that, if a public Sixth Amendment right to an open trial exists, the right of access does not apply to pretrial proceedings.¹⁷ The justices discussed the common law of public access at the time of the adoption of the Sixth Amendment and they opined that no common law right of public access to pretrial proceedings existed at that time.¹⁸ The justices also observed that, historical considerations aside, "the entire purpose of a pretrial suppression hearing is to ensure that the accused will not be unfairly convicted by contaminated evidence."¹⁹ Therefore, keeping potentially inadmissible evidence out of public circulation by closing pretrial proceedings is a reasonable means of promoting the right of the accused to a fair trial.²⁰

The four justices refused to decide whether the press and the public possessed a First Amendment right of access to pretrial proceedings.²¹ They noted that, if such a right existed, the trial judge had properly balanced that right against the defendants' right to a fair trial and had correctly found that the defendants' right prevailed.²²

9. 443 U.S. 368 (1979).

10. *Id.*

11. *Id.*

12. *Id.* at 374-76.

13. *Id.* at 376.

14. *Id.* at 376 & n.4.

15. *Id.* at 379.

16. *Id.* at 385-86.

17. *Id.* at 387.

18. *Id.* at 387-91.

19. *Id.* at 389 n.20.

20. *Id.*

21. *Id.* at 392.

The four justices held that the trial court's balancing of interests had not been necessary.²³ The interests that were otherwise secured by trial publicity were equally protected by the operation of the adversary process in a closed hearing. The defendants moved to close the hearing, and their counsel represented them zealously in the closed suppression hearing, even in the absence of spectators.²⁴ The plurality further observed that a trial judge has an overriding responsibility to maintain the integrity of the criminal adjudicative process, rather than to accommodate the press and the public. "[A] trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. Because of the Constitution's pervasive concern for these due process rights, a trial judge may take protective measures even when they are not strictly and inescapably necessary."²⁵ The plurality noted that, when information that is later suppressed is publicized during a pretrial hearing, it can always reach potential jurors, with effects that could be prejudicial to the accused.²⁶ The four justices further stated that "[c]losure of pretrial proceedings is one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun."²⁷

The Concurrence in Gannett

Justice Powell added a fifth and deciding vote to uphold the closure order of the trial judge. Justice Powell found that there was a First Amendment right of public and press access that applied to criminal proceedings generally, and to pretrial suppression hearings in particular.²⁸ Because suppression hearings are often dispositive of a case, "the public's interest in this pro-

ceeding often is comparable to its interest in the trial itself."²⁹ Justice Powell, however, found that the trial judge had closed the hearing based on the appropriate standard.

The question for the trial court . . . in considering a motion to close a pretrial suppression hearing is whether a fair trial for the defendant is *likely to be jeopardized* by publicity, if members of the press and the public are present and free to report prejudicial evidence that will not be presented to the jury.³⁰

The Dissent in Gannett

In the dissent, four justices opined that the press and the public had standing to oppose the closure of criminal proceedings under the Sixth (rather than the First) Amendment.³¹ In their view, this public right of access under the Sixth Amendment's public trial clause applied to both pretrial suppression hearings and proceedings on the merits.³² The dissenters noted that pretrial hearings are often dispositive of cases³³ and that "suppression hearings typically involve questions concerning the propriety of police and government conduct that took place hidden from the public view."³⁴ The public has an interest in the airing of this law enforcement conduct.³⁵

According to the dissenting opinion, the trial judge failed to apply the appropriate standard in balancing the public's right of access against the defendant's right to attenuate prejudicial pretrial publicity. The dissenters believed that the trial judge's standard was weighted too heavily against the public's right to access the proceeding. They opined that a trial judge could close a pretrial suppression hearing, or any criminal trial pro-

22. *Id.* at 391-93.

23. *Id.* at 393.

24. *Id.* at 382-84.

25. *Id.* at 378 (citation omitted) (emphasis added).

26. *Id.* at 378-79.

27. *Id.* at 379.

28. *Id.* at 397-98 & n.1.

29. *Id.* at 378 n.1.

30. *Id.* at 400 (emphasis added).

31. *Id.* at 432-33.

32. *Id.* at 436.

33. *Id.* at 434.

34. *Id.* at 435.

35. *Id.*

ceeding, only when such closure is “*strictly and inescapably necessary* in order to protect the fair-trial guarantee.”³⁶ The burden, therefore, is on the defendant to show that an open hearing will “irreparably damage” the right to a fair trial and that all alternatives short of closure are inadequate.³⁷ In contrast, the public or the press is not required to show why access serves any particular public interest. In fact, when the accused moves to close a proceeding, the public and the press need not demand access at all. The strict presumption against closure applies regardless of any protests or actions by the press or the public.³⁸

The dissenters noted that the issues that are litigated in suppression hearings typically do not concern the contents or nature of the statements or the objects that the defendant moves to suppress.³⁹ Rather, suppression hearings generally focus on how law enforcement obtained the statements or objects. Therefore, there usually would be ample alternatives to closure. For example, the parties could openly litigate police procedures while taking care not to disclose the contents of the evidence obtained or seized.⁴⁰

The Court Defines a First Amendment Right of Access to Criminal Proceedings

An Extreme Case Spawns a New First Amendment Right

In 1980, one year after deciding *Gannett*, the Supreme Court faced the “worst case” scenario of criminal trial closure. In *Richmond Newspapers, Inc. v. Virginia*,⁴¹ the defendant moved

to close the trial on the merits without making any showing that his interests in a fair trial outweighed the public interest in access to the trial. The prosecutor did not oppose the motion, and the trial judge closed the entire trial to the press and the public.⁴² The trial judge later denied a motion from representatives of the press to reverse the ruling; no findings were made as to whether closure was necessary to protect the defendant’s right to a fair trial.⁴³ In the closed trial, the judge (who had presided over two of the defendant’s three previous trials for the same offense⁴⁴) granted a motion for a finding of not guilty at the close of the commonwealth’s case and discharged the defendant from custody.⁴⁵

The New First Amendment Right

Faced with these extreme facts, the United States Supreme Court (by a vote of seven justices to one)⁴⁶ held, for the first time, that the press and the public have a First Amendment right of access to criminal trial proceedings. Three justices limited this right of access to the trial on the merits, rather than *all* criminal proceedings.⁴⁷ “[T]he First Amendment guarantees of speech and press, standing alone, prohibit [the] government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.”⁴⁸

The four justices who dissented in *Gannett* concurred. They agreed that the public’s Sixth Amendment right of access to pretrial suppression hearings was equally a First Amendment

36. *Id.* at 440 (emphasis added).

37. *Id.* at 441-42.

38. *Id.* at 443.

39. *Id.* at 442.

40. *Id.* In 1996, a military judge detailed to Fort Bragg, North Carolina, applied this principle in a highly publicized death penalty case. The parties litigated motions to suppress but withheld contents of the statements at issue from the media. Only the details of how law enforcement obtained the statements were aired in open court. Interview with Major Jack Einwechter, seminar course, Analysis of the Military Criminal Justice System, 45th Graduate Course, The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia (1997).

41. 448 U.S. 555 (1980).

42. *Id.* at 559-60.

43. *Id.* at 560-61.

44. *Id.* at 560. The defendant’s initial conviction for murder had been reversed because of improperly admitted evidence. His second trial ended in a mistrial after a juror sought and obtained excusal and no alternate was available. A third trial ended in a mistrial after a prospective juror infected the jury pool by discussing newspaper accounts of the previous trials with his fellow veniremen. *Id.* at 559.

45. *Id.* at 561-62.

46. Only Justice Rehnquist dissented. See *id.* at 604-06. Justice Powell, who had authored the decisive concurring opinion in *Gannett Co. v. DePasquale*, did not participate in the consideration or decision of the case. See *id.* at 581.

47. *Id.* at 576.

48. *Id.*

right.⁴⁹ In their view, however, that right applied equally to the trial on the merits and to pretrial proceedings.⁵⁰

Right of Access Distinct from Right of Free Expression: Justice Stevens' Concurrence

In a concurring opinion, Justice Stevens carefully distinguished the type of First Amendment right of *access* at issue in *Richmond Newspapers* from the traditional First Amendment right of *free expression*. Justice Stevens wrote:

This is a watershed case. Until today, the Court has afforded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.

. . . [T]oday, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.⁵¹

Because the trial judge in the *Richmond Newspapers* case had closed the entire trial rather than just an ancillary proceeding, and because he had failed to make any findings that would justify closure, the justices found it unnecessary to agree on a standard for closure.⁵² However, Justice Stevens argued that, if the First Amendment right of access was qualitatively distinct from the right of free expression, a distinct standard might govern when that right of access (*versus* the right of free expression) deserved protection.⁵³ In a separate concurring opinion, Justice Brennan explored what that different standard might be.

When Does the Right of Press Access Prevail?: Justice Brennan's Proposal

Justice Brennan argued that the right of access under the First Amendment, while violated by the outright closure of a full trial, has certain limitations. In his view, those limitations are first defined by whether there has been a historical practice of public access to the particular type of proceeding at issue.⁵⁴ The limitations are further defined by whether, past practice aside, public access to a given type of proceeding has promoted the functioning of the criminal justice system.⁵⁵ Justice Brennan implied that unless one of these tests is met, there is no right of access to criminal proceedings.⁵⁶

The Court Delineates the Scope of the First Amendment Right of Access

Between 1982 and 1984, the United States Supreme Court applied the new First Amendment right of access to criminal proceedings in two cases.⁵⁷ In each case, the prosecution sought and obtained closure over the objection of both the defense and the media. In these two cases, the Court defined a standard that heavily favors access by the press. It is essentially identical to the standard that governs the protection of the right to disseminate ideas under the First Amendment.

A "Compelling Interest-Narrowly Tailored Means" Standard

In *Globe Newspaper Co. v. Superior Court*,⁵⁸ the Supreme Court held that a Massachusetts statute that required the closure of trials during the testimony of crime victims under the age of eighteen impermissibly infringed on the right of the press and the public to have access to the trial proceeding under the First Amendment.⁵⁹ The Court held that any attempt by the state to

49. *Id.* at 582-600.

50. *Id.* at 603 (Blackmun, J. concurring in the judgment). In a jab at the plurality in *Gannett*, Justice Blackmun noted, "the very existence of the present case illustrates the utter fallacy of thinking, in this context, that 'the public interest is fully protected by the participants in the litigation.'" *Id.* at 603 n.3. One of the members of the *Gannett* plurality, Justice Stevens, observed that "it is likely that the closure order was motivated by the judge's desire to protect the individual defendant from the burden of a fourth criminal trial." *Id.* at 584.

51. *Id.* at 582-83.

52. *Id.* at 603.

53. *Id.* at 582-83.

54. *Id.* at 587.

55. *Id.*

56. *Id.* at 589, 597-98. "[R]esolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances." *Id.* at 597-98.

57. See generally *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).

58. 457 U.S. 596 (1982).

close a trial proceeding to avoid the disclosure of “sensitive information” required the state to show that closure advances a “compelling governmental interest” and “is narrowly tailored to serve that interest.”⁶⁰

In support of the statute, the state articulated two governmental interests: (1) the protection of minor victims of sex crimes from the further trauma and embarrassment of testimony and (2) encouraging these victims to come forward and to offer truthful testimony. The Court found that the first of these interests was a compelling one; however, the statute was not narrowly tailored to advance that interest.⁶¹ Other narrowly tailored means of protecting the psychological and physical well-being of a minor witness existed. Specifically, trial judges in Massachusetts can determine, on a case-by-case basis, whether closure is necessary to protect a witness’ welfare and to encourage a witness to come forward and to testify.⁶²

In a dissenting opinion, Chief Justice Burger and Justice Rehnquist argued that the majority had taken the First Amendment’s right of access too far. In their view, the majority’s “compelling state interest-narrowly tailored means” test placed too much weight on the importance of public access and too little emphasis on the state’s interest in administering criminal justice as it sees fit.⁶³ The closure need only further the state’s interest, it need not be “narrowly tailored” to do so.⁶⁴ Moreover, the state’s interest need only outweigh the press and the public’s right of access; it need not be “compelling.”⁶⁵ The dis-

senters noted that “[i]t is hard to find a limiting principle in the Court’s analysis. The same reasoning might require a hearing before a trial judge could hold a bench conference or any in camera proceedings.”⁶⁶ The dissenters urged the Court to apply the limiting principle that Justice Brennan proposed in *Richmond Newspapers*.⁶⁷

“Compelling Interest-Narrowly Tailored Means” versus the Brennan-Stevens “Limiting Principle”

In *Press-Enterprise Co. v. Superior Court of California*⁶⁸ (*Press-Enterprise I*), the Court unanimously held that a blanket closure of the voir dire proceedings, over the objection of the defense, impermissibly infringed on the public’s First Amendment right of access.⁶⁹ The Court applied the “compelling state interest–narrowly tailored means” test of *Globe Newspaper* to the closure. The Court agreed that the right of privacy of the jurors was a compelling interest; however, closure of the entire voir dire proceeding was not narrowly tailored to serve that interest.⁷⁰ If an individual juror expresses a desire to be questioned in a closed hearing to protect his or her privacy, the judge can evaluate that request in camera to determine if closure is necessary.⁷¹

In a concurring opinion, Justice Stevens reached the same result as the majority but applied a different rationale. Animated by his insight (first expressed in *Richmond Newspapers*)

59. *Id.* at 610.

60. *Id.* at 606-07.

61. *Id.* at 607. The Court treated the state’s interest in encouraging testimony by underage victims of sex offenses with skepticism.

[T]hat same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward. Surely it cannot be suggested that minor victims of sex crimes are the only crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify.

Id. at 610.

62. *Id.* at 608-09.

63. *Id.* at 615.

64. *Id.* at 616-17.

65. *Id.*

66. *Id.* at 614 n.4.

67. *Id.* at 613-14 (citing and quoting Brennan, J. concurring in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584-600 (1980)). Given Justice Brennan’s emphasis on inquiring whether there is a historical tradition of press and the public access to the particular proceeding at issue, the dissenters observed: “It would misrepresent the historical record to state that there is an ‘unbroken, uncontradicted history’ of open proceedings in cases involving the sexual abuse of minors.” *Id.* at 614.

68. 464 U.S. 501 (1984).

69. *Id.* at 511.

70. *Id.* at 510-11.

71. *Id.* at 512-13.

that press access is a right that is distinct from the right of free expression and deserving of less protection, Justice Stevens applied Justice Brennan's "limiting principle" of First Amendment access to trial proceedings.⁷² Justice Stevens stated that "[a] claim to access cannot succeed unless access makes a positive contribution to [the] process of self-governance."⁷³ Public knowledge of the voir dire process is necessary for the public understanding and governance of the trial process generally. However, public knowledge of private matters of certain potential jurors is *not* necessary for public understanding of, and ultimate control over, the process of selecting jurors in criminal trials.⁷⁴

*A First Amendment Right of Access to Pretrial Proceedings:
Press-Enterprise II*

In 1986, the United States Supreme Court rendered its last opinion to date on the subject of press and the public access to criminal proceedings.⁷⁵ In *Press-Enterprise II*,⁷⁶ the Court held that the First Amendment right of access applied to pretrial proceedings.⁷⁷ In doing so, the Court tacitly reversed on its holding in *Gannett Co. v. DePasquale*⁷⁸ that a criminal defendant, in order to obtain closure of a pretrial proceeding in which matters that are potentially prejudicial to a later jury pool will be aired,

need only show that an open pretrial hearing is "reasonably likely" to jeopardize his right to a fair trial.⁷⁹

In *Press-Enterprise II*, a defendant in a highly publicized multiple murder case in California moved for his pretrial hearing to be closed. The purpose of a preliminary hearing in California is to determine whether there is probable cause for a case to proceed to trial.⁸⁰ "The accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence."⁸¹ Thus, the California preliminary hearing serves the functions of both a probable cause hearing and a pretrial suppression hearing. Apart from the power of the presiding magistrate to suppress evidence, the California procedure is much like the military's Article 32 hearing.⁸²

The magistrate who presided over the defendant's hearing granted the defense motion for closure on the basis that "the case had attracted national publicity."⁸³ The magistrate further found that, because only the government's case would be presented in the probable cause hearing, "only one side may get reported in the media" should the hearing be open to the press and the public.⁸⁴

The Majority: Gannett Reversed?

72. *Id.* at 517-19.

73. *Id.* at 518.

74. *Id.* at 518-19.

75. In *Waller v. Georgia*, the defendant, rather than a member of the press, raised as an appellate issue the closure, over the defendant's objection, of a pretrial suppression hearing on the prosecution's motion. 467 U.S. 39 (1984). The Court did not have to face the question of whether the First Amendment right of access, first articulated in *Richmond Newspapers*, applied to pretrial suppression hearings. Instead, the Court simply held that the defendant's Sixth Amendment right to a public trial applied to suppression hearings as much as to the trial on the merits. *Id.* at 48. While the right is not absolute, it can be abridged only on a showing of a compelling or overriding state interest. Additionally, closure of the proceeding must be narrowly tailored to advance that interest, taking into account alternatives short of closure. *Id.* at 47. The state pointed to a peculiar state statute that rendered inadmissible in other cases any information obtained under a wiretap warrant and then released to the public. The Court held that closure of the entire suppression hearing was not a narrowly tailored means of advancing the state's interest in preserving its ability to bring other prosecutions. *Id.* at 48-49. While the Court applied the Sixth Amendment rather than the First Amendment, the "compelling state interest-narrowly tailored means" test the Court used was identical to the strict standard first applied in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

76. *Press-Enter. Co., v. Superior Court of Cal.*, 478 U.S. 1 (1986).

77. *Id.* at 13.

78. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

79. *Id.* at 399.

80. *Press-Enter. Co.*, 478 U.S. at 12.

81. *Id.*

82. *See supra* note 7.

83. *Press-Enter. Co.*, 478 U.S. at 4.

84. *Id.* On review, the California Superior Court agreed and held that there was "a reasonable likelihood that [an open hearing] might prejudice defendant's right to a fair and impartial trial." *Id.* at 1. The California State Supreme Court affirmed, citing "the defendant's right to a fair and impartial trial by a jury uninfluenced by news accounts." *Id.* at 5.

The Court purportedly adopted the “limiting principle” that was first proposed by Justice Brennan in *Richmond Newspapers* and that was reiterated by Justice Stevens in *Press-Enterprise I*. Specifically, the Court considered whether preliminary hearings historically have been open to the press and the public and whether “public access plays a significant positive role in the functioning of the particular process in question.”⁸⁵ The Court found that there was a tradition of public access to preliminary hearings.⁸⁶ The Court reasoned that because preliminary hearings in California are closely similar to trials on the merits, public access is as important to the functioning of preliminary hearings as it is to the functioning of trials.⁸⁷ Therefore, presiding magistrates can close preliminary hearings only if two circumstances exist: (1) it is substantially probable that a defendant’s right to a fair trial will be prejudiced and (2) if other alternatives “cannot adequately protect the defendant’s fair trial rights.”⁸⁸ The magistrate and the reviewing California Superior Court erred by failing to apply this strict standard to the issue of closure.⁸⁹

In applying Justice Brennan’s “limiting principle,” the Court did not abandon or retreat from the “compelling interest—narrowly tailored means” test that was set forth in *Globe Newspaper* and *Press-Enterprise I*. Rather, the Court used that test and the Brennan limiting principle. “[T]he proceedings cannot be closed unless specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’”⁹⁰ Though the form of the Court’s analysis changed somewhat, the result of that analysis remained the same. The Court still treated the right of press access as deserving the highest protection. Therefore, a proceeding can only be closed if the trial court cannot protect the defendant’s right to a fair trial in any other way.

The Dissent: Has Solicitude for Press and the Public Access Run Amok?

In a dissenting opinion, Justices Rehnquist and Stevens argued that the majority had misapplied Justice Brennan’s “limiting principle.”⁹¹ The dissent argued that, instead of inquiring whether there is a historical tradition of preliminary hearings being open to the press and the public, the Court should have inquired whether such pretrial inquiries were open to the public at the time of the adoption of the Bill of Rights.⁹² As the plurality in *Gannett* had found, there was no tradition of openness at the time that the Bill of Rights was adopted.⁹³

The dissenters then addressed the majority’s position that public access to preliminary hearings is as important to the functioning of the judicial proceeding as public access to trials on the merits. The dissent stated that if the majority’s view was correct there must also be a First Amendment right of access to federal grand jury proceedings.⁹⁴

Reverting to the plurality opinion in *Gannett*,⁹⁵ the dissenters argued that a trial judge has an overriding responsibility to minimize prejudicial pretrial publicity.⁹⁶ In the dissenters’ view, the California courts had been correct in assuming that the preliminary hearing could be closed on a finding that there was a “reasonable likelihood” that an open hearing would substantially prejudice the defendant’s right to a fair trial.⁹⁷ In the realm of pretrial proceedings, the First Amendment rights of the press and the public do not deserve the level of protection that is afforded to them by the “compelling government interest—narrowly tailored means” test.⁹⁸

85. *Id.* at 8.

86. *Id.* at 10-11.

87. *Id.* at 11-13.

88. *Id.* at 14 (emphasis added).

89. *Id.* at 14-15.

90. *Id.* at 13-14 (citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 502, 510 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982)).

91. *Id.* at 21.

92. *Id.*

93. *Id.* at 21-25. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 374-76 (1979).

94. *Press-Enter. Co.*, 478 U.S. at 25-27.

95. *Gannett*, 443 U.S. at 378.

96. *Id.* at 16 n.1.

97. *Id.* at 16.

The Court of Appeals for the Armed Forces and Public Access to Courts-Martial

The Court of Military Appeals (COMA) addressed the issue of public access to courts-martial for the first time in 1956, in *United States v. Brown*.⁹⁹ In *Brown*, the convening authority had ordered a closed trial to protect a female civilian from embarrassment as she related the details of obscene phone calls made to her by the accused. Over an objection by the defense, the law officer upheld the convening authority's closure.¹⁰⁰

The COMA held that, although the Sixth Amendment did not apply to courts-martial, "military due process" includes a right to an open trial by court-martial.¹⁰¹ The court listed four reasons why courts-martial should be open to the public: (1) to ensure that the advocates and judges observe the procedural rights of the accused and that the trial counsel diligently vindicates the disciplinary interests of the military; (2) to leave open the possibility that witnesses with knowledge of the case, who are unknown to the parties, will come forward with relevant information; (3) to promote public confidence in the military criminal justice system; and (4) to protect the accused's presumption of innocence.¹⁰² The court reasoned that if a trial were closed, the trier of fact might infer that government witnesses in the particular case needed some sort of extraordinary protection.¹⁰³ In the court's view, protecting an adult female witness from possible embarrassment was not a governmental interest

that was sufficient to overcome the due process interest of the accused in a public trial. Accordingly, the court reversed the accused's conviction.¹⁰⁴

An Independent Right to a Public Trial by Court-Martial

In 1977, the COMA again addressed the issue of partial closure of a court-martial in *United States v. Grunden*.¹⁰⁵ The court held that the "right to a public trial is indeed required in a court-martial."¹⁰⁶

The court found that the military judge had committed prejudicial error by closing the court-martial at the government's request.¹⁰⁷ The military judge had closed the portion of the accused's trial that pertained to espionage charges simply on the basis that classified information would or might be discussed. The military judge, however, failed to ascertain which witnesses would discuss classified information and to what extent each witness would do so.¹⁰⁸ The military judge also failed to assess independently whether public testimony about that classified information would actually pose a danger to national security.¹⁰⁹ The military judge could exclude the public and the press only from those portions of each witness' testimony that concerned matters that would endanger national security if made public.¹¹⁰ By imposing a blanket closure rather than a surgical one, the military judge committed error "of con-

98. *Press-Enter. Co.*, 478 U.S. at 28-29. The "reasonable likelihood of prejudice" standard used by the California Superior Court in affirming the magistrate's closure order was substantially the same as the "reasonable probability of prejudice" standard approved by the Court in *Gannett*. See *Gannett*, 443 U.S. at 376, 400 (1979). For this reason, the dissent in *Press-Enterprise II* closed with the observation that the majority had overruled *Gannett* "without comment or explanation or any attempt at reconciliation." *Press-Enter. Co.*, 478 U.S. at 29.

99. 22 C.M.R. 41 (C.M.A. 1956).

100. *Id.* at 44.

101. *Id.* at 46.

102. *Id.* at 45, 47, 49. The first three reasons for keeping courts-martial open were identical to those given by the United States Supreme Court in the case of *In re Oliver*. See 333 U.S. 257 (1948). In *Oliver*, the United States Supreme Court held that a witness who was called before a "one-man grand jury" in the State of Michigan (a grand jury consisting of one judge) could not be summarily imprisoned based on the judge's finding in a closed hearing that the witness was lying. *Id.* at 272-74. The Court held that the due process clause of the Fourteenth Amendment prohibited any criminal proceeding from taking place out of public view. *Id.* at 273. Because *Oliver* involved a state criminal proceeding rather than a federal one, the Court did not address whether the Sixth Amendment requirement of a public trial applied to the Michigan criminal contempt proceeding. The Court did not begin to incorporate the criminal procedure provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment until it decided *Mapp v. Ohio*. See 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule applied to state proceedings via Fourteenth Amendment due process clause).

103. *Brown*, 22 C.M.R. at 49.

104. *Id.*

105. 2 M.J. 116 (C.M.A. 1977).

106. *Id.* at 120 n.3.

107. *Id.* at 124.

108. *Id.* at 123.

109. *Id.* at 122-23.

110. *Id.* at 122.

stitutional magnitude” and reversal was required.¹¹¹ Thus, the COMA established a strict presumption against closure of a trial on the merits, even when the parties place classified subject matter and materials in evidence.

Wholesale Adoption of the Supreme Court’s Jurisprudence on Public Access

In 1985, the COMA declared for the first time that “the Sixth Amendment right to a public trial is applicable to courts-martial.”¹¹² In *United States v. Hershey*, the trial counsel had requested that the court be closed to facilitate the testimony and to minimize the embarrassment of a victim-witness, the accused’s thirteen-year-old daughter. Over a defense objection, the military judge closed the court without hearing evidence on the necessity of closure or making any findings.¹¹³ The issue in *Hershey* was, therefore, substantially the same as the issue addressed by the United States Supreme Court in *Globe Newspaper*.¹¹⁴

Applying the full line of Supreme Court cases on the issue of closure, the COMA acknowledged that “the press and general public have a constitutional right under the First Amendment to access to criminal trials,” including courts-martial.¹¹⁵ Thus, any party who seeks to close a court-martial must make a showing that satisfies the “compelling government interest-narrowly tailored means” test.¹¹⁶ In *Hershey*, the government did not produce specific evidence about the ability of the accused’s daughter to testify in open court. In addition, the court neither considered alternatives to closure nor made any findings to sup-

port closure. Therefore, the COMA held that the military judge’s decision to close the trial was erroneous.¹¹⁷

The CAAF has applied the Supreme Court’s doctrine on public access to military courts-martial in only two cases since its adoption of that doctrine in *Hershey*. In *United States v. Travers*,¹¹⁸ the court held that an accused’s desire to minimize publicity about his service as an informant did not justify closure of the court during the sentencing phase of the trial.¹¹⁹ Assuming that the accused’s interest in concealing his informant activities was compelling, the court held that closure of the trial was unnecessary to vindicate that interest.¹²⁰ Details of an accused’s informant activities can be brought to the attention of the sentencing authority by way of documents that are kept from public view. Thus, the military judge did not abuse his discretion in denying the request for closure.¹²¹

The second case after *Hershey* in which the CAAF applied the public access doctrine to military proceedings is *ABC, Inc. v. Powell*.¹²² The court in *ABC* considered an extraordinary writ to determine whether the Article 32 hearing in the case of Sergeant Major Gene C. McKinney should be closed over the sergeant major’s objection.¹²³ The court applied the Supreme Court’s doctrine on press and the public access to *pretrial* proceedings for the first time.¹²⁴

Because Sergeant Major McKinney joined the press in objecting to the closure of the Article 32 investigation, the court held that he was invoking his Sixth Amendment right to a public trial.¹²⁵ That right could be abridged only to serve a compelling interest and only by narrowly tailored means.¹²⁶ The court found that the government simply failed to substantiate the rea-

111. *Id.* at 123.

112. *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985).

113. *Id.* at 435.

114. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 806(d) discussion (1995).

115. *Hershey*, 20 M.J. at 436.

116. *Id.* Following the lead of the COMA, the *Manual for Courts-Martial* (in supplementary discussion but not in a binding rule) urges a strict standard on military judges. MCM, *supra* note 114, R.C.M. 806(d) discussion. “Absent an overriding interest articulated in the findings, a court-martial must be open to the public.” *Id.*

117. *United States v. Hershey*, 20 M.J. 436 (C.M.A. 1985). However, because the closure applied to the testimony of only one witness and resulted only in the exclusion of the appellant’s escort and the bailiff, the court found no prejudice to the accused. *Id.* at 437-38.

118. 25 M.J. 61 (C.M.A. 1987).

119. *Id.* at 63.

120. *Id.*

121. *Id.* In *United States v. Short*, the COMA held that a military judge’s expulsion from the courtroom of spectators (the accused’s young children), whom the judge feared would cause noise and distraction, was a reasonable measure to preserve order in the courtroom and did not implicate any constitutional issues. 41 M.J. 42, 43 (C.M.A. 1994).

122. 47 M.J. 363 (1997).

123. *Id.*

sons it offered for closure.¹²⁷ Specifically, the government had sought closure in an effort to protect the privacy of the alleged victims and to prevent contamination of any pool of panel members at a later trial by evidence that was admissible at the Article 32 but not at trial.¹²⁸ The court found that the government failed to point to any specific items of evidence which would be aired at the Article 32 but would not be admissible at trial.¹²⁹ Also, the government failed to specify which witnesses would be subject to invasions of privacy and failed to make a record of the potential for any such invasion of privacy.¹³⁰ The court implied that even if Sergeant Major McKinney had not opposed the closure of the Article 32, the court would have afforded equal standing to the press entities as extraordinary writ petitioners and would have opened the Article 32 on First, rather than Sixth, Amendment grounds.¹³¹

Why Military Standards Governing Press Access Are Identical to Civilian Standards

The COMA invoked “military due process” in *Brown* to support keeping courts-martial open to the press and the public.¹³² However, courts have more often invoked the rubric of “military due process” to justify various ways in which the military

justice system *departs* from civilian practice. Because the military justice system is an integral part of a war-fighting institution, Congress is deemed to have broader plenary power to enact or to authorize practices that, if enacted within a civilian criminal system, might not pass constitutional muster.¹³³

Initially, it might be assumed that “military due process” justifies less open criminal proceedings in the military than in civilian criminal systems. For example, press and public access to courts-martial might be restricted by way of local post regulations that restrict access to a post for legitimate security reasons.¹³⁴ Similarly, commanders may have to convene courts-martial in theaters of operations or armed conflict where the press and the public should be excluded for operational reasons.¹³⁵

There is, however, ample reason for the CAAF to hold, as it did in *Hershey*, that military standards that govern public access to military justice proceedings should replicate the standards that were enunciated by the United States Supreme Court for civilian courts. If Congress and the President, with the blessing of the United States Supreme Court, are permitted to fashion a military justice system with features that would not be tolerated in any civilian criminal forum, it is all the more impor-

124. In *MacDonald v. Hodson*, 42 C.M.R. 184 (C.M.A. 1970), the COMA addressed the issue of open *versus* closed pretrial proceedings for the first time. 42 C.M.R. 184 (C.M.A. 1970). However, *MacDonald* preceded the entire line of United States Supreme Court cases from *Gannett Co. v. DePasquale* to *Press-Enter. II*. In *MacDonald*, the court considered a petition for extraordinary relief by which the accused sought to compel an Article 32 investigating officer to hold an open Article 32 hearing. *Id.* The court noted that even though the accused desired an open proceeding, the investigating officer was acting in the accused’s best interests by keeping potentially prejudicial information from the public. The court held that the Article 32 investigation is not a trial within the meaning of the Sixth Amendment; therefore, the public trial requirement did not apply to the Article 32. *Id.* at 185. Until recently, service courts were apt to follow the *MacDonald* precedent rather than apply United States Supreme Court doctrine to the issue of open *versus* closed pretrial proceedings. *ABC* now makes clear that the United States Supreme Court doctrine governs public access to Article 32 proceedings, and by implication all pretrial proceedings, including Article 39(a) sessions. 47 M.J. at 363-65.

125. *ABC*, 47 M.J. at 365.

126. *ABC*, 47 M.J. at 365. Although the court did not cite *Waller v. Georgia*, it is the United States Supreme Court case that most directly supports the proposition that when a criminal accused opposes closure of a *pretrial* proceeding, the accused is invoking his Sixth Amendment right to a public trial, a right which can only be abridged to serve a compelling government interest and only by narrowly tailored means. *See Waller v. Georgia*, 467 U.S. 39 (1984).

127. *ABC*, 47 M.J. at 366.

128. *Id.* at 364.

129. *Id.*

130. *Id.*

131. *Id.* at 365.

132. *See United States v. Brown*, 22 C.M.R. 41 (C.M.A. 1956).

133. *See, e.g., Weiss v. United States*, 510 U.S. 163, 176-78 (1994) (finding that the fact that military judges lack a fixed term of office comports with military due process); *Middendorf v. Henry*, 425 U.S. 57 (1981) (holding that deprivation of the right to counsel before summary courts-martial comports with military due process).

134. One service court opinion raises the possibility that restraint on access to the installation might be used as a proxy for restricting access to courts-martial. “Members of the public not otherwise authorized to be present upon a military installation are not so authorized by virtue of the trial of a court-martial on the installation.” *United States v. Czarnecki*, 10 M.J. 570, 572 n.3 (A.F.C.M.R. 1980).

135. “Military exigencies may occasionally make attendance at courts-martial difficult or impracticable, for example, when a court-martial is conducted on a ship at sea or in a unit in a combat zone. However, such exigencies should not be manipulated to prevent attendance at a court-martial.” MCM, *supra* note 114, R.C.M. 806(a) discussion.

tant for the civilian press and the public to be able to monitor how the military justice system functions. For example, because the assignment and service of military judges are arguably subject to the will of superior officers,¹³⁶ it is all the more vital for the press and the public to monitor how those judges function given their lack of ultimate independence from a superior, non-judicial authority.¹³⁷

The State of the Law on Open Pretrial Military Justice Proceedings: A Scenario

The current state of the law in this area is best understood by looking at a hypothetical fact situation. Suppose a military accused, who is stationed in Germany, is charged with sexual abuse of his six-year-old stepson. The alleged abuse took place two years ago. The stepson and his mother have been living in Denver, Colorado for eighteen months. The allegation came to light when a nun in a parochial school counseled the boy regarding sexual activity with his minor cousins. The nun has an associate's degree in psychology. Criminal Investigation Division (CID) agents at Fort Carson videotaped their interview of the boy, in which they used anatomically correct dolls and more leading questions than open-ended ones. The boy refused to return to Germany for the trial. He also refused to answer questions at a deposition in Colorado. The nun, however, submitted to an extensive videotaped deposition regarding her sessions with the boy. She is willing to testify in Germany.

The defense has moved to exclude the CID videotape and to bar the testimony of the nun as inadmissible hearsay¹³⁸ and as violating the accused's confrontation clause rights.¹³⁹ Before the beginning of an Article 39(a)¹⁴⁰ session to rule on these motions, the defense counsel notices a *Stars and Stripes* news-

paper reporter in the courtroom. The *Stars and Stripes* is the only daily English language newspaper available to United States service members in Europe and is widely read by them on a daily basis. The reporter has been present at previous pretrial sessions in other recent cases and has filed detailed reports of those hearings.¹⁴¹

The defense counsel, in an in camera session pursuant to Rule for Courts-Martial 802,¹⁴² asks the judge to exclude spectators.¹⁴³ The defense counsel argues that the risk of prejudicial pretrial publicity is great. The defense argues that if the CID videotape and the testimony of the nun are excluded, the contents of each will nevertheless be prominently reported in the only daily newspaper available to the pool of potential panel members. Additionally, even if the military judge denies the defense motion, the fact that the defense sought to keep this information from the triers of fact will also be prominently reported.

In light of the United States Supreme Court's decision in *Press-Enterprise II*,¹⁴⁴ the military judge is likely to find that the accused's right to minimize prejudicial pretrial publicity is a compelling interest. However, the judge is also likely to find that excluding the press and the public from the Article 39(a) session is not a narrowly-tailored means of serving that interest.¹⁴⁵ Rather, in line with the majority's opinion in *Press-Enterprise II*, the military judge is likely to rule that voir dire of the panel members is a sufficient alternative means of avoiding prejudice. During voir dire, the court and counsel can assess whether prospective members of the panel read the *Stars and Stripes* articles and whether, even if they have read the articles, they can still reach a verdict impartially based on the facts that are presented in court.

136. See generally Fredric I. Lederer and Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL OF RTS. J. 629 (1994).

137. It could be argued that other unique features of the military justice system permit *greater* openness to the press and the public than in the civilian system. The whole purpose for closing a pretrial proceeding is to prevent potential jurors from receiving certain information through the press or other media prior to trial. When the trier of fact is a panel of professional commissioned and non-commissioned officers, the panel is arguably less susceptible to inflammatory or prejudicial information that is disseminated through the media than would a jury selected at random from the general citizenry.

138. MCM, *supra* note 114, MIL. R. EVID. 802 (providing that hearsay is generally inadmissible).

139. U.S. CONST. amend. VI (guaranteeing, *inter alia*, the right to confront prosecution witnesses).

140. Under UCMJ Article 39(a) a military judge may hold hearings outside the presence of panel members to adjudicate matters that do not require their presence. UCMJ art. 39(a) (West 1995).

141. A case that had been recently litigated before the same military judge in the same courtroom had involved an accused who had been living in Stuttgart in desertion for eight years. During his desertion, the accused had allegedly preyed on local national women by posing as a U.S. National Security Agency special agent in need of short-term loans to redress purported tax problems. The loans were never repaid. The reporter had filed detailed reports of the Article 39(a) sessions in the desertion case, in which a speedy trial motion was litigated.

142. See MCM, *supra* note 114, R.C.M. 806(b), authorizes the military judge to hold conferences with the parties in chambers "to consider such matters as will promote a fair and expeditious trial." *Id.* at R.C.M. 802(a).

143. MCM, *supra* note 114, R.C.M. 806(b) (authorizing the military judge to close a court-martial session on the motion of the accused, provided the accused shows "good cause").

144. *Press-Enter. v. Superior Court of California*, 478 U.S. 1 (1986).

Under this scenario, the defense will be left with a panel that is quite possibly tainted, yet impartial in the eyes of the law. Under the *Press-Enterprise II* standard, military judges will rarely, if ever, abridge the First Amendment interests of the *Stars and Stripes* as an agent of the public. At the same time, military judges who follow this standard in good faith will almost always sacrifice the right of the accused to a fair trial.

A More Balanced Approach Is Needed (and Is Already Being Applied)

In *Press-Enterprise II*, Chief Justice Rehnquist and Justice Stevens opined that the Court's former deference toward the authority of a trial judge to ensure that the accused is afforded a fair trial has been turned on its head. In their view, the majority had simply decided to place an extremely high value on the press' and the public's recently discovered First Amendment right of access and a concomitantly low value on the right of an accused to minimize the effects (which are often difficult to trace and quantify) of prejudicial pretrial publicity. Referencing the distinction between press access and free expression that was first noted by Justice Stevens in *Richmond Newspapers, Inc. v. Virginia*,¹⁴⁶ the dissenters emphasized that "the freedom to obtain information that the government has a legitimate interest in not disclosing is far narrower than the freedom to disseminate information, which is 'virtually absolute' in most contexts."¹⁴⁷ In the view of Justice Stevens and the Chief Justice, the majority was wrong to protect the freedom of access to information with the same "compelling government interest-narrowly tailored means" presumption that is used to protect the freedom to disseminate information.¹⁴⁸ The two First Amendment interests were not deserving of the same level of protection.

The two justices scolded the majority (Justice Brennan included) for ignoring, or at best misapplying, the "limiting principle" that Justice Brennan himself had proposed in *Globe Newspaper Co. v. Superior Court*. They opined that the analysis should focus on whether public access to a particular pretrial proceeding is rooted in historical practice and, apart from tradition, whether public access to that particular proceeding actu-

ally helps the criminal justice system work. If so, the question should turn to whether public access still poses a substantial danger to the accused's right to a fair trial. Even if the answer to both questions is "yes," the trial judge would not abuse his discretion by excluding the press and the public from the proceeding.

At other levels, the federal judiciary is beginning to recognize that there is a need for this more reasonable balancing of the interests of the accused and the public. Recently, no federal judge has had to more squarely face the issue of prejudicial pretrial publicity than U.S. District Court Judge Richard P. Matsch, who presided over the trials of those who were convicted of plotting to bomb the Murrah Federal Building in Oklahoma City in April 1995. In a January 1996 opinion, Judge Matsch gave guidance to media, defense, and government counsel regarding the standards that he would apply to public and media access in managing these complex and emotionally charged cases.¹⁴⁹ Judge Matsch explicitly announced that he would follow the approach of the Rehnquist-Stevens dissent in *Press-Enterprise II*, rather than apply the "compelling interest-narrowly tailored means" approach of *Globe Newspapers, Press-Enterprise I*, and the *Press-Enterprise II* majority.¹⁵⁰

First, Judge Matsch adopted Justice Brennan's "limiting principle." Judge Matsch reasoned that there is no First Amendment right of access unless: (1) the matter to which the press and the public seek access "involve[s] activity within the tradition of free public access to information concerning criminal prosecutions" and (2) "public access play[s] a significant positive role in the activity and in the functioning of the process."¹⁵¹

Second, Judge Matsch discarded the "compelling interest-narrowly tailored means" test in favor of a balancing of interests starting with a level scale rather than one that is weighted in favor of the First Amendment right of access. If protection of a "recognized interest" outweighs the First Amendment right of access, and if closure is "essential" to protect that interest in the light of any "reasonable alternatives," the court will be closed.¹⁵²

145. In non-binding discussion, the *Manual for Courts-Martial* addresses the issue of access to pretrial proceedings as follows: "When [pretrial] publicity may be a problem a [pretrial Article 39(a)] session should be closed only as a last resort." MCM *supra* note 114, R.C. M. 806(b) discussion. The discussion recommends using the alternatives of thorough voir dire; a continuance "to allow the harmful effects of publicity to dissipate;" selecting panel members recently arrived or from outside the area; sequestration; or moving the place of trial. *Id.*

146. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

147. *Press-Enter.*, 478 U.S. at 20.

148. See *id.* at 28-29.

149. *United States v. McVeigh*, 918 F. Supp. 1452 (D. Colo. 1996).

150. Instead of openly announcing defiance of the United States Supreme Court, Judge Matsch used the following diplomatic language: "The reach of the ruling in *Press-Enter. II* can be measured by careful consideration of the dissenting opinion of Justice Stevens, joined by Justice Rehnquist." *Id.* at 1463.

151. *Id.* at 1464.

Based on this standard, Judge Matsch denied media access to statements rendered by defendant Terry Nichols to the Federal Bureau of Investigation a few days after the bombing (as well as various other items that remained under seal), until after the trial of co-defendant Timothy McVeigh was completed. The Nichols statements were the subject of litigation in a pre-trial suppression hearing and were also at issue in the defendants' motion to sever their trials. In denying media access, Judge Matsch noted that public and media access to these statements was not grounded in historical practice and would not have advanced the functioning of either the suppression hearing or the severance litigation.¹⁵³ In any event, defendant McVeigh's right to a fair trial overrode the public's right of access to the statements.¹⁵⁴

Thus, when the defense counsel in the previous hypothetical asks the military judge to close the Article 39(a) session, under the Rehnquist-Stevens-Matsch approach, the military judge might well find as follows. First, there is no substantial historical evidence that the press and the public have traditionally been able to have access "on demand" to a pretrial proceeding in the nature of a suppression hearing. However, public access might advance the operation of the particular pretrial proceeding at issue. The proceeding ensures that hearsay statements that are made by a victim of child sexual abuse, who is reluctant or unwilling to testify, will be admitted against the accused so long as they are sufficiently reliable. The public should be able to assure itself that the court is discharging its obligation to bring such reliable evidence before the trier of fact.

Second, even though public access advances the proper functioning of the confrontation clause and hearsay litigation, permitting the child's out-of-court statements to the nun and to the CID agents to be aired in the one daily newspaper available to all of the potential panel members poses a substantial danger to the right of the accused to a fair trial. If the judge excludes the statements, panel members might still be aware of their contents, at least as distilled by the *Stars and Stripes* reporter. If the judge admits the statements, the potential panel members may know that the defense tried to keep them out of evidence.

Alternatives that are short of closure, would not suffice to protect the accused's right to a fair trial. Unlike a simple suppression of a confession, more is at issue in this confrontation

clause/residual hearsay type of hearing than how law enforcement obtained evidence. As a matter of constitutional law, the *intrinsic* characteristics of the hearsay statements (what they say as well as how they were obtained) are the keys to their reliability or lack thereof.¹⁵⁵ Litigation entails arguing about the substance of the evidence sought to be excluded, not just how law enforcement obtained the evidence. Therefore, the military judge might conclude that the courtroom should be closed for the confrontation clause/hearsay hearing.

Conclusion

With increasing frequency, military judges and Article 32 investigating officers must confront the issue of whether and to what extent pretrial military justice proceedings should be open to the press and the public. Even as the number of courts-martial declines, some cases receive heightened, if not unprecedented, attention in the broadcast and print media. Even in areas where court-martial procedures parallel civilian criminal procedure, rules which infringe on the public's right of access for what is thought to be a higher good are apt to spark litigation asserting the right of public access.¹⁵⁶

The First Amendment right of access to criminal proceedings that was established by the United States Supreme Court in 1980 is not on par with the distinct First Amendment rights of free expression and free dissemination of information. The right of access is not as important as other interests at stake, particularly the right of the accused to a fair trial. Yet, the United States Supreme Court has treated the right of access as equivalent in value to the right to disseminate information freely. The Court permits restrictions on access only in the rarest and most narrowly defined of circumstances. The standing precedent of the CAAF indicates that military courts must follow the United States Supreme Court's lead. However, Judge Matsch has demonstrated that even a federal trial judge need not inflexibly apply the strict approach taken by the United States Supreme Court.¹⁵⁷

In opposition to this prevailing approach to the right of access, certain justices of the United States Supreme Court, as well as federal trial judges who must directly contend with demands for public access and the consequences of pretrial

152. *Id.*

153. *See* United States v. McVeigh, 1996 WL 578516, at *37-38 (D. Colo. Trans.) (Judge Matsch's ruling on unsealing of severance motion materials).

154. *Id.*

155. *See* Idaho v. Wright, 497 U.S. 905 (1990).

156. For example, a fertile source of public access issues may lie in the recently amended version of the rape-shield rule, Military Rule of Evidence 412. *See* MCM, *supra* note 114, MIL. R. EVID. 412. Amendments to the Military Rules of Evidence, including Military Rule of Evidence 412, are adopted automatically from amendments of parallel provisions of the civilian Federal Rules of Evidence "unless action to the contrary is taken by the President." *Id.* MIL. R. EVID. 1102. Military Rule of Evidence 412, as amended, now provides that when a litigant wishes to introduce evidence of specific incidents of the sexual behavior of the victim, the military judge "must conduct a hearing *in camera* and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise." *Id.* MIL. R. EVID. 412(c)(2) (emphasis added).

publicity, have recognized the need to even the scales between the right of public access and the right of the accused to a fair trial. The more balanced approach of Chief Justice Rehnquist, Justice Stevens, and Judge Matsch more accurately reflects the true nature of the First Amendment right of access. On a prac-

tical level, their more balanced approach re-empowers the trial judge to discharge his overriding duty, which is to ensure that the accused receives a fair trial that is untainted by prejudicial pretrial publicity.

157. The fact that the United States Supreme Court purported to adopt the Brennan-Stevens limiting principle in *Press Enter. II*, opens the door to application of that limiting principle without adhering to the compelling interest-narrowly tailored means test. *See Press-Enter. v. Superior Court of California*, 478 U.S. 1 (1986). That is precisely what Judge Matsch did in *McVeigh*. *See United States v. McVeigh*, 918 F. Supp. 1452 (D. Colo. 1996).

Environmental Planning on Federal Facilities

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Introduction

In a familiar scene, the post engineer scowls as he listens to the inexperienced environmental law attorney explain why the engineer cannot order the bulldozers into action. The nervous attorney tries to explain the National Environmental Policy Act (NEPA)¹ and the National Historic Preservation Act (NHPA),² but these environmental provisions do not make much sense to the engineer. The project is ready to begin, and the post commander wanted it done yesterday. For the engineer, the environmental law attorney is the only obstacle.

This avoidable scenario can happen frequently on military installations and other federal facilities across the nation. Proper planning of actions and projects that affect the environment is difficult to master, and it is often completely nonexistent. A comprehensive understanding of how to apply the intricate planning requirements imposed by the NEPA and the NHPA is fundamental to maintaining an effective environmental planning program. A public works project that is enjoined for improper environmental planning can be extremely costly. It can result in contract claims, and it can cancel a project or a training event.

Early coordination between trainers, post engineers, environmental staff, and legal staff is critical to an effective environmental planning program. If proper coordination of proposed projects and actions that affect cultural and natural resources is not accomplished, an unproductive relationship will result among environmental staff, legal staff, public works engineers, and military trainers. A coherent environmental planning and review process can greatly reduce the miscommunication and misunderstanding that can result from a lack of coordination. If the environmental staff and legal staff carefully execute environmental requirements early in the planning

process, they can establish a cohesive relationship with post engineers and military trainers, create a smoother planning process, and minimize the risk of delay due to legal action.

This article provides the reader with a broad road map through the environmental planning regulations and provides some basic familiarity with common issues that may arise during planning of an action or project. This article is not intended as a primer or exclusive tool for environmental attorneys. Rather, it provides the new environmental attorneys with an overview of environmental rules and regulations, thus enabling them to spot issues and begin their research of those issues. First, this article presents the basic requirements of natural resource laws and regulations, including a broad overview of NEPA,³ the Endangered Species Act,⁴ and wetlands regulations. Second, the article touches on the cultural resources regulations, including the NHPA,⁵ the Native American Graves Protection and Repatriation Act,⁶ and the Archeological Resources Protection Act.⁷ Third, the article provides a general overview of the environmental planning requirement to make an air conformity determination. Finally, the article suggests environmental planning processes and styles that installations have used to manage environmental planning effectively.

Environmental Planning Requirements: The National Environmental Policy Act

The main environmental planning statute, and arguably the most significant of all environmental statutes, is the NEPA. The NEPA requires that federal agencies consider the impact of an action on the environment when taking any "major [f]ederal action significantly affecting the quality of the human environment."⁸ The implementing regulations, which were developed by the Council on Environmental Quality (CEQ), establish an

1. 42 U.S.C.A. §§ 4321-4370a (West 1998).

2. 16 U.S.C.A. § 470 (West 1998).

3. 42 U.S.C.A. §§ 4321-4370a.

4. 16 U.S.C.A. §§ 1531-1544.

5. *Id.* § 470.

6. 25 U.S.C.A. §§ 3001-3013 (West 1998).

7. 16 U.S.C.A. §§ 470aa-470ll.

8. 42 U.S.C.A. § 4332(2)(C).

intricate set of rules for conducting the type of environmental analysis that is required for a given action or project.⁹ The Army and other federal agencies have further elaborated on those requirements in their own regulations.¹⁰

Types of NEPA Documentation

An agency must prepare different types of NEPA documentation depending on the level of environmental impact that is possible. If an action or project definitely will not have an effect on the environment, no NEPA documentation or only minimal NEPA documentation will be required.¹¹ If an action or project could possibly cause significant environmental impacts, the agency must do an environmental assessment (EA).¹² An EA will determine whether significant environmental impacts would occur as a result of the action or project.¹³ The EA can assist the agency in determining whether to conduct an environmental impact statement (EIS), but an EA is not a prerequisite to an EIS.¹⁴ If an agency action or project will significantly affect the quality of the environment, the agency must conduct an EIS.¹⁵

Categorical Exclusions

Each federal agency has a number of "categorical exclusions" for which NEPA environmental documentation is not required. These categorical exclusions consist of routine actions, such as maintenance and road repair, that the participating agencies have determined do not affect the environment either as an individual project or when considered in light of other projects. Under the CEQ regulations, use of such categorical exclusions is encouraged.¹⁶

In determining whether a categorical exclusion applies to an action or project, attorneys must look at the "screening criteria"

described in *Army Regulation (AR) 200-2*, appendix A.¹⁷ If a proposed action affects sites that are eligible for the National Register of Historic Places, for instance, a categorical exclusion may not be used, even if it would otherwise apply.¹⁸ An EA is appropriate if a categorical exclusion does not apply to a proposed action or project and some minor environmental damage could occur. The environmental attorney should keep in mind that in some cases, including use of categorical exclusions, the Army proponent must prepare a "record of environmental consideration" to explain why additional environmental documentation is not required for a project.¹⁹

When is NEPA Documentation Required?

Environmental attorneys are sometimes asked if a particular operation requires NEPA documentation. To answer this question, the environmental attorney must receive guidance that explains what impacts are expected. Without this information, environmental attorneys should remind the requester that, under the Army regulation, at least an EA is required when the proposed project has the potential for any of the following: "(a) Cumulative impact on environmental quality when combining effects of other actions or when the proposed action is of lengthy duration; (b) Release of harmful radiation or hazardous/toxic chemicals into the environment; (c) Violation of pollution abatement standards; (d) Some harm to culturally or ecologically sensitive areas."²⁰ If the action or project is not expected to cause one of these conditions (for example, it is too insignificant to have such an impact), NEPA documentation is probably not necessary. Whether one of the conditions exists, however, is not a legal decision. Environmental attorneys are not normally qualified to determine the extent of a project's environmental impact. As additional guidance, *AR 200-2* describes several types of actions and projects that normally

9. 40 C.F.R. pts. 1500-1508 (1998).

10. U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988) [hereinafter *AR 200-2*].

11. *Id.* para. 5.1. See 40 C.F.R. § 1508.9.

12. *AR 200-2*, *supra* note 10, paras. 5-2 to 5-3.

13. *Id.* para. 5-2.

14. 40 C.F.R. § 1501.3.

15. 42 U.S.C.A. § 4332(2)(C) (West 1998).

16. 40 C.F.R. § 1500.4(p).

17. *AR 200-2*, *supra* note 10, app. A.

18. *Id.*

19. *Id.* para. 3-1a.

20. *Id.* para. 5-2.

require an EA.²¹ Whenever an environmental law attorney faces questions about the level of NEPA documentation required for an action or project, the attorney should consult with other environmental law specialists²² to ensure that he considers all the factors that weigh into the decision.

If an EA is completed and it results in a “finding of no significant impact,” no further environmental documentation is required. If the proposed action would cause significant environmental impact, however, the agency must conduct an EIS, which is the highest level of environmental analysis.²³ In addition, an agency can complete a higher level of analysis on a project than is required. Conducting an EIS allows the military to prepare and to present matters regarding controversial proposals. In a few select circumstances, an agency may also determine that, although completing an EIS would not be legally necessary, it would be prudent to conduct the EIS for strategic purposes, such as to garner public support for a proposed action.²⁴

Major federal actions that will have an affect on the environment require NEPA documentation.²⁵ Which projects constitute “major federal actions” that will have an affect on the “environment,” however, can be a matter of contention. “Major federal actions” can include rule-making or licensing decisions that can affect the environment indirectly.²⁶ These actions would also include transferring ownership of property. Under *AR 200-2*, new management and operational concepts, research and development activities, and materiel development

or acquisition activities are considered to be major federal actions and must be evaluated for environmental impacts.²⁷

Whether a proposed project or action requires an EIS is not always obvious. Projects that affect the environment have included a proposed low-income housing project on Manhattan’s Upper West Side²⁸ and a proposed jail adjacent to the federal courthouse in New York City.²⁹ In considering an environmental challenge to the proposed federal jail in New York City, the U.S. Court of Appeals for the Second Circuit determined that a federal agency should consider at least two factors when analyzing the environmental impacts of a proposed action:

- (1) [t]he extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.³⁰

For questions of whether a project or action on an Army installation requires an EIS, the environmental attorney should consult *AR 200-2*, which identifies conditions that require an

21. *Id.* para. 5-3.

22. The environmental law attorney should consult with his technical chain from the installation through corps and major command environmental law specialists to the Environmental Law Division.

23. 40 C.F.R. § 1501.4(c) (1998).

24. Before making such a decision, however, the proponent should coordinate with higher headquarters to ensure support for such an expensive process.

25. See generally *AR 200-2*, *supra* note 10, paras. 2-2, 5-1 to 5-3.

26. *Culvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971).

27. *AR 200-2*, *supra* note 10, para. 2-2.

28. See *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980).

29. See *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972).

30. *Hanly v. Kleindienst*, 471 F.2d 823, 830-31 (2d Cir. 1972).

EIS³¹ and several types of actions that normally require an EIS.³²

Is the Environmental Review Sufficient?

Judging whether an EA or an EIS is sufficient is very subjective. To ensure that the documents in either the EA or the EIS are adequate, the environmental attorney should review each document and determine whether it meets the requirements of the CEQ regulations. For instance, the document must always present an analysis of all reasonable alternatives, including a “no action” alternative, not just the proposed action.³³ The document must indicate that the agency proponent considered the issue of environmental justice—that is, whether minority or low-income populations disproportionately suffer negative effects as a result of the proposed action.³⁴

Beyond the rudimentary requirements, the better and more complete the EA or EIS is, the more likely it is that the agency will prevail in a court challenge. Agencies must apply a “rule of reason” to determine what factors to analyze. Mere speculation or “worst case” analysis is not required.³⁵ The purpose of the process is to ensure that agencies consider the environmental effects of their planned projects and actions. Agencies must “give serious weight to environmental factors” when making

project decisions.³⁶ If the reviewing environmental attorney notices a deficiency in an EA or EIS, someone else could notice the deficiency too.

The environmental attorney’s role in reviewing the EA or the EIS is a significant preventive measure against future legal action. An “affected party” who notices a defect or deficiency in an EA or an EIS may have a legal cause of action. The Supreme Court has recognized that the NEPA creates a right of action to sue by “affected parties” to enforce federal agency obligations to consider environmental impacts of their actions.³⁷ As a result, the NEPA is a ripe area for litigation against the government, and the environmental attorney’s review is the first line of defense.

Segmentation, Piecemealing, and Tiering of Environmental Reviews

During the planning and review of an EA or an EIS, the environmental attorney should be wary of project proponents who attempt “segmentation” or “piecemealing,” which is the practice of dividing a single action “into component parts, each involving actions with less significant environmental effects.”³⁸ “Segmentation” or “piecemealing” would occur if an agency

31. AR 200-2, *supra* note 10, para. 6-2. These include actions that would:

- a. Significantly affect environmental quality or public health or safety.
- b. Significantly affect historic or archaeological resources, public parks and recreation areas, wildlife refuge or wilderness areas, wild and scenic rivers, or aquifers.
- c. Have significant adverse effect on properties listed or meeting the criteria for listing in the National Register of Historic Places, or in the National Registry of Natural Landmarks
- d. Cause a significant impact to prime and unique farm lands, wetlands, floodplains, coastal zones, or ecologically or culturally important areas or other areas of unique or critical environmental concern.
- e. Result in potentially significant and uncertain environmental effects or unique or unknown environmental risks.
- f. Significantly affect a species or habitat listed or proposed for listing on the Federal list of endangered or threatened species.
- g. Either establish a precedent for future action or represent a decision in principle about a future consideration with significant environmental effects.
- h. Adversely interact with other actions with individually insignificant effects so that cumulatively significant environmental effects result.
- i. Involve the production, storage, transportation, use, treatment, and disposal of hazardous or toxic materials that may have significant environmental impact.

Id.

32. *Id.* para. 6-3. An EIS is normally required in situations that include expansions of facilities, construction where the project would affect “wetlands, coastal zones, or other areas of critical environmental concern,” disposal of hazardous, toxic or nuclear materials that could cause an environmental impact, development of new weapons systems that require substantial facilities construction, real estate transactions that may lead to significant changes in land use, stationing of brigade or larger units during peacetime if “significant biophysical environmental impact” would result, significant training exercises conducted off the installation, and major changes in missions of facilities that cause significant environmental impacts. *Id.*

33. *Id.* para. 5-4a(3).

34. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

35. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

36. *Town of Huntington v. Marsh*, 859 F.2d 1134 (2d Cir. 1988). See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

37. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 289 (1973).

38. See *Town of Huntington*, 859 F.2d at 1134.

analyzed different phases of a single project as separate projects in separate EAs to avoid conducting an EIS on the total project.

Separately analyzing a separate and distinct project, however, is legal and proper. In addition, “tiering” is also proper and encouraged in the CEQ regulations.³⁹ When some or most of the aspects of a proposed action have already been discussed in an earlier EIS, it is permissible to tier off that earlier document with a more succinct environmental analysis to avoid “repetitive discussions” of the same issues.⁴⁰ An EIS can also incorporate by reference information from other documents.⁴¹ If an agency chooses to produce an EIS for a proposal, however, it need not be tiered off another EIS, because an EIS, by definition and practice, is a complete analysis of an action.

The agency must apply the NEPA during the planning process prior to making any project decisions.⁴² If an agency makes a decision prior to applying the NEPA and uses an EA or an EIS for a post hoc rationalization of its decision, the agency’s action is illegal and vulnerable to a lawsuit. Under the CEQ regulations, an agency cannot take action on a project that will “limit the choice of reasonable alternatives.”⁴³ Thus, any action on a project that would predispose an agency toward a particular decision, such as awarding a contract to begin preparation work, is illegal.

In general, environmental attorneys should ensure that environmental planning documents related to plans and specifications are internally consistent. In the event that the agency’s

proposed action is challenged, related documents will be discoverable and will constitute part of the administrative record. As much as possible, environmental attorneys should avoid speculating about the relative risk of litigation over proposed actions; NEPA litigation can be unpredictable. An interest group could challenge a project that appears to be non-controversial because the group is disturbed over another government initiative and intends to use the NEPA case as a bargaining chip. Ensuring that proper environmental documentation is developed on each and every action and project is the only way to protect against an unexpected challenge.

Environmental Planning Requirements: Endangered Species Act

Endangered Species Act (ESA)⁴⁴ compliance should occur in concert with the NEPA process. Section 7 of the ESA requires that federal agencies consult with the U.S. Fish and Wildlife Service⁴⁵ to determine whether an activity will subject any threatened or endangered species or its critical habitat to “jeopardy.”⁴⁶ An agency that proposes “major construction”⁴⁷ (or other activities having a similar impact on the environment) in an area where listed species are present must prepare “biological assessment.”⁴⁸ The U.S. Fish and Wildlife Service will prepare a “biological opinion” that details whether a threatened or endangered species (or critical habitat) is subjected to jeopardy.⁴⁹ The Service determines whether the proposed action will jeopardize any threatened or endangered species (or result

39. 40 C.F.R. § 1502.20 (1998).

40. *Id.*

41. *Id.* § 1502.21.

42. *Id.* § 1501.2.

43. *Id.* § 1506.1.

44. 16 U.S.C.A. §§ 1531-1544 (West 1998).

45. Agencies may consult with the U.S. Fish and Wildlife Service regarding land based species and habitat or the U.S. Marine and Fisheries Service regarding marine based species and habitat.

46. *Id.* § 1536. “Threatened species” means “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). “Endangered species” means a species that “is in danger of extinction over all or a significant portion of its range” other than insects determined to be pests. *Id.* § 1532(6). “Critical habitat” means the geographical area occupied by the species at the time it is listed or areas outside that geographical area that are “essential for the conservation of the species.” *Id.* § 1532(5). A “jeopardy” determination will result if it is determined that an action would “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species” *Id.* § 1536(2).

47. “Major construction” is a “construction project or similar activity on a scale that would trigger the requirement for an Environmental Impact Statement by significantly affecting the quality of the human environment.” 50 C.F.R. § 402.02 (1998).

48. A “biological assessment” is “information prepared by or under the direction of the [f]ederal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation [of] potential effects of the action on such species and habitat.” 50 C.F.R. § 402.02 (1998).

49. 16 U.S.C.A. § 1536. A “biological opinion” states the opinion of the U.S. Fish and Wildlife Service “as to whether or not the [f]ederal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.02. Although technically required only when major construction (or similar activity) is involved, biological assessments should be prepared whenever possible. Doing so satisfies the agency’s obligation to use the best scientific and commercial data in fulfilling its Section 7 consultation responsibilities.

in the destruction or adverse modification of critical habitat) or whether any “incidental take”⁵⁰ of an endangered species will jeopardize the species.⁵¹ The Service will issue an opinion that describes the impacts to the species, describes reasonable measures to minimize harm to the species, and sets forth terms with which the proponent agency must comply to implement its proposed action.⁵² If, after consultation, however, the Service determines that the action will “jeopardize” the species, a “jeopardy opinion” will result.⁵³

Although there is a process for obtaining an exemption from endangered species requirements for an agency action,⁵⁴ a finding by the U.S. Fish and Wildlife Service that an agency action would place a listed species in jeopardy will usually terminate the action. In *Tennessee Valley Authority v. Hill*,⁵⁵ a tiny minnow-like fish, the snail darter, shut down the massive Tellico Dam project. In the Court’s opinion, Justice Burger wrote, “It may be curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million.”⁵⁶ Yet, the provisions of the ESA required just that.⁵⁷

Environmental Planning Requirements: Wetlands

Wetlands compliance⁵⁸ should occur in concert with the NEPA process. Compliance generally requires the agency pro-

ponent to coordinate with the U.S. Army Corps of Engineers or to request special permits. Wetlands compliance is a controversial and difficult area of environmental law. At first glance, the law in this area may appear to be straightforward. In reality, the law is not so simple. Because of the legal complexity of wetlands compliance issues, practitioners must consult with more experienced attorneys when they are faced with an issue in this area. The following information provides practitioners with a broad overview of wetlands planning requirements.

A permit from the U.S. Corps of Engineers (or a state with permitting authority) is required under Section 404 of the Clean Water Act (CWA) for all discharges of dredged or fill material into “waters of the United States.”⁵⁹ “Waters of the United States” include wetlands that are adjacent to or tributary to other waters of the United States.⁶⁰ Although it remains a matter of controversy, some courts have found nonadjacent wetlands to be waters of the United States based on their use by migratory waterfowl or interstate travelers, which constitutes a nexus to interstate commerce sufficient to establish federal jurisdiction.⁶¹

“Wetlands” are areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and normally do support, vegetation that is typically adapted for life in saturated soil conditions, including swamps, marshes, bogs, and similar areas.⁶² An area does not need to be saturated all year long to be classified as a “wetland.”⁶³

50. This refers to damage to a species or its critical habitat “that result[s] from, but [is] not the purpose of, carrying out an otherwise lawful activity conducted by the [f]ederal agency or applicant.” 50 C.F.R. § 402.2. “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C.A. § 1532(20).

51. 16 U.S.C.A. § 1536.

52. *Id.* § 1536(b)(4).

53. *Id.* § 1536(a)2.

54. *Id.* § 1536(h).

55. 437 U.S. 153 (1978).

56. *Id.* at 172-73.

57. *Id.*

58. 33 U.S.C.A. § 1344 (West 1998).

59. *Id.*

60. *See, e.g.,* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

61. *See, e.g.,* Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978). *But see* Tabb Lakes Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) (viewing this approach with disfavor).

62. 40 C.F.R. § 122.2 (1998). When the United States Supreme Court decided *Tennessee Valley*, the ESA did not contain an exemption process as set forth in 16 U.S.C.A. § 1536(h). In fact, the Court’s decision in *Tennessee Valley* caused congress to extensively amend the ESA. Among the changes, Congress established the complex exemption process.

63. *Id.*

The concept of discharge of dredged or fill material can be interpreted extremely broadly. Proposed activities that affect a small creek bed or western arroyo, for instance, could require a Section 404 permit. The dredging or filling of a wetland, however, is not the only wetland activity that requires a permit.⁶⁴ The incidental discharge into a wetland by bulldozers or tracked vehicles, for instance, could trigger the requirement for a Section 404 permit. In those circumstances, the agency should consult with the U.S. Army Corps of Engineers to determine whether a Section 404 permit is required.⁶⁵ Such consultation may even be required in desert environments such as Fort Bliss, Texas; Fort Huachuca, Arizona; or Fort Irwin, California.

Environmental Planning Requirements: Cultural Resources

Another source of potential problems in environmental planning for federal agencies comes from Section 106 of the NHPA.⁶⁶ Under Section 106, any federal “undertaking”⁶⁷ triggers a requirement to consult with the federal government’s Advisory Council on Historic Preservation (ACHP) regarding the fate of districts, sites, buildings, structures, and objects that are in or are eligible for the National Register of Historic Places.⁶⁸ These areas include archeological sites as well as historic structures.⁶⁹ Ordinarily, properties that are newer than

fifty years old will not be considered to be eligible for the National Register.⁷⁰ As previously noted, any proposal that would harm a site that is eligible for the National Register is not eligible for a categorical exclusion under the Army’s environmental planning regulation.⁷¹

Under the ACHP’s regulations, when a federal agency determines that a proposed action falls within the NHPA definition⁷² of an undertaking, the agency must consult with the state historic preservation officer (SHPO).⁷³ The agency must also solicit the views of public and private organizations, Native Americans, local governments, and other groups that are likely to have knowledge of or concerns with the Historic Register eligible properties.⁷⁴

The agency may proceed with the proposed project or action if: the agency determines that the project or action will have “no effect” on Historic Register eligible properties,⁷⁵ the SHPO agrees with that determination, and there are no objections raised within fifteen days.⁷⁶ If the agency determines that there is an effect but that it is not adverse and the SHPO agrees, the agency may make a “no adverse effect” determination and advise the ACHP.

If there will be an adverse effect on historic properties, the agency must notify the ACHP and enter negotiations with the

64. 33 U.S.C.A. § 1344.

65. *Id.*

66. 16 U.S.C.A. § 470f (West 1998). In addition to Section 106, Section 110 of the NHPA requires that federal agencies use their historic properties “to the maximum extent possible” rather than acquire or construct new properties. *Id.* § 470h-2. Section 110 of the NHPA also requires that federal agencies locate agency owned historic properties and nominate those properties to the National Register of Historic Places. *Id.* § 470h-2.

67. “Undertaking” includes:

[A]ny project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a federal agency or licensed or assisted by a [f]ederal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.

6 C.F.R. § 800.2(o) (1998)

68. 16 U.S.C.A. § 470f.

69. For instance, archeologists estimate that Fort Bliss has more than 15,000 archeological sites within its boundaries. Interview with James Bowman, Chief Archeologist, at Fort Bliss, Tex. (Nov. 12, 1997).

70. 36 C.F.R. § 60.4 (1998).

71. AR 200-2, *supra* note 10, app. A, §. 2.

72. 16 U.S.C.A. § 470w(7). *See* 36 C.F.R. § 800.2(o).

73. 36 C.F.R. § 800.4(a).

74. *Id.* § 800.2(e).

75. This provision also applies to projects that will have no effect on the “area of potential effects,” which is defined as the geographic area or areas within which the undertaking may cause changes in the character or use of historic properties. *Id.* § 800.2(c).

76. *Id.* § 800.5(b).

SHPO on a memorandum of agreement (MOA) to avoid or to mitigate the adverse effect.⁷⁷ The ACHP may enter this consultation process with or without a request from either the agency or the SHPO.⁷⁸ If the agency and the SHPO (and sometimes the ACHP) cannot reach an agreement, only the head of the federal agency (for example, the secretary of the Army) may overrule the SHPO and the ACHP. The agency head may not delegate this responsibility.⁷⁹

Federal agencies must follow Section 106 requirements when they directly undertake federal activities and when they are involved indirectly through funding, approving, permitting, or licensing.⁸⁰ In its regulations, the ACHP includes in its definition of a federal undertaking “any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects.”⁸¹ Courts have interpreted “undertaking” to include a wide variety of actions, including military operations,⁸² building leases,⁸³ land exchange agreements,⁸⁴ and revision of agency regulations.⁸⁵

In addition to the NHPA, the Native American Graves Protection and Repatriation Act (NAGPRA)⁸⁶ and the Archeologi-

cal Resources Protection Act (ARPA)⁸⁷ can play important roles in the environmental planning process. The NAGPRA requires that all federal agencies (and museums) that possess “Native American human remains and associated funerary objects”⁸⁸ compile an inventory and notify tribes that may have a cultural link to the remains and associated objects.⁸⁹ If the tribe desires, the agency must return the remains and associated objects to the tribe.⁹⁰ The agency must also provide a summary listing of “unassociated funerary objects, sacred objects, and cultural patrimony.”⁹¹ Because newly discovered remains or tribal objects would fall under the possession and control of the federal agency that discovers them, the federal agency would be required to provide similar notification to the tribes and give the tribes an opportunity for consultation and repatriation. Environmental planning in areas with a widespread historic presence of Native Americans must consider the potential effects of discovering Native American remains or tribal objects. Failure to comply with these Acts can cause problems with various interests groups; a new environmental attorney must thoroughly consult with archaeologists and environmental law experts prior to presenting any legal opinions or providing any legal advice concerning these ARPA and NAGPRA.

77. *Id.* § 800.5(e).

78. *Id.*

79. 16 U.S.C.A. § 470h (West 1998).

80. *Id.* § 470w(7).

81. 36 C.F.R. § 800.2(o).

82. *See, e.g.,* Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979).

83. Birmingham Realty Co. v. General Serv. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980).

84. Daingerfield Island Protective Soc’y v. Babbitt, 40 F.3d 442 (D.C. Cir. 1994).

85. Illinois Interstate Commerce Comm’n v. Interstate Commerce Comm’n, 848 F.2d 1246 (D.C. Cir. 1988).

86. 25 U.S.C.A. §§ 3001-3013 (West 1998).

87. 16 U.S.C.A. § 470aa-470ll (West 1998).

88. “Native American” means of or related to a “tribe, people, or culture that is indigenous to the United States.” 25 U.S.C.A. § 3001(9). “Associated funerary objects” mean objects that were a part of the “death rite or ceremony of a culture” and were placed with the body at the time of burial or later. *Id.* § 3001(3)(A).

89. *Id.* § 3003.

90. *Id.* § 3005.

91. “Unassociated funerary objects” include objects that are not presently under the control of the federal agency. *Id.* § 3001(3)(B). “Sacred objects” are specific ceremonial objects for the practice of Native American religions. *Id.* § 3001(3)(C). “Cultural patrimony” includes objects that have cultural significance to an entire tribe, rather than to an individual member of the tribe. *Id.* § 3001(3)(D).

The ARPA provides requirements for the protection of archeological sites. If archeological resources⁹² are discovered during the course of a federal activity, and if they must be excavated, the proponent must seek approval for the excavation.⁹³ Unauthorized excavation is prohibited under the ARPA.⁹⁴ In addition, the incidental discovery of an archeological site will trigger the requirements of Section 106 of the NHPA.

By appointing an experienced, knowledgeable, and well-organized historic preservation officer, an installation can considerably enhance its ability to accomplish cultural resources requirements. For example, Section 106 consultation can slow down a project considerably if it is not entered into early in the planning process. Section 106 and the NAGPRA requirements must be started as early as possible because these consultations can take substantially longer than the NEPA process, and the consultation must be complete “prior to the approval of the expenditure of funds.”⁹⁵ A historic preservation officer should have the education, experience, and skills to ensure compliance with these requirements.

Environmental Planning Requirements: Air Conformity Determinations

Section 176(c) of the Clean Air Act (CAA),⁹⁶ which was adopted with the 1990 amendments to the CAA, requires that

92. 16 U.S.C.A. § 470bb(1).

Archeological resource [means] any material remains of past human life or activities which are of archeological interest . . . [including] pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal remains, or any portion or piece of any of the foregoing items.

Id. It also includes “paleontological specimens, or any portion or piece thereof.” *Id.*

93. *Id.* § 470cc. The proponent must seek approval from the federal land manager, which means the secretary of the department “having primary management authority over such lands.” *Id.* § 470bb(2).

94. *Id.* § 470ee. In addition, information about the sites must be kept confidential. *Id.* § 470hh.

95. *Id.* § 470f.

96. 42 U.S.C.A. § 7506(c) (West 1998).

97. *Id.* A “SIP” is a state’s source-specific plan for “implementation, maintenance, and enforcement” of air quality standards. *Id.*

98. “Nonattainment areas” are areas that do not meet national ambient air quality standards (NAAQS) for a particular pollutant. 40 C.F.R. pt. 50 (1998).

99. A “maintenance area” is an area that does not exceed the NAAQS but has a maintenance plan for keeping its emissions in line with air quality standards. 40 C.F.R. § 51.852.

100. *Id.*

101. *Id.* § 51.853(b)(1).

102. *Id.* § 51.

103. *Id.* § 51.858.

104. *Id.* § 51.854.

105. *Id.* § 51.856(b).

all federal actions conform to any applicable state implementation plan (SIP).⁹⁷ Thus, installations that are located in air pollution non-attainment⁹⁸ and maintenance areas⁹⁹ must ensure that any proposed action will conform to the SIP. Under the Environmental Protection Agency’s (EPA) implementing regulations, a federal action means “any activity engaged in by a department, agency, or instrumentality of the [f]ederal government, or any activity that a department, agency, or instrumentality of the [f]ederal government supports in any way, provides financial assistance for, licenses, permits, or approves”¹⁰⁰

The air conformity rule of the Code of Federal Regulations sets standards for maximum emissions limits allowed for various air pollutants in non-attainment and maintenance areas.¹⁰¹ For actions that exceed those limits, the proponent federal agency must show that the action conforms to the SIP.¹⁰² The federal agency can demonstrate conformity by indicating that the action is already accounted for in the SIP, that the emissions are offset by emission reductions elsewhere within the non-attainment or maintenance area, or that the action does not contribute to or increase the frequency of air standards violations.¹⁰³

When making its conformity determination, a federal agency “must consider comments from any interested parties.”¹⁰⁴ The EPA regulations require a thirty-day notice and comment period.¹⁰⁵ The proponent federal agency must also

notify the EPA regional offices and state and local air quality agencies of the project or action.¹⁰⁶

Although the EPA promulgated the final air conformity rule in November 1993,¹⁰⁷ many agencies do not know of its requirements, or ignore those requirements. Therefore, an environmental attorney should ensure that the conformity analysis is done whenever it is required. A new environmental attorney should always consult with more experienced attorneys to ensure they are aware of when a conformity analysis is required. The conformity analysis will normally be done in conjunction with the NEPA process because it is required prior to taking any action and because it has a public notice requirement similar to NEPA's requirement. In its comments to the air conformity rule, the EPA noted that "[f]ederal agencies should consider meeting the conformity public participation requirements at the same time as the NEPA requirements."¹⁰⁸

In addition to the requirements addressed above, the Army has specific requirements that are independent of the Code of Federal Regulations. In a memorandum, the Director of Environmental Programs outlined several requirements that apply specifically to conformity determinations prepared by Army attorneys.¹⁰⁹ Environmental attorneys must ensure that these requirements are met; consulting with an experienced environmental attorney should be the first step to ensure that these air conformity requirements are met.

Effective Management of Environmental Planning

Even with extensive preparation, research, and education, no system for environmental planning is foolproof. Nevertheless, some models used within the Army are quite effective methods to ensure that all of the required environmental planning processes are followed. No matter what system is in place, however, environmental attorneys should stress the need to coordinate proposed actions with installation environmental offices early in the process. Although checklists and oversight systems are helpful, they cannot replace early, frequent, and clear communication between environmental professionals and project proponents. Further, because environmental law is always changing, environmental attorneys in the field must continually educate themselves and routinely consult with the

military's experts in environmental law, such as the attorneys at Litigation Division (Environmental Law Division) or The Judge Advocate General's School.

For an environmental planning system to be effective, it must force proponents to describe their proposed activities accurately and completely. Fort Bliss, for instance, has a system under which training proponents must file a range and maneuver area request form. The form, which is required for use of any Fort Bliss training areas, requires the proponent of the training to identify the type of unit involved, the dates and times of training, the range or maneuver areas requested, the weapons to be used, and the number of people involved.¹¹⁰ The form also allows trainers to make remarks regarding use of targets, including "aerial targets, special target requirements, area,[and] time of target presentation." The form also specifically requests information regarding any pyrotechnics that will be used.¹¹¹

Often, trainers do not recognize aspects of their training plans that would have environmental significance until the time that the training activity is scheduled to begin. It then becomes the responsibility of installation environmental staff independently to gather information about the proposed activity, and it becomes difficult to provide a meaningful environmental review. More complete information at an earlier stage can eliminate some of the last-minute analysis that sometimes takes place. Fort Huachuca, for example, has developed a checklist for environmental coordination that requires unit information, activity locations, dates, times, and descriptions of the proposed activities.¹¹² In addition, the proponent is required to check and to describe briefly any "ancillary activities" that will be required from a list of likely activities, including vehicle maintenance, military kitchens, personal sanitation, power generation, fuel storage, hazardous waste generation, temporary structures, field training, flight operations, off-road maneuvers, excavation, smoke or obscurant use, or other activities. This type of specificity could reduce the likelihood of overlooking an environmentally significant aspect of an activity.

Another necessity for an effective environmental planning system is a single point of contact within the installation's environmental office or directorate. At Fort Bliss, one individual is responsible for all environmental coordination. Whether the

106. *Id.* § 51.855(a).

107. 58 Fed. Reg. 63,214 (1993).

108. *Id.* at 63,234.

109. Memorandum, Director of Environmental Programs, Headquarters, Department of the Army, subject: General Conformity under the Clean Air Act (27 June 1995) (copy on file with the author).

110. Headquarters, Fort Bliss, Fort Bliss Form 88, Range and Maneuver Area Request (1995) (available at the Fort Bliss Directorate of Environment).

111. *Id.*

112. See Sample Memorandum, United States Army Intelligence Center and Fort Huachuca, Fort Huachuca, Ariz. subject: Request for Environmental Coordination IAW AR 200-2, (1995).

proposed activity involves construction, renovation or demolition by the engineers, or training by line units, the environmental coordinator ensures that all interested parties within the environmental directorate review it. These parties often include archeologists, historic architects, wildlife biologists, hazardous waste managers, and other specialists. The environmental coordinator should develop a checklist that includes each of the key elements of the environmental directorate, so that he can track the action. In addition, the environmental coordinator should host a weekly conference at which the status of all NEPA actions is reviewed. Because of the large responsibility of the environmental coordinator, it is critical that the installations employ a responsible individual with a thorough understanding of the NEPA.

Conclusion

Environmental and legal offices do not need to have an adversarial relationship with public works engineers and train-

ers. With an effective environmental planning program, research, education, and consultations with experts, the kinds of miscues that cause delays in training or public works projects can normally be avoided. In addition, an effective environmental planning program on an Army installation can be critical to successful training and infrastructure development. Careful coordination is required to ensure that all relevant environmental aspects are taken into consideration. Environmental attorneys must clearly understand the complicated requirements of such acts as the NEPA and the NHPA. Every installation should have some form of a checklist for coordination that will ensure that all potentially relevant environmental effects are considered. In addition, face-to-face meetings between project proponents and environmental reviewers can be tremendously valuable. With an effective program in place, staffed by quality environmental personnel, environmental planning can be smooth and effective, rather than a painful, last minute effort as it can be without an effective program.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

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-ADL-P, Charlottesville, Virginia 22903-1781.

Family Law Note

Pennsylvania Rules on Division of Special Separation Benefit and Voluntary Separation Incentive Payments in a Divorce

In 1991, to assist in the reduction of the U.S. military forces, Congress enacted legislation that provides for incentive payments that are designed to encourage members to leave the service. Congress provided two options: a one-time lump-sum payment called the Special Separation Benefit¹ (SSB) or an annual payment that is based on years of service called the Voluntary Separation Incentive² (VSI). Both of these programs are voluntary actions that require the service member's affirmative request and application to participate. In a divorce or separa-

tion context, it can be important to distinguish between voluntary separation and involuntary separation payments.³

The effect of these incentive payments on previously entered divorce decrees that awarded former spouses a portion of military retirement pay quickly became an issue. The statutes themselves did not address the issue. Using the rationale of *McCarty v. McCarty*,⁴ the doctrine of federal preemption seems to prevent the division of these payments. The Uniformed Services Former Spouses' Protection Act (USFSPA),⁵ however, allows state courts to divide disposable military retirement pay in a divorce action.⁶ Whether USFSPA covers the SSB or VSI payments depends on how the state defines the payments—as retirement pay or marital property.

In cases where the divorce occurred before the separation from service under either the SSB or VSI program, the result depends on how the court interprets the definition of marital property. Marital property is generally defined as property that is acquired during the marriage. In *Horner v. Horner*,⁷ a case of first impression in the state, Pennsylvania joined a minority⁸ of states by ruling that SSB payments are not marital property and are not retirement benefits. The payments, therefore, are not divisible.⁹ Karen and Daniel Horner, an Army officer, were

1. 10 U.S.C.A. § 1174 (West 1998). The SSB is a program that entitles a service member with over six years but less than twenty years active duty service to a one-time lump-sum payment determined by 10% of the product of years of service and 12 times the monthly basic pay at the time of release from active duty. *Id.* § 1174(d)(1).

2. 10 U.S.C.A. § 1175. Service members who select the VSI must transfer to the reserves for the period of time they receive the VSI payments. The VSI is an annual payment to the service member with over six years but less than twenty years active duty service based on 2.5% of the monthly basic pay that was received at the time of transfer to the reserve component multiplied by twelve and multiplied again by the number of years of service. The service member receives the annuity for twice the number of years of service. *Id.*

3. See *White v. White*, 710 So.2d 208 (Fla. Dist. Ct. App. 1998). *White* discusses the divisibility of separation pay that is awarded to the service members who involuntarily leave the service. In *White*, Mrs. White was passed over twice for promotion in the Navy and received a lump-sum separation pay pursuant to 10 U.S.C.A. § 631. Involuntary separation pay is generally characterized as severance pay and classified as separate property of the service member. Mr. White did not receive any portion of the separation pay. This is entirely different than the statutory authorization for SSB and VSI. See 10 U.S.C.A. § 631.

4. 453 U.S. 210 (1981). *McCarty* is the case that led to the passage of the Uniformed Services Former Spouses' Protection Act (USFSPA). California, a community property state, refused to treat Colonel McCarty's military retirement pay as separate property. The state court divided the retirement pay equally. The United States Supreme Court found that states were federally preempted from treating federal military retirement pay as marital property. The Court found that until Congress acted, the statute that established military retirement pay did not address the issue and therefore did not allow it. *Id.* at 224.

5. 10 U.S.C.A. § 1408.

6. 10 U.S.C.A. § 1408(c)(1).

7. 24 Fam. L. Rep. (BNA) 1183 (Dec. 23, 1997, *rev'd* Feb. 10, 1998).

8. Not all states have addressed the issue. Of those states addressing the issue, Ohio is the only other state ruling that SSB and VSI are separate property of the service member. See *McClure v. McClure*, 647 N.E.2d 832 (Ohio Ct. App. 1994).

9. *Horner v. Horner*, 24 Fam. L. Rep. (BNA) 1183.

married for 12 years.¹⁰ In their divorce, the court awarded Karen a percentage of Daniel's retirement pay based on the standard formula.¹¹ Four years after the divorce, Daniel was passed over for promotion and took advantage of the SSB program.¹² Karen petitioned the court to enforce the divorce decree and argued that the SSB was actually retirement pay.¹³

The Pennsylvania Supreme Court agreed with the lower courts that Daniel's SSB payment was not divisible because it was neither marital property nor retirement pay.¹⁴ Like most states, Pennsylvania defines marital property as property that is acquired during the marriage.¹⁵ The SSB program did not exist at the time of the Horner's divorce. Consequently, Daniel Horner did not acquire any interest in the SSB during the marriage, nor was it a benefit that he had anticipated.¹⁶ Karen argued that Daniel's SSB election was analogous to a civilian employee who takes early retirement incentives, a strategy that is used by civilian companies as cost-cutting measures. Although Pennsylvania holds that these early retirement incentives, which are acquired after separation, are not divisible, Karen argued that SSB is distinguishable because the service member must repay the SSB incentive if he receives a military retirement from service in the reserve component. The court rejected that argument and held that Daniel did not have any retirement benefits to surrender at the time of divorce and at the time of selecting the SSB payment.¹⁷ At the time that he was passed over for promotion, and elected the SSB, he had only 16 years of active service. Unlike civilian pension plans where an employee may be given the opportunity to retire early, Congress passed the SSB and VSI statutes to encourage separation from the service,

rather than retirement.¹⁸ If Daniel reaches retirement in the reserve component, Karen would receive her percentage of that retirement pay as awarded in the divorce decree.¹⁹

It is important for legal assistance attorneys to recognize that incentive programs, although they are not specifically covered under the USFSPA, raise issues for service members and spouses which are similar to retirement pay issues. It is imperative that attorneys consider where the divorce is taking place and address that state's treatment of these programs when counseling clients. It is also important to note that, because these payments are not true USFSPA payments, the jurisdictional restrictions that are placed on division of retirement pay by the USFSPA do not apply. Most states that have considered the issue treat SSB and VSI as divisible.²⁰ The issue, however, is not settled in every state. Major Fenton.

Consumer Law Notes

Consumer Protection Statutes Can Help With Landlord-Tenant Disputes—Ultimatums about Unpaid Rent Fall Under the Fair Debt Collection Practices Act

Judge advocates routinely see clients about problems in landlord-tenant relationships.²¹ Many soldiers that rent their residences may fall prey to an unscrupulous landlord. Two recent decisions from the United States District Court for the

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1184.

15. 23 PA. CONS. STAT. §3501(a)(6) (1997). Pennsylvania defines marital property as all property acquired by either party during the marriage, including the increase in value of the property, prior to the date of final separation.

16. *Horner*, 24 Fam. L. Rep. (BNA) 1183.

17. *Id.* at 1184.

18. *Id.* The court recognizes there is a big difference between separating from the military and receiving a discharge versus retiring from the military.

19. *Id.*

20. The following cases all found SSB or VSI divisible: *In re the Marriage of Heupel*, 936 P.2d 561 (Colo. 1997); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. App. 1996); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995); *In re Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994); *Kelson v. Kelson*, 675 So.2d 1370 (Fla. 1996); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); and *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. 1995).

21. This service is expressly authorized in U.S. DEPT. OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6c (10 Sept. 1995)[hereinafter AR 27-3]. Most clients are tenants because this regulation prohibits legal assistance on private business matters. *Id.* at para. 3-8. The regulation does contemplate, however, providing assistance "on matters relating to the purchase, sale, and rental of a client's principal residence and other real property. *Id.* at para. 3-6c. Thus, you could help a "landlord," so long as they are not renting the property as a business or investment. For example, if a soldier rents his principal residence because permanent change of stations orders require him to move, but he intends to return at some point to the home, a legal assistance attorney could assist the soldier.

Southern District of New York²² demonstrate that familiar consumer protection tools may be useful in assisting landlord-tenant clients.

In the first case, the plaintiff, Jennifer Romea, rented an apartment in Manhattan from a realty company.²³ After Ms. Romea apparently fell behind on the rent by several months, the landlord's lawyer sent a notice informing Ms. Romea that she had three days to pay her rent or the landlord would seek to evict her.²⁴ The notice that the attorney sent is statutorily required in New York as a precondition to summary dispossess proceedings.²⁵ Miss Romea sued under the Fair Debt Collection Practices Act (FDCPA), and alleged that the notice was deficient because it:

- (a) failed to disclose clearly that defendant was attempting to collect a debt and that any information obtained would be used for that purpose;
- (b) contained threats to take actions that could not legally, or were not intended to, be taken; and
- (c) omitted notice of the required thirty day validation period.²⁶

The landlord moved to dismiss the complaint by alleging that the unpaid rent was not a "debt" and the notice was not a "communication" as those terms are defined in the FDCPA.²⁷ In the alternative, the defendant argued that, even if those definitions were met, the court should not follow the plain language of the FDCPA because notices that are required by statute are

exempt from the FDCPA under a Federal Trade Commission's (FTC) commentary to the act.²⁸

Judge Kaplan made fairly short work of the defendant's definitional claims. Concerning the definition of "debt" under the FDCPA, the court agreed with the reasoning of the United States Court of Appeals for the Seventh Circuit in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*²⁹ That case held that the FDCPA applies to all obligations to pay money that arise out of consumer transactions, not just those where credit is extended.³⁰ Judge Kaplan was "entirely persuaded by the Seventh Circuit's reasoning in *Bass*" and held that the rent was a debt under the FDCPA.³¹ Regarding the defendant's second claim, the court looked to the broad statutory definition of "communication" and found that the defendant had "no colorable argument that [the eviction notice] does not satisfy the FDCPA's sweeping definition of 'communication.'"³²

The issue of "whether there is any proper basis for deviating from the plain meaning of [the] unambiguous language" in the statute was more complex.³³ The defendant had a particularly strong claim here because "the 1988 Federal Trade Commission staff commentaries on the FDCPA . . . purport to exclude from FDCPA coverage a notice that is required by law as a prerequisite to enforcing a contractual obligation between creditor and debtor, by judicial or nonjudicial legal process."³⁴ In reaching its decision, the court borrowed the United States Supreme

22. *Romea v. Heiberger & Assocs.*, 988 F. Supp. 712 (S.D.N.Y. 1997), *permission for interlocutory appeal granted Romea v. Heiberger & Associates*, 988 F. Supp. 715 (S.D.N.Y. 1998); *Ali v. Vikar Management Ltd.*, 994 F. Supp. 492 (S.D.N.Y. 1998).

23. *Romea*, 988 F. Supp. at 713.

24. *Id.*

25. *Id.*

26. *Romea*, 988 F. Supp. at 713.

27. *Id.* at 713-14.

28. *Id.* at 714-15. The FDCPA defines "debt" as: "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. A. § 1692a(5) (West 1998). "Communication" is also defined broadly as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C.A. § 1692a(2).

29. 111 F.3d 1322 (7th Cir. 1997). For a more detailed discussion of *Bass* and the issue of what constitutes a debt under the FDCPA, see Consumer Law Note, *Seventh and Ninth Circuits Hold That Bad Checks are Debts Under the FDCPA*, ARMY LAW., Feb. 1998, at 29.

30. *Bass*, 111 F.3d at 1326.

31. *Romea v. Heiberger & Assocs.*, 908 F. Supp. 712, 714 (S.D.N.Y. 1998).

32. *Id.*

33. *Id.*

34. *Id.*

Court's rationale in *Heintz v. Jenkins*.³⁵ In that case, the FTC had sought to exclude some attorney work from the FDCPA. The Court rejected the exclusion and noted that "the commentaries themselves state that they are 'not binding on the commission or the public.'"³⁶ The United States Supreme Court also found that the FTC's interpretation of this FDCPA provision was not reasonable and that there was nothing in the act to indicate that the FTC had the power to create an exception that was not provided for in the statute.³⁷ Judge Kaplan found that the *Romea* case fell "squarely within the reasoning of *Heintz*."³⁸ Thus, he rejected the defendant's motion to dismiss and found that the plaintiff had a colorable claim under the FDCPA.³⁹

This case is important for legal assistance practitioners for at least two reasons. First, it highlights another tool to use in protecting clients from landlords. Second, and perhaps more importantly, it shows that consumer advocates must "think outside the box." Consumer problems cannot usually be categorized under one statute or rule. Rather, the attorney must use all of the tools that are available to attack the problem. In this case, an attorney's innovative use of the FDCPA worked well for her client. In their negotiations on behalf of their clients, judge advocates should also pursue original legal theories that utilize all possible remedies, in their negotiations on behalf of their clients. Major Lescault.

Landlord Access to Credit Reporting Agency Information is Limited

The United States District Court for the Southern District of New York recently provided guidance on applying the Fair Credit Reporting Act (FCRA) to landlord-tenant cases. In *Ali v. Vikar Management Ltd*,⁴⁰ the court was asked to rule on a motion for summary judgment in a case which alleged that the defendant violated the FCRA by accessing information from

the plaintiff's credit report file.⁴¹ The court held that landlords violate the FCRA when they obtain address information under false pretenses and access credit reports for a purpose that is not authorized by the FCRA.⁴² The Court summarized the facts of the case in this way:

The plaintiffs in these related cases are tenants in rent stabilized apartments. Their landlord suspected that they actually reside elsewhere. If that were true, the tenants would not be eligible to keep the rent stabilized apartments and the landlord could evict them.

. . . .

Through its managing agent, the landlord obtained information about the tenants from a consumer credit reporting agency. The landlord sought this information not to check on the tenants' credit worthiness, but to verify their primary place of residence. For at least two of the tenants, the managing agent made false representations to obtain the information.⁴³

The plaintiffs sued the landlord's management company and alleged violations of the FCRA. All of the parties sought summary judgment.

In analyzing the plaintiff's FCRA claims, the court saw "two aspects of the FCRA at issue in this case: (1) using a consumer report for a permissible purpose pursuant to 15 U.S.C.A. § 1681b; and (2) obtaining consumer information under false pretenses as proscribed by 15 U.S.C. A. § 1681q."⁴⁴ The court held that address information that was contained in the consumer's credit report file was not a "consumer report" as that term is

35. 514 U.S. 291 (1995).

36. *Id.* at 298.

37. *Id.*

38. *Romea v. Heiberger & Assocs.*, 988 F. Supp. 715 (S.D.N.Y. 1998).

39. *Id.*

40. 994 F. Supp. 492 (S.D.N.Y. 1998).

41. *Id.* at 494.

42. *Id.*

43. *Id.*

44. *Id.* at 497 (citing 15 U.S.C.A. § 1618q (West 1998)).

used in the FCRA.⁴⁵ Thus, the release of this information was not limited to the permissible purposes for consumer reports under the act.⁴⁶ The Court went on to say, however, that using false pretenses to obtain any information subjects the requester to liability under the FCRA “even if the information supplied by the consumer reporting agency [is] not a consumer report.”⁴⁷ Therefore, the court granted summary judgment to all plaintiffs whose addresses had been obtained under false pretenses.⁴⁸

The situation of one of the plaintiffs is particularly useful to practitioners. The defendant accessed plaintiff Ramsaroop’s complete credit report.⁴⁹ The defendant claimed that the mere existence of the landlord-tenant relationship justified its accessing a tenant’s credit report.⁵⁰ The court rejected this notion. While Judge Chin did note that there were legitimate circumstances that allow landlords to access credit reports, there was no generalized authorization based upon the relationship itself.⁵¹ Thus, landlords may only access a credit report when they need the information for one of the permissible purposes defined by the FCRA.⁵²

Decisions like this, together with recent changes to the FCRA,⁵³ help restore the proper balance between a business’s legitimate need for information and a consumer’s right to privacy. This decision is also another good example of an attorney that examines the entire fact scenario and uses the tool that is best suited to protect the consumer. A practitioner might look at this case, categorize it as a landlord-tenant matter, and restrict his thinking and research to that area of the law. Doing so would be a disservice to the client. Like the attorneys in this case, practitioners must look at the entirety of the situation and

frame the case in a way that is best suited to protect the interests of their clients.

Judge advocates must continue to think like the attorneys in the two cases discussed above. Because of our diverse client base, unique circumstances are found in every case. A situation that may initially appear to fit into a particular area of the law, may actually be resolved more favorably for your client if you consider other consumer protection laws. When you consider common scenarios, such as landlord-tenant cases, think through all of the “tools” in your consumer protection “toolbox” before you decide how to proceed. Doing so will expand the possible avenues of help that are available to your client and make you a more effective legal assistance attorney. Major Lescault.

Tax Law Note

New Tax Credits Increase Necessity to Review Form W-4

For years legal assistance attorneys and tax assistance officers have educated the military community concerning correctly calculating federal income tax withholding. Despite the “thrill” of receiving a large federal income tax refund, the reality of a large refund is that the taxpayer most likely inaccurately computed the withholding of taxes. A taxpayer can have more money in their paycheck each month by carefully reviewing their withholding allowances on an Internal Revenue Service (I.R.S.) Form W-4. A large refund, on the other hand, is equivalent to giving the I.R.S. an interest free loan for twelve to eighteen months.

45. *Id.* A “consumer report” is defined as:

[a]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

- (A) credit or insurance to be used primarily for personal, family, or household purposes;
- (B) employment purposes; or
- (C) any other purpose authorized under section 1681b of this title.

15 U.S.C.A. § 1681a(d). The *Ali* Court found that “Address information on a consumer, for example, is not a consumer report because it is not information that bears on any of the characteristics described” in the definition of “consumer report.” *Ali v. Vikar Management Ltd.*, 994 F. Supp. 492, 497 (S.D.N.Y. 1998).

46. *Ali*, 994 F. Supp. at 497. The FCRA only allows a Credit Reporting Agency to release a consumer report under limited circumstances. *See* 15 U.S.C.A. § 1681b (West 1998).

47. *Ali*, 994 F. Supp. at 497, *citing* *Berman v. Parko*, 986 F. Supp. 195, 214 (S.D.N.Y. 1997).

48. *Id.* at 499-500.

49. *Id.* at 495-96.

50. *Id.* at 500.

51. *Id.*

52. *Id.* *See also* 15 U.S.C.A. § 1681a(d).

53. The 1997 changes to the FCRA did not have any effect on the *Ali* case or its rationale. *Ali v. Vikar Management Ltd.*, 994 F. Supp. 492, 497 n.4 (S.D.N.Y. 1998). For a discussion of the changes, *see* Consumer Law Note, *Fair Credit Reporting Act Changes Take Effect in September*, *ARMY LAW.*, Aug. 1997, at 19.

For tax year 1997, the average federal income tax refund was \$1325.⁵⁴ The I.R.S. anticipates that federal tax refunds for tax year 1998 will be higher for many taxpayers due to new tax credits. Tax credits are dollar-for-dollar reductions in the amount of tax that is owed. The new child tax credit⁵⁵ should have the most impact for individual taxpayers; however, there are also two new higher education tax credits which may also impact an individual's tax liability.⁵⁶ For many taxpayers in the military community, these new tax credits will lower taxes and result in larger refunds if service members do not adjust their withholding allowances.

For 1998, the new child tax credit is \$400 for each eligible dependent under the age of seventeen.⁵⁷ In 1999, this credit will increase to \$500 per child. The child tax credit will phase out for higher income taxpayers, however; the phase-out should only affect a small segment of the military community.⁵⁸ The child tax credit generally cannot be more than the tax liability.⁵⁹ This means that it can reduce a taxpayer's income tax to zero,

but it cannot result in a refund. There are some exceptions for taxpayers who have three or more qualifying children or who claim the earned income tax credit.⁶⁰ As is the case with dependency exemptions, no child care credit is allowed for a child for a tax year unless the taxpayer includes the child's name and social security number on the return for the year.⁶¹

Along with the child tax credit, there are two new higher education tax credits for 1998. The Hope Scholarship⁶² and the Lifetime Learning credits⁶³ are both based on qualified tuition and related fees⁶⁴ that are paid for the taxpayer, spouse or an eligible dependent.⁶⁵ The taxpayer should be careful to reduce qualified tuition and related expenses by scholarships, Pell Grants, employer-provided educational assistance, and other tax-free payments.⁶⁶ The student must be enrolled⁶⁷ for at least one academic period (semester, trimester, or quarter)⁶⁸ at an eligible educational institution during the year. For each eligible student, a taxpayer may claim only one of the education credits

54. I.R.S. News Release IR-98-39 (May 13, 1998).

55. I.R.C. § 24 (West 1998).

56. I.R.S. News Release IR-98-39 (May 13, 1998).

57. A qualifying child is a natural child, stepchild, grandchild or eligible foster child that is under age 17. I.R.C. § 24(c)(1)(C). A qualifying child must be a citizen or national of the United States and someone that can be claimed for federal income tax purposes as a dependent. I.R.C. § 24(c)(2).

58. The child tax credit will phase out for single taxpayers with incomes that exceed \$75,000, married filing jointly with incomes that exceed \$110,000, married filing separate returns with incomes of more than \$55,000. I.R.C. § 24(b)(2). The credit is reduced by \$50 for each \$1000 of modified Adjusted Gross Income (Adjusted Gross Income increased by excluded income from foreign, U.S. possessions, and Puerto Rico sources) above these amounts. I.R.C. § 24(b)(1) (West 1998).

59. I.R.C. § 26.

60. For families with three or more qualifying children, an alternative credit is available if it exceeds the regular child credit available after application of the tax liability limitation of I.R.C. § 26. The alternative credit is figured by adding the taxpayer's social security taxes for the tax year to the I.R.C. § 26 limitation amount, and reducing that sum by all nonrefundable credits and by the earned income credit other than supplemental child care credit of I.R.C. § 32(n). This additional child credit is refundable. I.R.C. § 24(d).

61. I.R.C. § 24(e) (West 1998).

62. I.R.C. § 25A(b) (West 1998).

63. I.R.C. § 25A(c).

64. Qualified tuition and related expenses mean tuition and fees that are required for the enrollment or attendance of a child at a post-secondary educational institution that is eligible to participate in the federal student loan program. They do not include the costs of books, room and board, transportation, and related expenses. Expenses for courses that involve sports, games, or hobbies do not qualify unless they are part of a student's degree program. Nonacademic fees, such as student activity fees, athletic fees, and insurance expenses, do not qualify. I.R.C. § 25A(f).

65. An eligible dependent is a person who can be claimed as a dependency exemption. It generally includes unmarried children under the age of 19 or who are full-time students who are under the age of 24 if the taxpayer supplies more than half the child's support for the tax year. If a dependency exemption for an individual is allowed to another taxpayer, the dependent cannot claim the Hope credit, and any qualified tuition and expenses that are paid by the dependent during the tax year are treated as paid by the taxpayer who is allowed to take the dependency exemption. I.R.C. § 25A(g)(3). It is important to note that a person who is a nonresident alien for any portion of the year may elect a Hope or Lifetime Learning credit only if he elects under I.R.C. § 6013(g) or (h) to be treated as a resident alien. I.R.C. § 25A(g)(7).

66. However, qualified amounts do not have to be reduced by amounts that have been paid by gift, bequest, devise, or inheritance. I.R.C. § 25A(g)(2). In addition, no credit is allowed for any expense for which an income tax deduction is allowed. I.R.C. § 25A(g)(5).

67. The student must carry at least half of the normal full-time workload for the course of study that he is pursuing. I.R.C. § 25A(b)(3)(B).

68. If qualified tuition and expenses are paid during one tax year for an academic period that begins during the first three months of the next tax year, the academic period, beginning in the earlier year, is treated for these credit purposes. I.R.C. § 25A(g)(4).

in a single tax year.⁶⁹ The higher education credits phase out for some taxpayers.⁷⁰ In addition, if a student receives a tax free distribution from an education Individual Retirement Account (IRA) in a particular tax year, none of that student's expenses can be used as the basis of a higher education tax credit for that year.⁷¹

The Hope credit is available only for the first two years of a student's post-secondary education.⁷² Taxpayers may elect a personal nonrefundable tax credit that is equal to 100% of the first \$1000 of qualified higher-education tuition and related expenses paid during the tax year for education furnished to an eligible student, plus half of the next \$1000.⁷³ The maximum credit is \$1500 a year for each eligible student.⁷⁴ The Hope credit applies to payments that are made after 1997 for academic periods beginning after that year.

The Lifetime Learning credit, which applies to expenses that are paid after June 30, 1998, is available for any level of higher education. The credit is twenty percent of up to \$5000 of qualified tuition and related expenses that are paid during the tax year with a maximum credit of \$1000 per year.⁷⁵ The Lifetime Learning credit differs from the Hope credit because it covers a broader period and range of educational courses. By contrast, the Hope credit only applies to the first two years of post secondary education; the Lifetime Learning credit applies to expenses for undergraduate, graduate, and continuing education courses. Therefore, expenses for courses of instruction at an eligible institution that are taken to acquire or improve job skills that would not qualify for the Hope credit will qualify for the Lifetime Learning credit.⁷⁶

Legal assistance attorneys and tax officers should encourage members of the military community to review the new tax cred-

its. If these new tax credits benefit the military taxpayer, then the taxpayer should consider changing his tax withholding. Internal Revenue Service Publication 919 entitled "*Is my Withholding Correct for 1998?*," explains how to analyze and factor in the benefits of the new child and higher education tax credits when adjusting tax withholding. It also includes a Form W-4 that can be submitted to local military finance offices to change the amount of tax withholding and worksheets to help taxpayers to correctly determine the tax effect of the new credits. Military families can reap an early benefit from the new child tax credit and add money to their paychecks by filing a new Form W-4.

A more expansive review of recent changes to the Internal Revenue Code that impact upon service members will be presented in the November issue of *The Army Lawyer*. Internal Revenue Service publications and tax forms are available from the I.R.S. web site at <<http://www.irs.ustreas.gov>> or by calling 1-800-TAX-FORM. Major Rousseau.

Criminal Law Note

Defense Concessions May Not Be Enough to Exclude Uncharged Misconduct

Introduction

Military Rule of Evidence (MRE) 404(b)⁷⁷ prohibits the government from offering uncharged misconduct, or "bad acts" evidence, to prove that the accused is a bad person. However, the government may use "bad acts" evidence to prove an element of a charged offense, such as intent or identity.⁷⁸ The military judge should consider several factors when balancing the

69. I.R.C. § 25A(c)(2).

70. Availability of the higher education credit phases out ratably for taxpayers with modified Adjusted Gross Income (Adjusted Gross Income increased by foreign, possessions, and Puerto Rico income inclusions) of \$40,000 to \$50,000 for single filers, and \$80,000 to \$100,000 for joint return filers. I.R.C. § 25A(d) (West 1998). Married taxpayers must file jointly to claim the credit. I.R.C. § 25A(g)(6) (West 1998).

71. I.R.C. § 530(d) (West 1998).

72. I.R.C. § 25A(b)(2).

73. I.R.C. § 25A(b)(1).

74. I.R.C. § 25A(a)(1); I.R.C. § 25A(b)(1); I.R.C. § 25(e)(1).

75. I.R.C. § 25A(c)(1).

76. I.R.C. § 25A(c)(2)(B).

77. Military Rule of Evidence (MRE) 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (1995) [hereinafter MCM].

78. *Id.*

probative value of “bad acts” evidence against the danger of unfair prejudice to the accused.⁷⁹ One factor is whether there are other means to prove the element at issue. For example, the accused may offer to concede an element of the offense to prevent the government from offering “bad acts” evidence under MRE 404(b). An offer by the defense to concede an element, however, may not be enough to exclude uncharged misconduct.

In *United States v. Crowder (Crowder II)*,⁸⁰ the United States Court of Appeals for the District of Columbia held that a defendant’s offer to concede the element of intent does not *per se* prohibit the government from using “bad acts” evidence to prove intent.⁸¹ *Crowder II* is a reconsideration and reversal of the court’s earlier opinion in *Crowder I*.⁸² In *Crowder I*, the court ruled that the defense could prohibit the government from introducing “bad acts” evidence under Federal Rule of Evidence 404(b)⁸³ by conceding intent.⁸⁴

Facts

Crowder involved two cases (Crowder and Davis) that were combined on appeal. In *Crowder*, three police officers saw Rochelle Crowder engage in an apparent drug transaction by exchanging a small object for cash. The police stopped and gestured for Crowder to approach. Crowder turned and ran and the police followed him. During the chase, Crowder discarded a brown paper bag. The brown bag contained 93 zip-lock bags of crack cocaine and 38 wax-paper packets of heroin. While searching Crowder, the officers also found a beeper and \$988

in small denominations. Crowder denied ever possessing the bag containing drugs. His first trial ended in a mistrial.⁸⁵

At his second trial, the government gave notice of intent to prove Crowder’s knowledge, intent, and modus operandi with evidence that Crowder sold crack cocaine to an undercover officer in the same area seven months after his initial arrest.⁸⁶ To keep this evidence from the jury, Crowder offered to stipulate that the amount of drugs that were seized was consistent with distributions; therefore, anyone who possessed them had the intent to distribute. The judge refused to force the government to stipulate and admitted evidence of the later sale over defense objection.⁸⁷

In the companion case, an undercover police officer, purchased a rock of crack cocaine from Horace Davis on a Washington, D.C. street corner. After the transaction, the undercover officer broadcast Davis’ description over the radio. Davis was apprehended near the scene a few minutes later as he opened his car door. During a subsequent search of the car, the police found 20 grams of crack cocaine.⁸⁸

At trial, Davis put on a defense of misidentification. He claimed that he had walked out of a nearby store just before his arrest. The government gave notice of intent to introduce evidence that Davis made three prior cocaine sales in this same area in order to prove his knowledge of drug dealing and his intent to distribute. In an effort to exclude this evidence, Davis offered to stipulate that the person who sold the drugs to the undercover officer had the knowledge and intent to distribute. The district court ruled that the government did not have to

79. MCM, *supra* note 77, MIL. R. EVID. 403.

80. *United States v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998).

81. *Id.* at 1204.

82. *United States v. Crowder*, 87 F.3d 1405 (D.C. Cir. 1996) (en banc) [hereinafter *Crowder I*].

83. Federal Rule of Evidence (FRE) 404(b) is identical to the military rule and provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(B).

84. *Crowder*, 87 F.3d at 1410.

85. *Crowder*, 141 F.3d at 1204.

86. *Id.* at 1203.

87. *Id.* at 1204.

88. *Id.*

accept Davis' concession and could prove knowledge and intent through Davis' prior acts.⁸⁹

Case History

In *Crowder I*, the D.C. Circuit held that a defendant's unequivocal offer to concede the element of intent, coupled with an instruction to the jury that the government no longer needed to prove that element, made the evidence of other bad acts irrelevant.⁹⁰ The court reasoned that the defense concession, combined with the jury instruction, gave the government everything it required and eliminated the risk that a jury would consider the uncharged misconduct for an improper purpose.⁹¹

The United States Supreme Court granted certiorari.⁹² The Court then vacated the judgment in *Crowder I* and remanded the case for further consideration in light of its opinion in *Old Chief v. United States*.⁹³ In *Old Chief*, though the Court held that the government should have acquiesced to the defense's offer to stipulate, the Court said that this case was an exception. Justice Souter, writing for the majority, affirmed the general rule by saying "when a court balances the probative value against the unfair prejudicial effect of evidentiary alternatives, the court must be cognizant of and consider the government's need for evidentiary richness and narrative integrity in presenting a case."⁹⁴ The Court also said "the accepted rule that the prosecution is entitled to prove its case free from any defen-

dant's option to stipulate the evidence away rests on good sense."⁹⁵

Crowder II Analysis

On remand, the United States Court of Appeals for the District of Columbia Circuit reversed its earlier decision, and held that the district court did not err by admitting evidence of uncharged misconduct under Rule 404(b), notwithstanding the defense's willingness to concede intent.⁹⁶ The majority noted that *Crowder I* was based on the premise that a defendant's offer to concede a disputed element renders the government's evidence irrelevant. In *Crowder II*, the court reasoned that this premise failed in light of the United States Supreme Court's holding in *Old Chief*. Evidentiary relevance⁹⁷ under Rule 401 is not affected by the availability of alternative forms of proof, such as a defendant's concession or offer to stipulate.⁹⁸

According to the court, the analysis of "bad acts" evidence does not change simply because the defense offers to concede the element at issue. The first step in the analysis remains whether the "bad acts" evidence is relevant under Rule 401. If the government's evidence makes the disputed element more likely than it would otherwise be, the evidence is relevant despite the defendant's offer to stipulate. The next question is whether the government is attempting to properly use the evidence under Rule 404(b). Finally, even if the evidence is both

89. *Id.* at 1205.

90. *United States v. Crowder*, 87 F.3d 1405, 1410-11 (D.C. Cir. 1996).

91. *Id.* at 1414.

92. *United States v. Crowder*, 117 S.Ct. 760 (1997).

93. 117 S.Ct. 644 (1997). In 1993 Johnny Lynn Old Chief was arrested after a fight that involved at least one gunshot. Old Chief was charged, inter alia, with violating 18 U.S.C. § 922 (felon in possession of a firearm) and aggravated assault. Old Chief had been previously convicted of assault causing serious bodily injury. In order to keep this prior conviction from the jury, Old Chief offered to stipulate that he was previously convicted of a crime that was punishable by imprisonment that exceeds one year. *Id.* at 648. The government refused to join in a stipulation. The district court ruled that the government did not have to stipulate and the Ninth Circuit affirmed. *Id.* at 648-49. The United States Supreme Court granted certiorari and reversed. *Id.* at 656. The Court ruled that it was an abuse of discretion under FRE 403 for the district court to reject the defendant's offer to concede a prior conviction in this case. The district court erred in admitting the full judgment over a defense objection when the nature of the prior offense raised the risk that the jury will consider the prior judgment for an improper purpose. It was significant that the only legitimate purpose of the evidence was to prove the prior conviction element of the offense. *Id.* at 647-56.

94. *Id.* at 653-54.

95. *Id.*

96. *United States v. Crowder*, 141 F.3d 1202, 1209 (D.C. Cir. 1998).

97. For military practitioners the definition of relevant evidence is contained in MRE 401 this rule provides that "relevant evidence [is] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MCM, *supra* note 77, MIL. R. EVID. 401.

98. *Crowder*, 141 F.3d at 1209.

relevant and admissible under Rule 404(b), the trial judge can still exclude the evidence if it is unfairly prejudicial, cumulative, or misleading.⁹⁹ One factor that the trial judge should consider when making a balancing determination under Rule 403 is whether the defendant is willing to concede the element that the evidence is being offered to prove.¹⁰⁰ Counsel will need to focus their efforts on whether a defense offer to concede an element renders the “bad acts” evidence unduly prejudicial.¹⁰¹

Advice to Practitioners

Old Chief and *Crowder II* have important implications for military practitioners. In *Old Chief*, the United States Supreme Court recognized that the trial judge must be cognizant of the government’s need for “evidentiary richness.”¹⁰² The Court also accepted the proposition that the government is entitled to prove its case free of a defendant’s offer to stipulate. This does not bode well for defense counsel who seek to limit the trial counsel’s use of uncharged misconduct through stipulations.

The District of Columbia Circuit’s reconsideration and reversal of its earlier opinion in *Crowder II* further complicates the defense counsel’s task. In the future, defense counsel will be hard pressed to argue that their willingness to stipulate to a disputed element renders the government’s “bad acts” evidence irrelevant. In light of these cases, the better approach for defense counsel is to argue that an accused’s willingness to concede the element makes the “bad acts” evidence unfairly prejudicial.

On the other hand, government counsel should use the decisions in *Old Chief* and *Crowder II* to their advantage. Government counsel should cite the United States Supreme Court’s language and argue that the defense cannot dictate the manner in which the government may try its case. Trial counsel must articulate why a stipulation would deny them the ability to preserve the evidentiary richness and narrative integrity of the 404(b) evidence. Finally, government counsel should argue that the defense’s willingness to concede the disputed element

is only one factor that the military judge should consider in a balancing under MRE 403. The government must show how other factors tip the scale in favor of admissibility.

Conclusion

Crowder I gave the defense counsel a powerful tool that could be used to limit the government’s introduction of “bad acts” evidence under Rule 404(b). Unfortunately for the defense, times have changed. The United States Supreme Court’s decision in *Old Chief* and the District of Columbia Circuit’s reversal in *Crowder II* severely weakens the defense’s ability to force the government to stipulate to elements of the offense in order to exclude “bad acts” evidence. In the future, the best that defense counsel can hope for is that their willingness to stipulate renders the government’s “bad acts” evidence unfairly prejudicial. On the other hand, as long as the government can convince the military judge that the “bad acts” evidence is proper and not unfairly prejudicial, it should be able to try its case free from forced defense concessions. Major Hansen.

International and Operational Law Note

A Problem Solving Model for Developing Operational Law Proficiency:

An Analytical Tool for Managing the Complex

***Teach me and I’ll Forget;
Show me and I’ll Remember;
Let me do and I’ll Understand***

The following note is designed to introduce a proposed model for developing operational law problem solving skills. A comprehensive package of materials that is intended to allow implementation of this model will be available for distribution during the upcoming World-Wide Continuing Legal Education (WWCLE) Course at TJAGSA. However, the general frame-

99. *Id.* at 1210. See also MCM, *supra* note 77, Mil R. Evid. 403.

100. *Id.*

101. Although no military court has addressed this issue directly, the Court of Military Appeals hinted at the issue in *U.S. v. Orsburn*, 31 M.J. 182 (C.M.A. 1990), *cert. denied*, 498 U.S. 1120 (1991). Staff Sergeant Steven Orsburn was charged with indecent acts with his eight-year-old daughter. The government offered evidence of three pornographic books found in Orsburn’s bedroom to show his intent to gratify his lust or sexual desires. *Id.* at 188. The defense argued that the evidence was irrelevant because if someone did commit indecent acts with the eight-year-old girl, there was no question that he did so with the intent to gratify his lust or sexual desires. The military judge admitted the evidence over the defense’s objection. Chief Judge Sullivan, writing for the majority, held that the military judge did not abuse his discretion in balancing the probative value of this evidence against the danger of unfair prejudice. *Id.* Judge Sullivan noted that Orsburn “refused to commit himself on the issue of intent or provide any assurances that he would not dispute intent.” *Id.* In light of *Old Chief* and *Crowder II*, a defense offer to concede the element of intent should not act as a *per se* bar to the use of “bad acts” evidence in military practice.

102. *Old Chief*, 117 S.Ct. at 651.

work that is presented here is offered as a foundation for implementing such a skill development program at the installation.¹⁰³

This skill development concept is motivated by a belief that the scope and diversity of operational legal issues mandates some mechanism to better manage analysis in the operational environment. Additionally, it is based upon a belief that an analytical tool that assists operational law attorneys to anticipate issues might enhance the ability of judge advocates to provide proactive legal support. The resulting analytical template is the foundation for this program.

This template, attached at Appendix A and described in detail below, is similar to some analytical tools that are used in the tactical intelligence arena. It is intended to serve two purposes. First, it simplifies issue resolution by focusing legal analysis into manageable categories. Second, it improves issue resolution by strengthening the judge advocate's ability to anticipate legal issues related to the operation.

This model shares a common thread with the Intelligence Preparation of the Battlefield (IPB) analytical model—that a systematic approach to anticipating issues is the best way to prepare to resolve those issues when they arise. Anticipating issues in order to enhance success on the battlefield is the essence of the IPB process. In the operational law arena, a systematic approach to anticipating legal issues might result in a more proactive, versus reactive, delivery of legal support to any given military operation. In short, a judge advocate could conduct a Legal Preparation of the Battlefield (LPB) in order to anticipate probable legal issues, and prioritize the order of response to such issues.

The function of the chart at Appendix A is designed to fulfill this purpose. It creates analytical categories by intersecting each phase of an operation with six legal operating systems—broad categories of legal issues likely to be encountered during a military operation. These legal operating systems are described in Appendix B. There are two anticipated benefits of thinking in terms of such categories. The first benefit relates to the synchronization of the focus of legal support with the focus of supported commanders and their planners. The second ben-

efit relates to improving the ability of the judge advocate to manage the tremendous diversity of legal issues that he will encounter during an operation. This in turn makes analysis of these issues more efficient and aids in identifying where to focus effort.

It is important to recognize, however, that both the phases of the operation, (and to a lesser extent, the legal operating systems) represented on this chart, are intended for a Joint Readiness Training Center (JRTC)-type operation. Modification of this chart to better fit the parameters of a specific mission would only enhance its value to an operational judge advocate. An example of such a modification, developed by Lieutenant Colonel Karl Goetzke, is shown at Appendix C. Lieutenant Goetzke developed this modification in response to a request to review the original matrix and consider how it could be applied to Operation Joint Endeavor. Regardless of modification, however, the basic value remains the same: focusing the thought process into manageable “boxes.”

For training purposes, the concept that this note is intended to introduce is the use of this template to identify six legal issues related to each phase of a notional JRTC deployment. As indicated above, during the upcoming WWCLE, a comprehensive package of materials will be available for staff judge advocates (SJAs) who are interested in implementing this Leadership Development Program. These materials will include a basic factual scenario, the template filled in with thirty-six legal issues, a narrative explanation of each legal issue, and a fact sheet-type solution for each legal issue. The proposed concept is for SJAs to use these materials as the foundation for a Leadership Development Program that emphasizes operational law problem solving and briefing skills.

The process begins with the operational law attorney (or Leadership Development Program coordinating officer) creating analysis teams that are composed of personnel from the Office of the Staff Judge Advocate. The program coordinator will then brief the basic scenario to six teams of office personnel who will resolve the issues. This includes a review of the hypothetical mission. The SJA will role-play the Joint Task Force Commander and highlight his intent. The analysis teams

103. The genesis of this proposal was the use of this model during an elective in the 46th Graduate Course. This elective focused on a clinical approach to developing operational law expertise—application of knowledge previously presented during the core instruction to actual scenario-driven events. The concept of building an elective around scenario-driven issue resolution originated with Major Rich Whitaker, and became the original “military operations” elective for the 45th Graduate Course. This elective focused on a notional deployment and the resolution of issues for a Staff Judge Advocate (SJA) who was preparing for various aspects of the deployment.

During the next iteration of the elective, the concept of a scenario-driven series of operational legal issues was refined in a number of ways. First, the class was divided into six “teams” for the entire six weeks. Each team worked together each week to resolve a designated legal issue, selecting one member to brief a resolution of the issue during the class. Second, the briefing was not presented to a hypothetical SJA, but instead to a hypothetical joint task force commander. Third, in order to ensure the problems presented to the students reflected current issues that were being confronted in the field, representatives from the Center for Law and Military Operations participated in every aspect of the class.

The success of the process used in the class led to discussion with the Center for Law and Military Operations on how the model might be offered to a wider audience. One concept that was suggested was video taping sessions and using the tape as a “distance learning” tool. However, there was strong consensus that the interactive nature of the briefings would be lost by simply having officers view a video taped session.

will be given the basic scenario and one legal issue from a legal operating system for the first phase of the operation. The next six Leadership Development Program sessions will consist of team briefings to the SJA by each analysis team, in his role as the commander, on the resolution of its legal issue for that phase of the operation. The program coordinator will then distribute copies of the solution and, along with the SJA, "hot wash" the briefings. The session will end with assignment of issues for the next phase of the operation.

There are numerous benefits of using this model to improve operational law proficiency. However, the most significant benefit is placing judge advocates in the position of actually having to resolve and brief an operational law issue. An addi-

tional benefit to this approach is that it provides the SJA an opportunity to assess the ability of his subordinates to deal with such questioning. Working through actual problems, and briefing the resolution to a notional commander, should greatly enhance understanding of the relevant legal authority related to that issue. Another benefit includes exposing the operational law attorney to a variety of legal issues and solutions by requiring him to be prepared to critique each brief. Finally, and perhaps most importantly, it should enhance the confidence of each judge advocate in his ability to manage the variety of legal issues that are encountered during an operation, resolve them efficiently and effectively, and present the resolution to the supported commander and staff. Major Corn.

APPENDIX A

PHASE OF OPERATION	METHODS AND MEANS	NON-COMB'T	FISCAL, K'S, CLAIMS	STAFF COORDN'N	LAO, DISCIPLINE, AND ADMIN	ROE
PRE-DEPLOYMENT						
ISB						
COUNTER INSURGENCY						
DEFEND						
ATTACK						
POST CONFLICT STABILITY OPS						

APPENDIX B

EXPLANATION OF THE LEGAL OPERATING SYSTEMS

The analytical model represented by the attached matrix is built around the concept of categorizing issues into six legal operating systems (LOS). This is adapted from the Battlefield Operating System concept. Battlefield operating systems (BOS) are broad categories of combat functions used by Army leaders to aid in the planning and execution of combat operations. The seven BOS are intelligence, maneuver, fire support, air defense, mobility and survivability, logistics, and battle command. This list demonstrates that multiple combat functions of various elements of a combat unit are pigeon holed into broad categories to make them more manageable. According to *Field Manual (FM) 100-5*, “At the tactical level the battlefield operating systems [BOS], for example, enable a comprehensive examination in a straightforward manner that enhances the integration, coordination, preparation, and execution of successful combined arms operations.”¹⁰⁴

The legal operating systems that form the foundation of the Legal Preparation of the Battlefield (LPB) model are intended to serve the same function for the judge advocate that the battlefield operating systems serve for the commander—“enable a comprehensive examination in a straightforward manner that enhances the integration, coordination, preparation, and execution of successful [legal support].”¹⁰⁵ The six proposed LOS are:

- Methods and Means of Warfare Issues
- ROE Issues
- Non-Combatant Issues
- Fiscal, Contract, and Claims Issues
- Staff Coordination Issues
- Administrative and LAO Issues

These six categories of operational legal issues are intended to improve the delivery of proactive legal support. Instead of attempting to randomly consider every potential legal issue related to an operation, the judge advocate (JA) can think in terms of broad based systems representing commonly linked legal issues. This will hopefully help focus planning and analysis. When superimposed over the phases of the planned operation, this focus becomes even more defined and assists the JA in allocating his analytical resources in accordance with the phased focus of the supported command. While these six LOS are certainly subject to modification based on the needs of the JA, a description of each will show that almost all operational legal issues can be covered by them.

Methods and Means of Warfare Issues. This LOS is intended to include all of the traditional rules related to the targeting prong of the law of war. Specifically, any targeting related issues would fall under this LOS. The issues that are subject to analysis under this LOS include defining the role of the JA in the targeting process, from analyzing the legal versus policy based application of the law of war to analyzing the legality of proposed uses of weapons systems.

Rules of Engagement LOS. This LOS is intentionally distinct from the Methods and Means of Warfare LOS to reinforce the point that ROE are not necessarily identical to the law of war. While they may be similar in practice, this distinction ensures that the JA analyzes the legality of employing force against both ROE-based limitations and law of war-based limitations. This LOS includes issues that include ROE review and development, requests for modifications, ROE training, and the impact of ROE on specific operations.

Non-Combatant LOS. This LOS includes all issues related to non-combatants during the operation. Issues under this LOS include human rights obligations towards host nation civilians, to treatment of enemy non-combatants.

Fiscal, Contract, and Claims LOS. This LOS is intended to pull together all “money” related legal issues. Issues analyzed under this LOS include authority to expend funds for specific purposes, to solatia payments during combat operations.

Staff Coordination LOS. This LOS is intended to force the JA to think of all the coordination-related issues during the operation. It heavily emphasizes the coordination between the JA and the public affairs office, psychological operations personnel, civil affairs personnel, the Department of State, and non-government organizations (NGOs). It also encompasses anticipating common support

104. U.S. DEP'T OF ARMY FIELD MANUAL 100-5, OPERATIONS 2-12 (14 June 1993).

105. *Id.*

requirements from other staff elements. Issues that are analyzed under this LOS include coordinating NGO visits, to proposing modifications to a status of forces agreement.

LAO, Disciplinary, Administrative LOS. This LOS is intended to cover both legal assistance-related issues, and other administrative-type issues. It includes all of the classic legal assistance issues that are likely to be encountered during an operation. It also covers dealing with administrative and disciplinary issues related to civilians accompanying the force, also the logistics of actually providing legal support to the command (the “where do I go and what do I do” issues). Finally, it is intended to be a “catch-all” category to cover other issues that might fall through the cracks, such as criminal law and investigation related issues.

APPENDIX C

Legal Systems	LOW (Methods- Means)	ROE	Contract and Fiscal law	Military Justice	Legal Assistance	Admin. Law	Claims	Support (Logistics Personal Readiness, FSG)
Stages								
Mobilization								
Predeployment								
Deployment								
Entry-Operations								
Operations: Close Deep Rear								
Post-conflict								
Redeployment								
Reconstitution								
Demobilization								

Contract Law Note

Federal Supply Schedules: Just Like the Local Convenience Store, But Do You Pay for Convenience¹⁰⁶

Recently, we recognized the need for a new large cork bulletin board in our secretary's office here in Charlottesville. Our original plan was to simply order a new bulletin board from the Federal Supply Schedules (FSS). To our surprise, we discovered that while the bulletin board itself would be \$45.00, shipping would cost an additional \$60.00. Rather than pay \$105.00, we visited a local office supply store with a government credit card in hand, and we purchased the same bulletin board for \$40.00. In addition to ensuring that you pay a fair and reasonable price,¹⁰⁷ there are several recent cases that illustrate other pitfalls to these streamlined contracting vehicles. This note is intended to help you ensure that these advantageous buys constitute the success story advertised.

Competition Lives!

Our purchasers, whether they are traditional contracting officers or government credit card holders, have grown comfortable with ignoring competition on micro-purchases (under \$2500).¹⁰⁸ Likewise, FSS buyers are naturally attracted by the General Services Administration's (GSA) predetermination that the FSS contracts are issued pursuant to full and open competition. Ordering offices, consequently, need not seek further competition, synopses the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides.¹⁰⁹ Orders at or below the micro-purchase threshold have no substantive restrictions. Buyers above

micro-purchase threshold, however, are supposed to "consider reasonably available information. . . by using the *GSA Advantage!* on-line shopping service, or by reviewing the catalogs and price lists of at least three schedule contractors."¹¹⁰ Note that there is no mention of small business set-asides or formal publication requirements. Thus, the competition rules are significantly relaxed, but not completely excused.¹¹¹ This relaxation of the rules has led buyers astray on larger buys.

The often-cited *ATA Defense Industries, Inc.*¹¹² case by the Court of Federal Claims illustrates the reemergence of competition considerations into the FSS world. In that case, the Army was attempting to upgrade target ranges at Fort Stewart, Georgia. The buy was executed under an existing FSS contract. However, approximately thirty-five percent of the total dollar value of the contract involved products and services that were not covered under the FSS agreement. The Army undoubtedly relied upon General Accounting Office (GAO) decisions that had permitted the inclusion of "incidentals" when making what was essentially a schedule buy.¹¹³ The Court of Federal Claims found that Congress' mandate at 10 U.S.C. § 2304 (requiring the use of competitive procedures), does not contain an incidentals exception.¹¹⁴ As a result of this decision, the existence of any de minimus exception for non-schedule items is in question.

The GAO will also review subsequent modifications to existing FSS contracts for changes that materially change the nature of the order, thereby impairing competition. In *Marvin J. Perry & Associates*,¹¹⁵ the protester challenged the substitution of ash wood furniture for red oak furniture in a FSS buy for the Great Lakes Naval Training Center, Great Lakes, Illinois. The vendor actually sent ash furniture by mistake then pro-

106. See GENERAL SERVS. ADMIN, ET AL., FEDERAL ACQUISITION REG. SUBPART 8.4 (June 1997) [hereinafter FAR]. This program which is, directed and managed by the General Services Administration (GSA), provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices that are associated with volume buying. The GSA enters into multiple award, indefinite delivery contracts with commercial firms for given periods of time. The resulting schedules provide the buyer with comparable commercial supplies and services at varying prices. Orders are placed directly with the schedule contractor and deliveries are made directly to the customer. See Federal Supply Service Home Page (visited May 28, 1998) <<http://www.fss.gsa.gov>>.

107. Do not forget that there is also a built-in one percent "industrial funding fee" included in the vendor's price on FSS purchases.

108. FAR, *supra* note 106, at 13.202. Micro-purchases, however, may be awarded without soliciting competitive quotations only where the contracting officer or individual appointed considers the price to be reasonable.

109. FAR, *supra* note 106, at 8.404(a).

110. See FAR, *supra* note 106, at 8.404(b)(2); *GSA Advantage!* (visited May 27, 1998) <<http://www.fss.gsa.gov/cgi-bin/advantage!?38>>.

111. For the market survey and publication considerations that are normally required on commercial item purchases that are in excess of the micro-purchase threshold, see the simplified acquisition procedures contained in the FAR, *supra* note 106, at 13.104-105.

112. 38 Fed. Cl. 489 (1997).

113. See *e.g.*, ViON Corporation, B-275063.2, Feb. 4, 1997, 97-1 CPD ¶ 53 (agency properly ordered items incidental to and necessary for the operation of a computer system ordered under FSS contract, which provided for the provision of such incidental items not specifically listed).

114. 38 Fed. Cl. at 502.

115. B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128.

posed that the Navy accept the furniture at the same price.¹¹⁶ The protester documented that vendors could have obtained ash at considerable savings over red oak, which could have translated into lower price quotations. The GAO, therefore, sustained the protest. They found that the modified order was essentially different, thus creating “concern for a fair and equitable competition that is inherent in any procurement.”¹¹⁷

I'll Take One of Those, and One of Those, and . . .

Given the ease of FSS procurements, buyers can sometimes get “catalog fever,” by buying what looks good rather than what actually meets the government’s requirements at a reasonable price. There are some procurement officials, however, who would never dream of short circuiting a formal acquisition planning process.¹¹⁸ These individuals often lose complete sight of what is really important in a catalog buy. The GAO, however, does not provide an infallible safety net all of the time. In reviewing allegations that the government has misstated its requirements, the GAO normally will only examine the agency’s assessment to ensure that it has a reasonable basis.¹¹⁹

The ordering office is responsible for ensuring that the items that are purchased meet the agency’s needs at the lowest overall cost.¹²⁰ Practically speaking, a challenge only arises where an agency is challenged for not buying the lowest-cost alternative on the schedules. In *CPAD Technologies*,¹²¹ the Air Force bought nine narcotics and explosive detection systems through the FSS. The Air Force originally published a notice in the

Commerce Business Daily, obtained product demonstrations, and ultimately determined that a schedule contractor best met the agency’s needs.¹²² The protester alleged that the Air Force should have purchased CPAD’s lower-priced systems. The protest was dismissed, however, because the agency had documented that the awardee system’s lighter weight, smaller size, and effectiveness of operation caused the agency to conclude that this system best met its needs.¹²³ This case illustrates why it is critical to document your reasoning when you do not select the lowest-priced alternative.

No Rules, Just Right?

The unstructured nature of the evaluation process can deceive some buyers into believing that there are no procedural rules left in FSS buys. In *COMARK Federal Systems*,¹²⁴ the Health Care Financing Administration, of the Department of Health and Human Services, issued a request for quotations (RFQ) and announced that it would issue multiple blanket purchase agreements (BPAs)¹²⁵ for a variety of computer hardware, software, and associated equipment and services. Three vendors were selected to receive BPAs.¹²⁶ Two weeks later, the agency issued RFQ 0008 for 1950 desktop workstations. All of the items that were offered were to be off of FSS. The RFQ, however, did not list any evaluation criteria.¹²⁷ When COMARK’s low, technically acceptable quote was not selected, they protested, contending that the agency had conducted an improper “best value”¹²⁸ analysis. The GAO sustained the protest and concluded that the RFQ did not accurately state the agency’s requirements and that the protester

116. *Id.* at 2.

117. *Id.* at 5.

118. *See FAR, supra* note 106, at 7.105. Contents of Written Acquisition Plans.

119. Midmark Corp., B-278298, Jan. 14, 1998, 98-1 CPD ¶ 17.

120. FAR, *supra* note 106, at 8.404(a).

121. B-278582.2, Feb. 19, 1998, 98-1 CPD ¶ 55.

122. *Id.* at 1.

123. *Id.* *See also* Commercial Drapery Contractors, Inc., B-271222.2, June 27, 1996, 96-1 CPD ¶ 290 (issuance of FSS orders were improper where the urgency that was alleged was caused by delays which were incident to the prior improper issuance and subsequent cancellation of purchase orders for the same requirement to the same vendor in response to clearly meritorious protests).

124. B-278323, Jan. 20, 1998, 98-1 CPD ¶ 34.

125. *See FAR, supra* note 106, at 13.210. Blanket purchase agreements are a simplified acquisition tool to fill anticipated repetitive needs for supplies and services by establishing “charge accounts” with qualified sources. BPAs are permitted in FSS contracting. FAR, *supra* note 106, at 8.404(b)(4).

126. *COMARK*, B-278323 at 6.

127. *Id.*

128. “Best value” procurements are now defined as any acquisition that obtains the greatest overall benefit in response to a government requirement. *See FAR, supra* note 106, at 2.101. The term “trade-off approach” is now used to describe the kind of cost-benefit analysis that has traditionally been understood as a best value procurement.

was not prejudiced by the agency's action.¹²⁹ The lesson learned is that you must provide reasonable guidance about selection criteria should you decide to get innovative in your FSS buys.

When You Are Buying Too Much of a Good Thing

Each schedule has an established maximum order threshold.¹³⁰ This threshold represents the point where, in GSA's opinion, it is advantageous for the ordering office to seek a price reduction.¹³¹ Where further price reductions are not offered, an order may still be placed, if the ordering office determines that it is still appropriate to do so.¹³² Also, there is no prohibition against seeking discounted prices on orders that are below the maximum order threshold. Customers that obtain further price reductions may still place orders against the FSS

contract and the contractor need not extend that price reduction to all FSS ordering offices.¹³³

Conclusion

It takes more than statutory and regulatory changes to benefit from procurement reform. Increased discretion in government procurements demands good business judgment and reasoned action, as the Defense Logistics Agency recently learned after it was revealed that the armed services are paying outrageous prices for weapons systems spare parts using commercial items procurement techniques.¹³⁴ Buyers that are conscious of the business judgment, competition, and procedural issues still relevant to FSS buys will make the best use of these advantageous contractual vehicles. Major Freeman.

129. *COMARK*, B-278323 at 6.

130. Customer orders were once restricted by a maximum order limitation. Buys that were in excess of that limitation were vulnerable to a challenge under the Competition in Contracting Act, 10 U.S.C.A. § 2304. *See* *Komatsu Dresser Co.*, B-246121, Feb. 19, 1992, 92-1 CPD ¶ 202 ("re-quote arrangements" clause that provided for limited competitions only among schedule contractors for requirements that exceeded the maximum order limitation are a violation of CICA).

131. FAR, *supra* note 106, at 8.404(b)(3).

132. *Id.*

133. FAR, *supra* note 106, at 8.404(b)(5).

134. *See* Eleanor Hill, Inspector General, Department of Defense (DOD), Remarks before the Subcommittee on Acquisition and Technology on Armed Services Committee, United States Senate (March 18, 1998), in S. REP NO. 98-093 (1998). The report is available on the Internet at <http://www.dodig.osd.mil/fo/index.html> (visited May 27, 1998). In mid-1996, the DOD Inspector General's Office received complaints relating to overpriced aircraft spare parts purchases by DLA. Audits revealed that DOD's procurement approaches were "poorly conceived, badly coordinated and did not result in the government getting good value for the prices paid." *Id.* at 5. The worst example cited were setscrews, purchased for \$75.60 each (a 13,163 percent increase over a previous price of 57 cents). *Id.* All of the audited transactions were sole-source procurements, not FSS buys.

Note from the Field

*Captain Drew Swank
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Mediation and the Equal Employment Opportunity Complaint Process

Mediation is nothing new to the equal employment opportunity (EEO) complaint process. For years, federal sector EEO counselors have attempted to resolve complaints informally between management and the employees who filed the complaints.¹

Mediation is an alternative dispute resolution (ADR) technique that is designed to resolve disputes without resorting to litigation. A neutral third party, the mediator, facilitates and directs communications between the adverse parties in an effort to aid them in resolving the conflict with a solution of their own making. The mediator is not a judge or a jury, and he often does nothing more than offer suggestions or potential solutions.

Mediation is particularly well suited for federal EEO complaints. The first goal of mediation is to improve communication between the parties. Mediation can achieve where litigation fails because it improves the interpersonal communications and relationships between the parties. This is important because the parties often forget that many times the complainant is still on the job the following week, the next year, and perhaps the next ten years after filing the complaint.

Mediation can offer other tangible benefits over litigation. The parties can attempt mediation at any time during the informal processing of an EEO complaint. Furthermore, mediation is cost effective. Unlike an adversarial formal hearing, in mediation there are no transcript fees, no witness travel costs, and often no costs for attorney representation, which is not required during mediation. The only cost is the time that the participants are willing to spend in trying to resolve the conflict. Most importantly, mediation can provide lasting agreements because parties may be more likely to adhere to a contractual agreement of their own making.

Mediation has recently been in the spotlight as a method of resolving federal sector disputes. A federal statute, entitled the Alternative Means of Dispute Resolution in the Administrative

Process,² mandated mediation for the federal government. On May 1, 1998, President Clinton issued an executive memorandum concerning the designation of interagency committees to facilitate and to encourage agency use of alternate means of dispute resolution.³

Formal mediation is now included in the EEO process. In the spring of 1997, the Equal Opportunity Employment Commission (EEOC) began a voluntary mediation diversion program of federal sector cases on a trial basis. Cases that the EEOC administrative judges were scheduled to hear are instead being mediated by local attorneys on a pro bono basis. Fort Bliss, in El Paso, Texas, implemented this pilot program in May 1997. While local attorneys have mediated only two cases to date, this program gives mediation an opportunity to resolve EEO complaints formally.

The problem with the current approach, however, is that mediation comes too late in the complaint process to offer much success. When the case is diverted to mediation, it has already been informally and formally processed and investigated by the Department of Defense Civilian Personnel Management Service's Office of Complaints Investigation. When the case is diverted, both parties are already prepared for litigation. Once prepared for litigation, parties usually lack an open, compromising attitude. The current approach should add one more step and follow the lead of the Government Accounting Office (GAO).

Government Accounting Office Model Program

The GAO began a formalized mediation program in November 1990.⁴ Since then, the GAO has mediated over one hundred grievances, with an astounding resolution rate of almost ninety

1. See U.S. DEP'T OF ARMY, REG. 690-600, EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS, para. 2-2(f) (18 Sept. 1989) (authorizing the use of ADR procedures during the precomplaint stage).

2. 5 U.S.C. A. § 571 (West 1998).

3. Memorandum from President William J. Clinton on Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking (May 1, 1998). This memorandum can be found on the internet at <<http://www.pub.whitehouse.gov>>.

4. *GAO Succeeds with Mediation*, FED. EEO ADVISOR (LRP Publications, Horsham, Pa.), Apr. 1998, at 9 [hereinafter *GAO Succeeds with Mediation*].

percent.⁵ One-half of the grievances that were mediated from 1991 to 1997 involved work relations, which is the same type of complaint that is normally received in the Department of Defense (DOD). While the GAO mediation program attempts to mediate a complaint at any stage in the EEO complaint process, the program's success lies in mediating complaints as early in the process as possible. Within the first one or two weeks of the pre-complaint process, the complaint is screened to see if it is suitable for mediation. If suitable, trained mediators immediately attempt to resolve the complaint between the parties.

Fort Bliss has made a similar, but informal, effort with some success. As with the GAO program, the Fort Bliss EEO office uses government employees who are trained and certified mediators during the pre-complaint processing stage. Because it is a voluntary program, however, few cases are diverted to mediation. A standardized mediation program is needed for the informal complaint processing stage.

The EEOC has already recognized the need for mediation and other forms of ADR in the pre-complaint process. The EEOC has proposed a new rule that would require federal agencies to develop formal ADR programs in addition to the current provisions that merely encourage the use of ADR to resolve complaints.⁶

By mediating cases during the informal processing stage (like the GAO program and as suggested by the EEOC), the parties undoubtedly have a greater chance of success than if they mediate immediately prior to litigation. Parties should be more willing to negotiate during the pre-complaint stage

because they are not entrenched, psychologically and monetarily, into a set position for litigation.

There are several ways through which a pre-complaint mediation program could be implemented in the DOD. Equal employment opportunity counselors could receive formal instruction in mediation and attempt to mediate between the complainant and the agency. In the alternative, EEO counselors could screen complaints to identify those complaints that are likely to be mediated and refer to the cases to a trained mediator who could resolve the cases during the pre-complaint stage. Fort Bliss currently uses this second approach. A third approach is for different federal agencies that are in the same area to share mediators.⁷

Mediating a complaint does not have an impact on processing deadlines. The Code of Federal Regulations has a ninety-day processing extension for attempts at alternative means of resolution, such as mediation.⁸

Training is the key to success in implementing a pre-complaint mediation program. Not only do EEO counselors need to be trained in mediation techniques, but officials in the chain of command should also be briefed on mediation to gain an understanding of the mediation process and its goals.

The GAO program is quantifiable proof that mediation during the pre-complaint processing stage pays great dividends.⁹ Considering the costs that installations sustain merely to process and to investigate EEO claims, a formal mediation program that is conducted during the informal complaint stage is a solid, low-cost investment.

5. *Id.*

6. Equal Employment Opportunity Commission Notice of Proposed Rulemaking, 63 Fed. Reg. 8995 (1998) (to be codified at 29 C.F.R. pt. 1614).

7. *How to Meet EEOC's Coming ADR Requirements*, FED. EEO ADVISOR (LRP Publications, Horsham, Pa.) Feb. 1998, at 9 (noting that 17 different federal agencies in Louisville, Kentucky make their employees who are qualified mediators available to other agencies to mediate their complaints).

8. 29 C.F.R. § 1614.105(f) (1998).

9. GAO Succeeds with Mediation, *supra* note 114.

The Art of Trial Advocacy

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

To Write or Not to Write?: That Should Not Be A Question¹

One of the most frequently asked questions by experienced trial advocates is whether they should write their opening and closing statements and direct and cross examinations before they proceed to trial.

Counsel's first advocacy move,² after brainstorming about how to organize and present the case, should be drafting a closing argument.³ Proceeding from there, counsel must write out the execution for the other phases of trial. This includes direct and cross-examinations and summaries of evidence, opening statements, and motions. Writing out the component parts of a case permits counsel to see a picture of the end product—a good trial notebook.⁴ For most advocates, writing out the component parts of a case is the essential step in trial preparation that permits counsel to validate their general thoughts about the facts and law applicable to their case. If you have difficulty writing out your opening statement or direct examinations, that should be the first clue that your thinking may be flawed, or needs further refinement.

Methods

Advocates often use many methods to write out the phases of a trial. The three most common writing methods include the (1) write everything, (2) outline, and (3) summarize methods.⁵ Each method coincides with the advocate's level of experience. New advocates normally use the "write everything" method. Intermediate advocates use the "outline method." Experienced advocates tend to use the "summarize method," although many continue to use the other methods.

The "write everything" method consumes the most time, but is the most effective way to prepare for trial. For example, writ-

ing out every question for direct or cross-examination helps advocates construct short, specific, single fact questions. The pitfall with this method is that it might lead advocates to read excessively or rely too heavily on their notes at trial.

New advocates should use the "write everything" method. This is the least complicated method and produces a safety net should counsel become disoriented in the court-martial.

The second method of writing a case for advocacy success is to use an outline. This is almost as simple as writing everything. Instead of constructing a prose opening, an advocate organizes the general areas and key points that make an effective opening statement into outline form. The general areas and key points will prompt the advocate during the trial. Intermediate advocates often use this method. Not surprisingly, getting to this stage of advocacy usually involves starting with the "write everything" method.

The third way to write a case is the "summary" method. This method involves writing a few words and phrases that describe a theme or the objective that the advocate seeks to establish.⁶ For example, before delivering a sentencing argument, the defense counsel might decide that there are three points that he wishes to emphasize about the accused. For example, the defense counsel might wish to emphasize the accused's "lack of a meaningful education," "bad family environment," and "good intention gone mistakenly awry." During the closing argument, an advocate uses the "summary" phrases as prompts that remind him to introduce the particular theme and form the argument. The "summary" method allows an advocate to easily insert additional prompts as the case proceeds.

The "summary" method often draws the most attention from new counsel because it appears to involve the least amount of work and time. In actuality, it probably involves the same

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1. Of course, the title is a rewording of the Hamlet "to be or not to be" speech. See WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1.
 2. There are many things that an advocate should do before taking care of the advocacy part of a case. For example, an advocate must read the case file, conduct preliminary investigation, and interview witnesses.
 3. See generally Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAWYER, June 1998, at 21.
 4. Once a counsel prepares the trial notebook, a picture of the desired result of trial becomes clear. For example, the desired result may include effective representation for the government or the accused—which leads to either a guilty finding or on acquittal, or a superb sentence.
 5. There may be other methods of writing the phases of a trial. Some of these methods may work better than others depending upon the individual advocate and the specific issues of the case.
 6. This is different from the "outline" method because the subparts of the main point are not written. Rather, an advocate remembers the subparts and uses the words and phrases that are written to prompt and refresh his recollection of the points that he desires to make. In addition, an advocate writes the words and phrases as the trial proceeds or at the close of a particular stage of the trial rather than prior to trial.

amount of preparation time, coupled with the sage experience that is gained from many years of practice.

Don't Be Fooled

To avoid a script-like delivery at trial, many experienced advocates never write presentations word for word. Rather, they create a mental picture of key points to present to the factfinder, or use the "summary" method after they have heard opposing counsel conduct the opening statement or direct examination. Don't be fooled. Experienced advocates who can stand and deliver a closing argument or conduct an effective direct or cross-examination with "little or no prep time" do not do so "off the cuff." They do so as a result of years of experience, and in most cases, after using each of the aforementioned writing methods. For inexperienced counsel, the "summary method" presents the highest risk of failure since there is no written backup plan if the advocate loses his train of thought.

Conclusion

Regardless of the method that counsel choose, writing the phases of a case is the step that enables advocates to internalize how to execute the plan of attack at a court-martial. It permits counsel to place the planning on paper in concrete form; revise and refine the initial attack plan; and appropriately weave personality and ideas into the process. It also serves as the first link⁷ for advocates to translate facts, law, and their theme into smooth verbal communication for the factfinder.

An effective advocate goes through a maturation process of writing everything, writing some things, and then perhaps writing less. Experience enables an advocate to choose which option best suits his case, personality, or talent level. The "write everything" method is the best way to ensure success in the courtroom. Adopting a strategy that includes some method of writing out the phases of a trial can only enhance an advocate's chance for success. Major Coe.

7. The other important link in converting facts, objectives, and theme into a verbal communication is the rehearsal.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 8, is reproduced in part below.

United States v. Hoechst Celanese Corp.: Challenging Inconsistent Interpretations by EPA Regions

In a petition for certiorari that is attracting a great deal of interest, Hoechst Celanese Corp. is seeking reversal of a decision by the United States Court of Appeals for the Fourth Circuit¹ that found the corporation liable for violations of the Clean Air Act (CAA) and National Emission Standard for Hazardous Air Pollutants (NESHAP) for benzene.² The petition concerns the interpretation of the CAA fugitive emission standard for benzene, which applies to a facility that “uses” more than 1000 megagrams of benzene a year.³ Hoechst was cited for violations that were based on the Environmental Protection Agency (EPA) Region IV’s interpretation of “use” which was contrary to the interpretation of Region VI that exempted a similar facility of Hoechst’s from the requirements.⁴

Region IV’s interpretation of benzene “use” was not limited to the amount consumed, but also included recycled benzene each time it cycled through two separate points in the system. Based on this interpretation, Region IV denied Hoechst an exemption from the regulations because its plant used more than 1000 megagrams per year.⁵ Region VI had exempted a

similar plant, by taking the position that “use” was measured by the total quantity of benzene that was in use at the facility.⁶

An issue for the Fourth Circuit was the consistency and availability of Region IV’s interpretation. The court found that despite previous contrary interpretations of “use” by other EPA offices and state agencies, Region IV put Hoechst on actual notice of their interpretation by a letter.⁷ The Fourth Circuit decided that Region IV’s interpretation deserved deference because it was consistent with the CAA or its regulations and was not created for the purpose of litigation.⁸

Circuit Judge Niemeyer’s partial dissent recognized the problem with inconsistent EPA interpretations over a period of time and throughout different regions. The dissent asserted that Region IV’s notice of their interpretation should not constitute a definitive agency-wide EPA notice that could result in penalties for noncompliance.⁹ The Corporate Environmental Enforcement Council and seven other national trade associations have picked up the dissent’s reasoning in an amicus brief that supports Hoechst’s petition for certiorari. The brief that was filed on April 22, 1998, states that EPA’s regional offices should apply consistent and publicly available interpretations of federal regulations. In addition, the brief supports the position that only those agency interpretations that are published and have nation wide application should be given deference.¹⁰

This issue is of interest to any regulated entity that operates in more than one EPA Region. As different regulatory requirements are placed on facilities that are located in different parts of the country, the resulting confusion becomes a real operational impediment. When a federal appeals court upholds a regional interpretation that is then controlling in that circuit’s jurisdiction, there may be a problem with conflicting regional

1. *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997).

2. *Id.*

3. *Id.* at 219.

4. *Id.* at 228.

5. *Id.* at 222.

6. *Id.* at 232.

7. *Id.* at 229.

8. *Id.* at 221.

9. *Id.* at 233.

10. High Court Brief Argues Interpretation of EPA Rules Must Agree With one Another, 12 *Tox. L. Rep.* 48, 1407 (1998).

interpretations because EPA's regions are not contiguous with federal judicial circuits. Major Anderson-Lloyd.

Enforcing Executive Orders

Many executive orders contain the proviso that the order does not create a private right of action. For example, Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Population and Low Income Populations, Section 6-609 states that "[t]his order is intended only for internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any persons. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."¹¹

Recently, there was a challenge of the Environmental Assessment (EA) regarding Army construction activities in support of the U.S. Border Patrol along the Rio Grande River. The plaintiffs sought to enjoin these activities by alleging, among other things, that the Army failed to comply with Executive Order 11988, Flood Plain Management, 3 C.F.R. 117 (1978) and Executive Order 119909, Protection of Wetlands, 3 C.F.R. 121 (1978).¹² They do not contain the limiting language on judicial review cited above. These executive orders, which are very similar, require federal agencies to make certain determinations regarding the necessity of undertaking a project in a 100-year flood plain or wetland. According to the plaintiffs the EA lacked these determinations.

The court in *Rio Grande International Study Center v. United States Department of Defense* did not rule on the plaintiffs' assertion that the Army needed to comply with the executive orders. Instead, the court found that the non-compliance, if any, was minor and that the balance of harm tipped to the Army

completing the project.¹³ In a footnote, however, the court, did analyze whether a private right of action existed.¹⁴ The court expressed doubt that these executive orders could be enforced by private parties. It relied on *Facchiano Constr. Co. v. United States Dep't of Labor*,¹⁵ which held that generally there is no private right of action to enforce obligations imposed on executive branch officials by executive orders. The *Rio Grande* court noted that the action by the agency would be reviewable only if the executive order in question had the force and effect of law and was intended to create a private right of action.¹⁶ Executive orders have the force and effect of law when they are issued pursuant to a statutory mandate or a delegation from Congress. The *Rio Grande* court expressed two reasons why these two could not be enforced privately. First, the court noted that both executive orders relied on the "the authority vested in [the President] by the Constitution and statutes of the United States of America and as President of the United States of America, in furtherance of the National Environmental Policy Act",¹⁷ which the court viewed as a broad invocation of the Constitution and laws of the United States. Citing *Independent Meat Packers Ass'n v. Butz*,¹⁸ the court said that the force and effect of law is not conferred by such broad invocations. Second, relying on *Watershed Assoc. Rescue v. Alexander*,¹⁹ the court in *Rio Grande* court noted that none of the statutes invoked by these executive orders directed the President to issue orders that have the force and effect of law.

There is authority, however, in the Fifth Circuit that is contrary to the position that was expressed by the court in *Rio Grande*. Specifically in *Harris*,²⁰ the Fifth Circuit Court of Appeals held that Executive Order 11990 had the force and effect of law. This case was not addressed by the court in *Rio Grande* even though it was cited by the plaintiffs. While *Harris v. United States* offers no analysis on why it finds that this order has the force and effect of law, it certainly leaves open the question of its enforceability.

The lesson to be learned from *Rio Grande*, is that the enforceability of Executive Orders 11988 and 11990 is not set-

11. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

12. See *Rio Grande Int'l Study Center v. United States Department of Defense*, No. L-98-9 (S.D. Tex. filed Feb. 13, 1998) (unpublished opinion on file with the author).

13. *Id.*

14. *Id.* at No. L-98-9, n8.

15. 987 F.2d 206, 210 (3d Cir. 1993).

16. See *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975).

17. *Rio Grande Int'l Study Center v. United States Department of Defense*, No. L-98-9 (S.D. Tex., filed Feb. 13, 1998).

18. *Independent Meat Packers*, 526 F.2d at 235.

19. 586 F. Supp. 978, 987 (D. Neb. 1982).

20. 19 F.3d 1090, 1093 (5th Cir. 1994).

ted. More importantly, it does not need to become an issue in the NEPA context. Findings that an agency must make in order to proceed with activities in a flood plain or wetlands, are set out in Section 2(a)(1) of Executive Order 11988 and Section 2(a) of Executive Order 11990. Reviewers of EAs and environmental impact statements that involve activities in, or affecting, flood plains or wetlands, must ensure that these documents articulate the requirements of Section 1(a)(1) and/or Section 2 (a) and how they are satisfied. Mr. Lewis.

Alternate Dispute Resolution Working Group Reconvenes

The Department of Defense (DOD) Environmental Alternative Dispute Resolution Working Group has reconvened. The first action of the working group was to develop a charter. The members agreed upon the charter as follows:

To promote and encourage the understanding and use of Alternative Dispute Resolution (ADR) by DOD components in environmental planning, compliance, restoration, and litigation matters in conjunction with development of partnering relationships with federal, state, and local environmental regulators and stakeholders. To identify procedures for and barriers to: timely and efficient implementation of environmental ADR processes; effective oversight within DOD components of environmental ADR initiatives; and expanding availability and access among DOD components of information and training that relate to environmental ADR initiatives.

After finalizing the charter, the working group attendees discussed the various ADR initiatives that were being undertaken by the Department of Justice (DOJ) and the EPA, and recognized a need to become more familiar with similar initiatives that may also be underway within their own component.

You may want review how ADR can assist you in your work as well. Copies of the following can be provided upon request: DOJ's Policy on the Use of ADR and Case Identification Criteria for ADR; EPA's Guidance on the Use of ADR in EPA Enforcement Cases; EPA's Status Report on Use of ADR in Enforcement and Site Related Action (1995-1996); EPA's Superfund Enforcement Mediation-Regional Pilot Project Results; DOD ADR Program Components; DOD Directive 5145.5 (April 22, 1996) on ADR; Executive Order 12988 - Civil Justice Reform; and White House Memo, Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking (May 1, 1998). Please contact Carrie Greco

at (703) 696-1566 if you would like a copy of any of these documents.

The working group is currently reviewing their components' initiatives and also areas where barriers that may exist to broader use of ADR can be removed or lowered. If you have any questions about the use of ADR in your case or project you may call the Army Dispute Resolution Points of Contact Gary E. Bacher, Assistant to the General Counsel, who may be contacted at (703) 697-5155; Colonel Nicholas P. Reston, Chief, Contract Appeals Division, United States Army Litigation Center, who may be contacted at (703) 696-1511; the Dispute Resolution Specialist, Lawrence M. Baskir, Principal Deputy General Counsel, who may be contacted at (703) 697-4807; or the Army's representative for the Working Group, Carrie Greco, who may be contacted at (703) 696-1566. Ms. Greco.

CWA Services Steering Committee to Examine MP&M Survey

The Clean Water Act Services Steering Committee (SSC) is examining issues that involve DOD responses to a federal facility survey that was sent to the DOD from the EPA. The purpose of the survey is to collect information and data to assist the EPA as the agency drafts regulations that will set effluent limitations for metal products and machinery activities. The EPA has advised the SSC that the agency is primarily concerned with gathering data that pertains to the following areas: process waste discharges, pretreatment units, pollution prevention, and costs. Members of the SSC have reviewed the survey and concluded that while it will help provide useful information to the EPA, some modifications are required. For the most part, these changes will either tailor particular questions more closely to DOD activities or clarify what types of information may be used to answer the survey questions.²¹ The SSC members will meet to begin drafting the DOD-proposed version of the survey late this month with the aim of sending it to selected installations in June 1998. Major DeRoma.

Litigation Division Note

Right to Financial Privacy Act

Recently, a number of civil actions have been filed against the Army alleging violations of the Right to Financial Privacy Act²² (RFP Act) arising out of military criminal investigations and prosecutions. This note reviews the substantive and procedural requirements of the RFP Act, as well as the provisions relating to civil liability for violations of the Act.

21. For example, rough estimates vs. detailed effluent sampling and analysis.

22. Right to Financial Privacy Act of 1978, 12 U.S.C. A. § 3401, et seq. (West 1998).

Congress passed the RFPFA in response to the Supreme Court's decision in *United States v. Miller*²³ which held that a bank customer has no constitutionally protected privacy interests in bank records.²⁴ The RFPFA protects "customers²⁵ of financial institutions²⁶ from unwarranted intrusions into their records while at the same time permitting legitimate law enforcement activity."²⁷ The RFPFA applies to financial institutions located in any State or territory of the United States.²⁸

Pursuant to the Act, a government authority may access the financial records of any customer from a financial institution only if: the customer consents; the government obtains a valid search warrant; a proper judicial subpoena is issued; or, an appropriate authority submits a proper formal written request.²⁹ In addition, the RFPFA permits government access to a customer's financial records pursuant to an administrative subpoena.³⁰ In the Army, administrative subpoenas are only available to Army personnel through the DOD Inspector General's office.³¹ On the other hand, nothing in the Act prevents a financial institution from notifying a government authority that such institution possesses information regarding a customer who may have violated a statute or regulation.³²

Violation of the RFPFA by government personnel may result in government liability to the customer in the amount of:

- (1) \$100 without regard to the volume of the records involved;
- (2) any actual damages sustained by the customer as a result of the disclosure;
- (3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and
- (4) the costs of the action together with reasonable attorney's fees as determined by the court.³³ Customers may also obtain injunctive relief against the government pursuant to the RFPFA.³⁴

These are the only authorized judicial remedies and sanctions for violations of the RFPFA.³⁵ Suppression of records at a court-martial is not a remedy available to the plaintiff.³⁶ Ordinarily, money damages will be limited to a civil penalty and actual damages unless the customer can prove a willful or intentional violation of the Act. Nevertheless, attorney's fees and costs associated with the civil litigation can be very, very expensive. For example, the court in *Neece v. I.R.S.*³⁷ awarded each plaintiff \$100 as a civil penalty, \$1580 for actual damages, \$68,883.75 for attorney's fees and \$24,126.23 for costs associated with the litigation.³⁸

23. 425 U.S. 435 (1976).

24. H.R. Rep. No. 95-1383, at 34 (1978).

25. 12 U.S.C. A. § 3401(5) (West 1998). For purposes of the Act, "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary in relation to an account maintained in the person's name." *Id.*

26. *See id.* § 3401(1). For purposes of the Act, "financial institution" means any office of a bank, savings bank, card issuer as defined in section 1602(n) of Title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands." *Id.*

27. H.R. Rep. No. 95-1383, at 34 (1978).

28. 12 U.S.C. A. § 3401(1).

29. *See id.* §§ 3402, 3408. For Army personnel, the authority to make formal written requests is limited to law enforcement personnel. *See* U.S. DEP'T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS, para. 2-3 (15 Jan. 1992) [hereinafter AR 190-6].

30. 12 U.S.C. A. § 3405.

31. Inspector General Act of 1978, 5 U.S.C. A. app. 3 § 6(a)(4) (1982). *See also* AR 190-6, *supra* note 29 para. 2-3.

32. 12 U.S.C. A. § 3403(c).

33. *See id.* § 3417(a).

34. *See id.* § 3418.

35. *See id.* § 3417(d).

36. *Wooten v. U.S. Army*, 34 M.J. 141, 148 (C.M.A. 1992).

37. 41 F.3d 1396 (10th Cir. 1994).

38. *Id.* at 1399-1403.

As in the most recent suits filed against the Army, three alleged violations of RFPA most often form the basis of civil litigation against the Army. First, plaintiffs frequently contend the government failed to properly notify the customer pursuant to 12 U.S.C.A. § 3406(b). Second, plaintiffs often allege the Army law enforcement personnel failed to obtain the concurrence of the appropriate United States Attorney's Office prior to seeking a search warrant under Rule 41, Federal Rules of Criminal Procedure. Finally, plaintiffs commonly contend that Army law enforcement personnel improperly received grand jury information in violation of 12 U.S.C.A. § 3420. These frequently-asserted claims are briefly discussed in turn.

Notification

The RFPA provides that the customer of the financial institution generally must be given notice that records relating to him have been sought by a governmental entity.³⁹ Records sought by grand jury subpoenas are exempt from the compulsory notification requirements.⁴⁰ If the government obtains the customer's financial records pursuant to a search warrant, prior notice is not required.⁴¹ However, when records are obtained pursuant to a search warrant, notice must be given no later than 90 days after execution of the search warrant unless the government has obtained a court order granting a delay in giving notice under 12 U.S.C.A. § 3406(c).⁴²

There are several statutory exceptions to the notification requirements (and other provisions of the Act) that may be applicable in the military context. First, the RFPA does not apply in connection with a civil action arising from a government loan, loan guarantee, or loan insurance agreement.⁴³ In

addition, no notification is required if the bank is merely asked to provide basic account information such as name, type of account, and account number.⁴⁴ Also, government authorities performing authorized foreign intelligence investigations are permitted access to records of customers of financial institutions without notifying those customers.⁴⁵ Moreover, the financial institution may disclose financial information or records that are not identifiable as being derived from the financial records of a particular customer.⁴⁶ Finally, government access to customer information without notification can be obtained in emergency situations where delay would create imminent danger of physical injury, serious property damage, or flight from prosecution.⁴⁷

United States Attorney Concurrence

Law enforcement personnel may obtain financial records using a search warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure.⁴⁸ However, under no circumstances may a military agent of the DOD seek a search warrant under Rule 41 without the concurrence of the appropriate United States Attorney's Office.⁴⁹

Grand Jury Information

Finally, "financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of the grand jury . . . shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized

39. 12 U.S.C.A. §§ 3405, 3406, 3407, 3408 (West 1998).

40. *See id.* § 3413(i).

41. *See id.* § 3406(b).

42. *Id.*

43. *See id.* § 3413(h).

44. *See id.* § 3413(g).

45. *See id.* § 3414(a).

46. *See id.* § 3413(a).

47. *See id.* § 3414(b)(1).

48. AR 190-6, *supra* note 29, para. 2-4(a).

49. 28 C.F.R. § 60.1 (1996).

by Rule 6(e) of the Federal Rules of Criminal Procedure.”⁵⁰ Rule 6(e)(3)(A) permits disclosure of grand jury information to government attorneys as well as other personnel necessary to assist that government attorney in the performance of his duty to enforce federal criminal law.⁵¹ Under Rule 6(e)(3)(B), the information may not be used for any other purpose.⁵²

The requirements of the RFPA are not onerous. With a basic understanding of the RFPA and its applicability in specific situations, Army attorneys and the law enforcement personnel they advise can avoid common pitfalls that are increasingly spawning civil litigation. Unawareness of or disregard for the RFPA’s requirements unnecessarily exposes the government to litigation and costly civil liability. Major Key.

50. 12 U.S.C.A. § 3420(a).

51. FED. R. CRIM. P. 6(e).

52. *Id.*

Claims Report

United States Army Claims Service

Affirmative Claims Note

Unlawful Charges Levied on Insurance Settlements

Active duty service members often receive authorized medical care at private hospitals in emergency situations. In these situations, the government is required to reimburse the private hospital for care that has been provided to the service member. At times, the hospital will attempt to recover additional funds directly from the service member or from his insurer. This practice is prohibited by statute.

The government calculates the full and final payment and reimburses private hospitals through the supplemental health care program for active duty members.¹ Under this program, hospital care reimbursements may not exceed the average amount that is paid for comparable services in the geographic area where the hospital is located.² This is referred to as a diagnostic related group (DRG)-based billing system, and by design, it complies with the statutory provisions.

Private hospitals that accept patients under the supplemental health care program should have full knowledge of the assignment rules. These rules are delineated on the back of the Universal Business (UB)-92 billing forms that pertain to "CHAMPUS-determined reasonable charges . . . even if it is less than the billed amount."³ There are special procedures in place to insure that the UB-92 forms that are used by private hospitals are originals rather than a photocopy or a facsimile. These procedures ensure that the rules are on the reverse of the forms that hospital personnel use to input each bill.

The following situation illustrates the problem in this area. Recently, a private hospital provided care to an active duty soldier who was injured in a motor vehicle accident. The hospital submitted a bill to the government and received a DRG-based reimbursement that was less than the amount that was billed.

The hospital then violated the terms of their supplemental health care program participation agreement by asserting a claim for the remainder of the cost of care against the tortfeasor's liability insurance settlement with the injured soldier. The private hospital should not have asserted a claim for the full amount of the bill; rather, it should have accepted the amount of the DRG-based reimbursement as full and final payment. It is mentioned in 10 U.S.C.A. § 1086(h)(1) that a private hospital must not impose a legal obligation on any of its patients to pay for such services.⁴

The current edition of 32 C.F.R. part 199 discusses payments to health care providers who have provided supplemental health care to active duty service members.⁵ This section provides:

For a hospital covered by the CHAMPUS DRG-based payment system to maintain its status as an authorized provider for CHAMPUS pursuant to § 199.6, the hospital must also be a participating provider for purposes of the supplemental care program. As a participating provider, each hospital must accept the DRG-based payment system amount determined pursuant to § 199.14 as payment in full for the hospital services covered by the system. The failure of any hospital to comply with this obligation subjects the hospital to exclusion as a CHAMPUS-authorized provider.⁶

According to an attorney from the Office of Assistant General Counsel for the TRICARE Management Activity, violations of this rule are referred through her office to the program integrity section.⁷ Private hospitals that are found to have pursued or received more than the DRG-based payment for care provided will lose their TRICARE/CHAMPUS provider status.⁸ Additionally, they will be barred from providing care to

1. See 10 U.S.C.A. § 1086(h)(2) (West 1998).

2. *Id.*

3. Universal Business (UB) Form 92 (copies are available through the U.S. Army Claims Service).

4. *Id.* § 1086(h)(1).

5. 32 C.F.R. § 199.16(b) (1997).

6. *Id.*

7. Telephone Interview with Helen J. Hilton, Assistant General Counsel for the TRICARE Management Activity (Jan. 1998).

8. *Id.*

Medicare and Medicaid patients, a significant source of revenue for private hospitals.⁹

Claims personnel who know of private hospitals that violate the laws that pertain to DRG-based payment should refer these matters to: TRICARE Management Activity, ATTN: Assistant General Counsel, 16401 East Centretch Parkway, Aurora, Colorado 80011-9043

It is important to note that this is not a TRICARE/CHAMPUS issue. The TRICARE/CHAMPUS program does not actually pay for treatment to active duty service members. However, TRICARE/CHAMPUS rules do apply to payment under the supplemental health care program for active duty members.¹⁰

Private hospitals may appeal the billing rate through the local military medical treatment facility TRICARE/CHAMPUS health benefits advisor, who also deals with supplemental health care program patients.¹¹ Interestingly, DRG-based payments sometimes exceed the amount that was billed by the private hospital. It appears that the government has not received (and does not expect to receive) repayment from private hospitals for DRG-based payments that exceed the hospital's billed amount. This is part of the give-and-take aspect of the broad-based DRG-based payment system. Ms. Jedlinski.

Personnel Claims Note

Dispatch of DD Form 1840R After the Seventy-Five Day Limit

Some field claims offices do not routinely forward copies of Department of Defense Form 1840R¹² to the carrier if the form is received after the end of the seventy-five day notice period. It is important that these forms be dispatched to the carrier even though they are received after the seventy-five-day notice period. There are situations that may allow for recovery, but which may not be evident until later.¹³ For instance, the claimant may have been hospitalized or on temporary duty. If the hospitalization or temporary duty is for a significant portion of the seventy-five day notice period, or if it overlaps the end of

the notice period, the Army might be able to recover from the carrier despite the late submission. Also, if government personnel misinform the claimant about the reporting requirement, we may be obligated to pay the claim.¹⁴ When missing items are involved, business practice dictates that the carrier will initiate a search for the missing items. This form is usually the only notice of the missing items that the carrier will receive before demand for recovery is received. Mr. Lickliter.

Listing Titles of Missing Video Cassette Tapes

It is critical for field claims personnel to obtain as much information as possible concerning lost video cassette recorder (VCR) tapes before paying for them. The claimant should be asked to provide a list of the titles of each of the lost tapes. If this is not possible, the claimant should provide a detailed statement that indicates the type of tapes (prerecorded, blank, or self-recorded) and an explanation of why he is unable to recall the individual titles.

The importance of such statements was demonstrated in a recent case that was decided by the Defense Office of Hearings and Appeals (DOHA). In this case, the carrier failed to deliver two boxes of VCR tapes. The claimant indicated that he was missing 300 VCR tapes. The Army assessed ten dollars for each tape, for a total of \$3000, and then depreciated the amount by fifty percent to arrive at an offset figure of \$1500. The claimant had listed the titles of 48 VCR tapes, but failed to list the rest of the titles. The carrier offered four dollars each for all 300 tapes.

The appeal went to the DOHA. For the forty-eight tapes for which the claimant provided titles, the DOHA assigned a value of ten dollars each and depreciated this amount by fifty percent to arrive at a final figure of \$240. Because there was no list of titles for the remaining 252 tapes, the DOHA accepted the carrier's offer of four dollars each for blank tapes and depreciated that amount by fifty percent. The Army was forced to reimburse the carrier \$756.

As the above case illustrates, detailed statements from the claimant are critical when lost VCR tapes are involved. Absent

9. *Id.*

10. 32 C.F.R. § 199.6 (1997).

11. 32 C.F.R. § 199.14 (1997).

12. U.S. DEP'T OF DEFENSE, DD FORM 1840R, JOINT STATEMENT OF LOSS OR DAMAGE (Jan. 1988).

13. Joint Military Industry Memorandum of Agreement on Loss and Damage Rules (1 Jan. 1992) reproduced at figure 11-5, U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES (1 Apr. 1998) [hereinafter DA PAM 27-162].

14. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 11-21a(3) (31 Dec 1997); DA PAM 27-162, *supra* note 13, para. 11-21g.

these statements, the Army cannot fully recover from the carrier. Ms. Schultz.

Empty Compact Disc Cases

Recently, a number of claimants have alleged that compact discs (CDs) were stolen from their shipments, only the empty CD cases were delivered. Claims that involve such losses pose a difficult dilemma for claims examiners. It is difficult for a claims examiner to understand why someone would steal CDs and leave the cases behind. In these cases, the claims examiner may reasonably conclude that the claimant shipped the CDs separately or hid the CDs and then later filed a fraudulent claim. On the other hand, there may be no concrete evidence of fraud, and the examiner may decide to give the claimant the benefit of the doubt.

A number of factors should be considered when a claim is being examined under these circumstances. First, the claims examiner should look at whether other items were claimed for reasonable quantities and value. Second, if the inventory does not state the number of CDs included in the shipment, determine if the number of CDs that is being claimed is reasonable. Next, he should determine if the number of CDs that are being claimed could have fit in the container that was listed on the inventory. Finally, based on his contact with the claimant, the examiner should determine whether the claimant is being completely honest.

The opinion of the claims examiner will be the most significant factor in deciding whether to pay or to deny one of these claims. If the examiner believes that the claimant is being truth-

ful, the claimant should be paid a reasonable amount for the claim. Mr. Lickliter.

Claims Management Note

FY98 Close-out and New Codes for FY99

The last day for paying claims in fiscal year (FY) 1998 is 16 September 1998. The close out report is due to the United States Army Claims Service Budget Office no later than the close of business on 18 September 1998. This report will be in the same format as the monthly financial report. The budget office will hold funds in reserve for offices that receive emergency claims after 16 September 1998. Funding will be approved telephonically on a claim-by-claim basis.

The claims accounting codes for FY 1999 have one change. The FY designator advances from 8 to 9. This is the third digit in the first group of digits in every claims payment and deposit accounting codes, making the first group of digits 2192020 instead of 2182020.

Every claims office that pays claims, whether by manual voucher or by electronic funds transfer, must ensure that FY 1999 accounting codes are used by finance.

Under no circumstances should a claims office use a FY 1998 accounting code for claims that are certified for payment after the beginning of FY 1999. Captain LaRosa.

CLAMO Report

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

Introduction

The Center for Law and Military Operations (CLAMO) continues its mission to examine legal issues that arise during all phases of military operations and to devise training and resource strategies for addressing those issues. One way it does so is by building a database of references, to include after action reports, lessons learned, raw documents from operations, and other materials. These databases are maintained in Lotus Notes format and they are accessible through local staff judge advocate Lotus Notes servers or through the internet at www.jagc.army.mil.¹

New Databases

The center has added three new databases: CLAMO-SOFAs, CLAMO-RC AARs, and CLAMO-OJG AAR. The CLAMO-SOFAs database contains the text of eighty-six Status of Forces Agreements (SOFA) with countries. The CLAMO-RC database contains sixty-five reserve component documents, over two-thirds of which address Desert Shield/Desert Storm after action reports and lessons learned. It also contains some materials on Operation Joint Endeavor (Bosnia). The CLAMO-OJG AAR database contains raw documents and materials concerning operation Joint Guard, Bosnia (follow-up to Joint Endeavor). As with any of the CLAMO databases, these should neither be used as the sole basis of research nor be viewed as authoritative.

Joint Endeavor (Bosnia) Lessons Learned

The Center also compiles and disseminates key lessons learned from various operations, for example *Law and Military Operations in Haiti 1994-95: Lessons Learned for Judge Advocates*,² released on 11 December 1995. As previously announced, there is an extensive database on Operation Joint Endeavor. The formal Joint Endeavor lessons learned is being written.

Help Us to Help You

The Center relies on judge advocates in the field for input. Judge advocates should send to CLAMO any after action reports, lessons learned, presentations/slide shows, or other operational law-related materials that they feel would be useful to other judge advocates in the future.

CLAMO may be contacted through Major John W. Miller, II, or Captain Tyler L. Randolph, at: Center for Law and Military Operations, The Judge Advocate General's School, 600 Massie Road, Charlottesville, Virginia 22903-1781. Phone (502) 798-6339, DSN 934-7115, ext. 339. E-mail RandoT@hqda.army.mil or MilleJW@hqda.army.mil

1. See CLAMO Report, ARMY LAW., Oct. 1997, at 42. (containing detailed instructions on accessing databases).

2. CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-95: LESSONS LEARNED FOR JUDGE ADVOCATES (1995).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

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

Reserve Component Quotas for Resident Graduate Course

Two student quotas in the 48th Judge Advocate Officer Graduate Course have been set aside for Reserve Component Judge Advocate General's Corps (JAGC) officers. The forty-two week graduate level course will be taught at The Judge Advocate General's School in Charlottesville, Virginia from 16 August 1999 to 26 May 2000. Successful graduates will be awarded the degree of Master of Laws (LL.M.) in Military Law. Any Reserve Component JAGC captain or major who will have at least four years JAGC experience by 16 August 1999 is eligible to apply for a quota. An officer who has completed the Judge Advocate Officer Advanced Course, however, may not apply to attend the resident course. Each application packet must include the following materials:

Personal data: Full name (including preferred name if other than first name), grade, date of rank, age, address, and telephone number (business, fax, home, and e-mail).

Military experience: Chronological list of reserve and active duty assignments; include **all** OERs and AERs.

Awards and decorations: List of all awards and decorations.

Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded. Law school transcript.

Civilian experience: Resume of legal experience.

Statement of purpose: A concise statement (one or two paragraphs) of why you want to attend the resident graduate course.

Letter of Recommendation: Include a letter of recommendation from one of the judge advocate leaders listed below:

United States Army Reserve (USAR) TPU: Legal Support Organization (LSO) Commander

Command or Staff Judge Advocate

Army National Guard (ARNG): Staff Judge Advocate.

DA Form 1058 (USAR) or NGB Form 64 (ARNG): The DA Form 1058 or NGB Form 64 must be filled out and be included in the application packet.

Routing of application packets: Each packet shall be forwarded through appropriate channels (indicated below) and must be received at GRA no later than 15 December 1998.

ARNG: Forward the packet through the state chain of command to Office of The Chief Counsel, National Guard Bureau, 2500 Army, Pentagon, Washington, DC 20310-2500.

USAR CONUS TROOP PROGRAM UNIT (TPU): Through chain of command, to Commander, AR-PERSCOM, ATTN: ARPC-OPB, 9700 Page Avenue, St. Louis, MO 63132-5200. (800) 325-4916

OTJAG, Guard and Reserve Affairs: Dr. Mark Foley, Ed.D., (804)972-6382/Fax (804)972-6386 E-Mail foleym@hqda.army.mil. Dr. Foley.

The Army Judge Advocate General's Corps Application Procedure for Guard and Reserve

Mailing address:

Office of The Judge Advocate General
Guard and Reserve Affairs
ATTN: JAGS-GRA-PA
600 Massie Road
Charlottesville, VA 22903-1781

e-mail address: Gra-pa@hqda.army.mil
(800) 552-3978 ext. 388
(804) 972-6388

Applications will be forwarded to the JAGC appointment board by the unit to which you are applying for a position. National Guard applications will be forwarded through the National Guard Bureau by the state. Individuals who are currently members of the military in other branches (Navy, Air Force, Marines) must request a conditional release from their service prior to applying for an Army JAGC position. *Army Regulation (AR) 135-100* and *National Guard Regulation (NGR) 600-100* are the controlling regulations for appointment in the reserve component Army JAGC. Applications are reviewed by a board of Army active duty and reserve component judge advocates. The board is a standing board, in place for one year. Complete applications are processed and sent to the board as they are received. The approval or disapproval process is usually sixty days. Communications with board members is not permitted. Applicants will be notified when their application arrives and when a decision is reached. Approved applications are sent to the Army's Personnel Com-

mand for completion and actual appointment as an Army officer.

Required Materials

Applications that are missing items will be delayed until they are complete. Law school students may apply in their final semester of school, however, if approved, they cannot be appointed until they have passed a state bar exam.

(1) DA Form 61 (USAR) or NG Form 62 (ARNG), application for appointment in the USAR or ARNG.

(2) Transcripts of all undergraduate and law school studies, prepared by the school where the work was completed. A student copy of the transcript is acceptable if it is complete. You should be prepared to provide an official transcript if approved for appointment.

(3) Questionnaire for National Security (SF86). All officers must obtain a security clearance. If final clearance is denied after appointment, the officer will be discharged. In lieu of SF 86, current military personnel may submit a letter from their organization security manager stating that you have a current security clearance, including level of clearance and agency granting the clearance.

(4) Chronological listing of civilian employment.

(5) Detailed description of legal experience.

(6) Statement from the clerk of highest court of a state showing admission and current standing before the bar and any disciplinary action. This certificate must be less than a year old. If disciplinary action has been taken against you, explain circumstances in a separate letter and submit it with the application.

(7) Three letters from lawyers, judges, or military officers (in the grade of captain or above) attesting to applicant's reputation and professional standing.

(8) Two recent photographs (full length military photos or head and shoulder type, 3" x 5") on separate sheet of paper.

(9) Interview report (DA Form 5000-R). You must arrange a local interview with a judge advocate (in the grade of major or above, or any official Army JAGC Field Screening Officer). Check the list of JAG units in your area. This report should not be returned to you when completed. The report may be mailed or e-mailed to this office, or included by the unit when they forward your application. You should include a statement with your application that you were interviewed on a specific date, and by whom.

(10) Assignment request. For unit assignment, include a statement from the unit holding the position for you (the specific position must be stated as shown in the sample provided).

(11) Acknowledgment of service requirement. DA Form 3574 or DA Form 3575.

(12) Copy of your birth certificate.

(13) Statement acknowledging accommodation of religious practices.

(14) Military service record for current or former military personnel. A copy of your OMPF (Official Military Personnel File) on microfiche. Former military personnel can obtain copies of their records from the National Personnel Records Center www.nara.gov/regional/mpr.html. E-mail inquiries can be made to center@stlouis.nara.gov.

(15) Physical examination. This exam must be taken at an official Armed Forces examination station. The physical examination may be taken prior to submitting the application or after approval. However, the examination must be completed and approved before appointment to the Army. Individuals currently in the military must submit a military physical examination taken within the last two years.

(16) Request for age waiver. If you cannot complete 20 years of service prior to age 60 and/or are 33 or older, with no prior commissioned military service, you must request an age waiver. The letter should contain positive statements concerning your potential value to the JAGC, for example, your legal experience and/or other military service.

(17) Conditional release from other branches of the Armed Services.

(18) DA Form 145, Army Correspondence Course Enrollment Application.

(19) Civilian or military resume (optional).

Dr. Foley.

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.

U.S. ARMY RESERVE COMPONENTS JUDGE ADVOCATE GENERAL'S CORPS

FACT SHEET

Judge advocates have provided professional legal service to the Army for over 200 years. Since that time the Corps has grown dramatically to meet the Army's increased need for legal expertise. Today, approximately 1500 attorneys serve on active duty while more than 2800 Judge Advocates find rewarding part-time careers as members of the U.S. Army Reserve and Army National Guard. Service as a Reserve Component Judge Advocate is available to all qualified attorneys. Those who are selected have the opportunity to practice in areas as diverse as the field of law itself. For example, JAGC officers prosecute, defend, and judge courts-martial; negotiate and review government contracts; act as counsel at administrative hearings; and provide legal advice in such specialized areas as international, regulatory, labor, patent, and tax law, while effectively maintaining their civilian careers.

APPOINTMENT ELIGIBILITY AND GRADE: In general, applicants must meet the following qualifications:

(1) Be at least 21 years old and able to complete 20 years of creditable service prior to reaching age 60. In addition, for appointment as a first lieutenant, be less than 33, and for appointment to captain, be less than 39 (waivers for those exceeding age limitations are available in exceptional cases).

(2) Be a graduate of an ABA-approved law school.

(3) Be a member in good standing of the bar of the highest court of a state or federal court.

(4) Be of good moral character and possess leadership qualities.

(5) Be physically fit.

Grade of rank at the time of appointment is determined by the number of years of constructive service credit to which an individual is entitled. As a general rule, an approved applicant receives three years credit from graduation from law school plus any prior active or reserve commissioned service. Any time period is counted only once (i.e., three years of commissioned service while attending law school entitles a person to only three years constructive service credit, not six years). Once the total credit is calculated, the entry grade is awarded as follows:

(1) 2 or more but less than 7 years	First Lieutenant
(2) 7 or more but less than 14 years	Captain
(3) 14 or more but less than 21 years	Major

An applicant who has had no previous military commissioned service, therefore, can expect to be commissioned as a first lieutenant with one years service credit towards promotion.

PAY AND BENEFITS: Basic pay varies depending on grade, length of service, and degree of participation. Reserve officers are eligible for numerous federal benefits including full-time Servicemen's Group Life Insurance; limited access to post exchanges, commissaries, theaters and available transient billets; space-available travel on military aircraft within the continental United States, if on reserve duty; authorized survivor benefits; and generous retirement benefits. When performing active duty or active duty for training, reservists may use military recreation, entertainment and other post facilities, and receive limited medical and dental care.

PARTICIPATION REQUIREMENTS: The JAGC Reserve Program is multifaceted, with the degree of participation determined largely by the individual. Officers are originally assigned to a Troop Program Unit (TPU). Follow on assignments may include service as an Individual Mobilization Augmentee (IMA). TPU officers attend monthly drills and perform two weeks of annual training a year. Upon mobilization, they deploy with their unit and provide legal services commensurate with their duty positions.

Individual mobilization augmentee officers are assigned to active duty agencies or installations where they perform two weeks of on-the-job training each year. During the remainder of the year, they do legal assistance, take correspondence courses, or do project work at their own convenience in order to earn points towards retirement. Upon mobilization, these officers go to their assigned

positions and augment the legal services provided by that office. Officers may also transfer from one unit to another or between units and IMA positions depending upon the availability of vacancies. This flexibility permits the Reserve Judge Advocate to tailor his or her participation to meet personal and professional needs. Newly appointed officers will usually serve in TPU assignments.

SCHOOLING: New officers are required to complete the Judge Advocate Officer's Basic Course within twenty-four months of commissioning as a condition of appointment. Once enrolled in the Basic Course, new officers must complete Phase I in twelve months. This course consists of two phases: Phase I is a two-week resident course in general military subjects at Fort Lee, Virginia. Phase II, military law, may be completed in residence at Charlottesville, Virginia or by correspondence. In addition to the basic course, various other legal and military courses are available to the reservist and may be taken either by correspondence or in residence at The Judge Advocate General's School in Charlottesville, Virginia.

SERVICE OBLIGATION: In general, new appointees incur a statutory service obligation of eight years. Individuals who have previous military service do not incur an additional obligation as a result of a new appointment.

RETIREMENT BENEFITS: Eligibility for retirement pay and other benefits is granted to members who have completed 20 years of qualifying federal military service. With a few exceptions, the extent of these benefits is the same for both the reservist and the service member who retires from active duty. The major difference in the two retirement programs is that the reservist does not begin receiving most of the retirement benefits, including pay, until reaching age 60. The amount of monthly retirement income depends upon the grade and total number of qualifying points earned during the course of the individual's career. Along with the pension, the retired reservist is entitled to shop in military exchanges and commissaries, use most post facilities, travel space-available on military aircraft worldwide, and utilize some medical facilities.

U.S. ARMY RESERVE COMPONENT INFORMATION: Further information, application forms, and instructions may be obtained by calling **1-800-552-3978, ext. 388**, e-mail gra-pa@hqda.army.mil or writing:

Office of The Judge Advocate General
Guard and Reserve Affairs
ATTN: JAGS-GRA
600 Massie Road
Charlottesville, VA 22903-1781.

Intenet Links

National Guard: www.ngb.dtic.mil
US Army Reserve: www.army.mil/usar/ar-perscom/atoc.htm
Reserve Pay: www.dfas.mil/money/milpay/98pay/index.htm

Dr. Foley.

GRA On-Line!

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

COL Tom Tromej,.....trometn@hqda.army.mil
Director

COL Keith Hamack,.....hamackh@hqda.army.mil
USAR Advisor

Dr. Mark Foley,.....foleyms@hqda.army.mil
Personnel Actions

MAJ Juan Rivera,.....riverjj@hqda.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkeda@hqda.army.mil
Automation Assistant

Ms. Sandra Foster,fostesl@hqda.army.mil
IMA Assistant

**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.

1998-1999 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 riverjj@hqda.army.mil. Major Rivera.

**THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT
(ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE
1998-1999 ACADEMIC YEAR**

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*</u>	<u>ACTION OFFICER</u>
7-8 Nov	Minneapolis, MN 214th LSO Thunderbird Hotel & Convention Center 2201 East 78th Street Bloomington, MN 55452 (612) 854-3411	AC GO RC GO Int'l - Ops Law Criminal Law GRA Rep	MAJ John Kingrey 214th LSO 505 88th Division Rd Fort Snelling, MN 55111 (612) 713-3234 MAJ Geoffrey Corn MAJ Greg Coe MAJ Juan J. Rivera
21-22 Nov	New York, NY 4th LSO/77th RSC Fort Hamilton Adams Guest House Brooklyn, NY 10023 (718) 630-4052/4892	AC GO RC GO Int'l Ops Law Criminal Law GRA Rep	LTC Donald Lynde HQ, 77th RSC ATTN: AFRC-CMY-JA) Bldg. 200 Fort Totten, NY 11359-1016 (718) 352-5703/5720 (Lynde@usarc-emh2.army.mil) MAJ Michael Newton MAJ Jack Einwechter COL Keith Hamack
9-10 Jan 99	Long Beach, CA 78th MSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MAJ Christopher Kneib 5129 Vail Creek Court San Diego, CA 92130 (work) (619) 553-6045 (unit) (714) 229-7300 MAJ Stephanie Stephens MAJ M. B. Harney COL Thomas N. Tromeay
30-31 Jan	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	LTC Frederick S. Feller 7023, 95th Avenue, SW Tacoma, WA 98498 (work) (360) 753-6824 (home) (253-582-6486 (fax) (360) 664-9444 MAJ Harrold McCracken LTC Tony Helm COL Keith Hamack
6-7 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: Tdonne2947@aol.com MAJ Victor Hansen LTC Karl Goetzke COL Keith Hamack

20-21 Feb	Denver, CO 87th MSO	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	MAJ Jody Hehr MAJ Michael Smidt COL Thomas N. Trome	MAJ Paul Crane DCMC Denver Office of Counsel Orchard Place 2, Suite 200 5975 Greenwood Plaza Blvd. Englewood, CO 80111 (303) 843-4300 (108) e-mail: pcrane@ogc.dla.mil
27-28 Feb	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	LTC Jackie R. Little MAJ Michael Newton MAJ Juan J. Rivera	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
6-7 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MAJ Herb Ford MAJ Walter Hudson COL Thomas N. Trome	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
13-14 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MAJ Mike Berrigan MAJ Dave Freeman COL Keith Hamack	COL Robert P. Johnston Office of the SJA, 12th LSO Building 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
13-14 Mar	San Francisco, CA 75th LSO	AC GO RC GO Int'l - Ops Law Criminal Law GRA Rep	LTC Manuel Supervielle MAJ Edye Moran Dr. Mark Foley	MAJ Douglas T. Gneiser Hancock, Rothert & Bunshoft Four Embarcadero Center Suite 1000 San Francisco, CA 94111 (415) 981-5550
20-21 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	LTC Paul Conrad MAJ Norm Allen Dr. Mark Foley	CPT Ted Gauza 2636 Chapel Hill Dr. Arlington Heights, IL 60004 (312) 443-1600 (312) 443-1600
10-11 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	MAJ Marty Sitler LTC Richard Barfield Dr. Mark Foley	MAJ Barbara Koll Office of the Commander 213th LSO 1650 Corey Boulevard Decatur, GA 30032-4864 (404) 286-6330/6364 work (404) 730-4658 bjkoll@aol.com

23-25 Apr	Little Rock, AR 90th RSC/1st LSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MAJ Rick Rousseau MAJ Tom Hong Dr. Mark Foley	MAJ Tim Corrigan 90th RSC 8000 Camp Robinson Road North Little Rock, AK 72118-2208 (501) 771-7901/8935 e-mail: corrigan@usarc-emh2.army.mil
24-25 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Training Center 360 Elliott Street Newport, RI 02841	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	MAJ Moe Lescault MAJ Geoffrey Corn COL Thomas N. Tromeu	MAJ Lisa Windsor/Jerry Hunter OSJA, 94th RSC 50 Sherman Avenue Devens, MA 01433 (978) 796-2140-2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
1-2 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Boulevard Gulf Shores, AL 36547 (334) 948-4853 (800) 544-4853	AC GO RC GO Int'l - Ops Law Contract Law GRA Rep	LCDR Brian Bill MAJ Beth Berrigan COL Keith Hamack	1LT Chris Brown OSJA, 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9303/9304 e-mail: brownrc@usarc-emh2.army.mil
14-16 May	Kansas City, MO 8th LSO/89th RSC Embassy Suites (KC Airport) 7640 NW Tiffany Springs Parkway Kansas City, MO 64153-2304 (816) 891-7788 (800) 362-2779	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MAJ Janet Fenton MAJ Michael Hargis Dr. Mark Foley	MAJ James Tobin 8th LSO 11101 Independence Avenue Independence, MO 64054-1511 (816) 737-1556

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

Please notify MAJ Rivera if any changes are required, telephone (804) 972-6383.

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

September 1998

9-11 September	3d Procurement Fraud Course (5F-F101).
9-11 September	1998 USAREUR Legal Assistance CLE

14-25 September	(5F-F23E). 10th Criminal Law Advocacy Course (5F-F34).
14-18 September	1998 USAREUR Administrative Law CLE (5F-F24E).

October 1998

1-14 October	147th Basic Course (Phase I-Fort Lee) (5-27-C20).
5-9 October	1998 JAG Annual CLE Workshop (5F-JAG).
14 October-18 December	147th Basic Course (Phase II-Fort Lee) (5-27-C20).
19-23 October	43rd Legal Assistance Course (5F-F23).
26-30 October	52nd Fiscal Law Course (5F-F12).

November 1998

2-6 November	150th Senior Officers Legal Orientation Course (5F-F1).
16-20 November	22nd Criminal Law New Developments Course (5F-F35).
16-20 November	52nd Federal Labor Relations Course (5F-F22).
30 November-4 December	1998 USAREUR Operational Law CLE (5F-F47E).
30 November - 4 December	151st Senior Officers Legal Orientation Course (5F-F1).

December 1998

7-11 December	1998 Government Contract Law Symposium (5F-F11).
7-11 December	1998 USAREUR Criminal Law Advocacy CLE (5F-F35E).

14-16 December	2nd Tax Law for Attorneys Course (5F-F28).	22-26 March	2d Advanced Contract Law Course (5F-F103).
	1999	22 March-2 April	11th Criminal Law Advocacy Course (5F-F34).
January 1999		29 March-2 April	153rd Senior Officers Legal Orientation Course (5F-F1).
4-15 January	1999 JAOAC (Phase II) (5F-F55).		
5-8 January	1999 USAREUR Tax CLE (5F-F28E).	April 1999	
11-15 January	1999 PACOM Tax CLE (5F-F28P).	12-16 April	1st Basics for Ethics Counselors Workshop (5F-F202).
11-15 January	1999 USAREUR Contract and Fiscal Law CLE (5F-F15E).	14-16 April	1st Advanced Ethics Counselors Workshop (5F-F203).
11-22 January	148th Basic Course (Phase I-Fort Lee) (5-27-C20).	19-22 April	1999 Reserve Component Judge Advocate Workshop (5F-F56).
20-22 January	5th RC General Officers Legal Orientation Course (5F-F3).	26-30 April	10th Law for Legal NCOs Course (512-71D/20/30).
22 January-2 April	148th Basic Course (Phase II-TJAGSA) (5-27-C20).	26-30 April	53rd Fiscal Law Course (5F-F12).
25-29 January	152nd Senior Officers Legal Orientation Course (5F-F1).	May 1999	
		3-7 May	54th Fiscal Law Course (5F-F12).
February 1999		3-21 May	42nd Military Judge Course (5F-F33).
8-12 February	70th Law of War Workshop (5F-F42).	June 1999	
8-12 February	1999 Maxwell AFB Fiscal Law Course (5F-F13A).	7-18 June	4th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
8-12 February	23rd Administrative Law for Military Installations Course (5F-F24).	7 June- 16 July	6th JA Warrant Officer Basic Course (7A-550A0).
March 1999		7-11 June	2nd National Security Crime and Intelligence Law Workshop (5F-F401).
1-12 March	31st Operational Law Seminar (5F-F47).	7-11 June	154th Senior Officers Legal Orientation Course (5F-F1).
1-12 March	142nd Contract Attorneys Course (5F-F10).	14-18 June	3rd Chief Legal NCO Course (512-71D-CLNCO).
15-19 March	44th Legal Assistance Course (5F-F23).	14-18 June	29th Staff Judge Advocate Course (5F-F52).

21 June-2 July	4th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).	13-17 September	1999 USAREUR Administrative Law CLE (5F-F24E).
21-25 June	10th Senior Legal NCO Management Course (512-71D/40/50).	13-24 September	12th Criminal Law Advocacy Course (5F-F34).
		October 1999	
28-30 June	Professional Recruiting Training Seminar	4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
July 1999		4-15 October	150th Basic Course (Phase I-Fort Lee) (5-27-C20).
5-16 July	149th Basic Course (Phase I-Fort Lee) (5-27-C20).	15 October 22 December	150th Basic Course (Phase II-TJAGSA) (5-27-C20).
6-9 July	30th Methods of Instruction Course (5F-F70).	12-15 October	72nd Law of War Workshop (5F-F42).
12-16 July	10th Legal Administrators Course (7A-550A1).	18-22 October	45th Legal Assistance Course (5F-F23).
16 July- 24 September	149th Basic Course (Phase II-TJAGSA) (5-27-C20).	25-29 October	55th Fiscal Law Course (5F-F12).
21-23 July	Career Services Directors Conference	November 1999	
August 1999		1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
2-6 August	71st Law of War Workshop (5F-F42).	15-19 November	23rd Criminal Law New Developments Course (5F-F35).
2-13 August	143rd Contract Attorneys Course (5F-F10).	15-19 November	53rd Federal Labor Relations Course (5F-F22).
9-13 August	17th Federal Litigation Course (5F-F29).	29 November 3 December	157th Senior Officers Legal Orientation Course (5F-F1).
16-20 August	155th Senior Officers Legal Orientation Course (5F-F1).	29 November 3 December	1999 USAREUR Operational Law CLE (5F-F47E).
16 August 1999- 26 May 2000	48th Graduate Course (5-27-C22).	December 1999	
23-27 August	5th Military Justice Managers Course (5F-F31).	6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
23 August- 3 September	32nd Operational Law Seminar (5F-F47).	6-10 December	1999 Government Contract Law Symposium (5F-F11).
September 1999		13-15 December	3rd Tax Law for Attorneys Course (5F-F28).
8-10 September	1999 USAREUR Legal Assistance CLE (5F-F23E).		

	2000	27-31 March	Course (5F-F34). 159th Senior Officers Legal Orientation Course (5F-F1).
January 2000			
		April 2000	
4-7 January	2000 USAREUR Tax CLE (5F-F28E).	10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).	10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
10-21 January	2000 JAOAC (Phase II) (5F-F55).	12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-28 January	151st Basic Course (Phase I-Fort Lee) (5-27-C20).	17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).
18-21 January	2000 PACOM Tax CLE (5F-F28P).		
		May 2000	
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).	1-5 May	56th Fiscal Law Course (5F-F12).
28 January- 7 April	151st Basic Course (Phase II- TJAGSA) (5-27-C20).	1-19 May	43rd Military Judge Course (5F-F33).
31 January- 4 February	158th Senior Officers Legal Orientation Course (5F-F1).	8-12 May	57th Fiscal Law Course (5F-F12).
		June 2000	
February 2000		5-9 June	3rd National Security Crime and Intelligence Law Workshop (5F-F401).
7-11 February	73rd Law of War Workshop (5F-F42).	5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).	5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
14-18 February	24th Administrative Law for Military Installations Course (5F-F24).	5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
28 February- 10 March	33rd Operational Law Seminar (5F-F47).	12-16 June	4th Senior Legal NCO Course (512-71D-CLNCO).
28 February- 10 March	144th Contract Attorneys Course (5F-F10).	12-16 June	30th Staff Judge Advocate Course (5F-F52).
March 2000			
13-17 March	46th Legal Assistance Course (5F-F23).	19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
20-24 March	3rd Contract Litigation Course (5F-F102).	19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
20-31 March	13th Criminal Law Advocacy		

26-28 June Professional Recruiting Training Seminar

3 December Atlanta, Georgia
ICLE Environmental Matters
Atlanta, Georgia

3. Civilian-Sponsored CLE Courses

1998

4-6 September 9th Annual Urgent Legal Matters
ICLE The Cloister
Sea Island, Georgia

4 December Employment Law
ICLE Marriott Gwinnett Place Hotel
Atlanta, Georgia

10 September Cyber Crime
ICLE Atlanta, Georgia

18 December Labor Law
ICLE Swissotel
Atlanta, Georgia

11 September Nuts and Bolts of Family Law
ICLE Atlanta, Georgia

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

11 September U.S. Supreme Court Update
ICLE Marriott Gwinnett Place Hotel
Atlanta, Georgia

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

2 October Guardianship
ICLE Swissotel
Atlanta, Georgia

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

15 October Effective Legal Negotiations
ICLE and Settlement
Atlanta, Georgia

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

16 October Adoption Law
ICLE Terrace Garden Hotel
Atlanta, Georgia

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

16 October Winning Trial Techniques
ICLE Marriott Gwinnett Place Hotel
Atlanta, Georgia

16 October Criminal Law
ICLE Swissotel
Atlanta, Georgia

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

23 October Professional and Ethical
ICLE Dilemmas
Atlanta, Georgia

29 October Microsoft Word for Attorneys
ICLE Marriott Gwinnett Place Hotel
Atlanta, Georgia

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

5 November Professionalism, Ethics and
ICLE Malpractice
Kennesaw State University
Marietta, Georgia

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

6-7 November ADR Institute
ICLE Swissotel

CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662	MICLE:	Institute of Continuing Legal Education 1020 Greene Street Ann Arbor, MI 48109-1444 (313) 764-0533 (800) 922-6516
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900	MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252	NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300	NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664	NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250	NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272	PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080	PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227	TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837	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	Missouri	31 July annually
		Montana	1 March annually
		Nevada	1 March annually
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968	New Hampshire**	1 July annually
		New Mexico	prior to 1 April annually
		North Carolina**	28 February annually
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905.	North Dakota	30 June annually
		Ohio*	31 January biennially
		Oklahoma**	15 February annually
		Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>		
Alabama**	31 December annually		
Arizona	15 September annually		
Arkansas	30 June annually	Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December (Note: this is a recent change)
California*	1 February annually		
Colorado	Anytime within three-year period	Rhode Island	30 June annually
Delaware	31 July biennially	South Carolina**	15 January annually
Florida**	Assigned month triennially	Tennessee*	1 March annually
Georgia	31 January annually	Texas	Minimum credits must be completed by last day of birth month each year
Idaho	Admission date triennially	Utah	End of two-year compliance period
Indiana	31 December annually	Vermont	15 July annually
Iowa	1 March annually	Virginia	30 June annually
Kansas	30 days after program	Washington	31 January triennially
Kentucky	30 June annually	West Virginia	30 June biennially
Louisiana**	31 January annually	Wisconsin*	1 February biennially
Michigan	31 March annually	Wyoming	30 January annually
Minnesota	30 August		
Mississippi**	1 August 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. 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 A345826 | Soldiers' and Sailors' Civil Relief Act Guide, JA-260-98 (226 pgs). |
| AD A333321 | Real Property Guide—Legal Assistance, JA-261-93 (180 pgs). |
| AD A326002 | Wills Guide, JA-262-97 (150 pgs). |
| *AD A346757 | Family Law Guide, JA 263-98 (140 pgs). |
| AD A283734 | Consumer Law Guide, JA 265-94 (613 pgs). |
| AD A345749 | Uniformed Services Worldwide Legal Assistance Directory, JA-267-98 (48 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).

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).

Administrative and Civil Law

*AD A351829 Defensive Federal Litigation, JA-200-98 (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 A347157 Environmental Law Deskbook, JA-234-98 (424 pgs).

AD A338817 Government Information Practices, JA-235-98 (326 pgs).

AD A344123 Federal Tort Claims Act, JA 241-98 (150 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).

International and Operational Law

*AD A352284 Operational Law Handbook, JA-422-93 (281 pgs).

Reserve Affairs

*AD A345797 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-98 (55 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.

2. 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.

3. 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 icon 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 for-

mat. 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.

4. 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):

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
3MJM.EXE	January 1998	3d Criminal Law Military Justice Managers Deskbook.
4ETHICS.EXE	January 1998	4th Ethics Counselors Workshop, October 1997.
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.
21IND.EXE	January 1998	21st Criminal Law New Developments Deskbook.
22ALMI.EXE	March 1998	22d Administrative Law for Military Installations, March 1998.
42LA_V1.EXE	June 1998	42d Legal Assistance Course (Main Volume), February 1998.
42LA_V2.EXE	June 1998	42d Legal Assistance Course (Tax Volume-Minus Chapter M), February 1998.
42LA_V3.EXE	June 1998	42d Legal Assistance Course (Tax Volume-Chapter M), February 1998.

46GC.EXE	January 1998	46th Graduate Course Criminal Law Desk-book.	98JAOACD.EXE	March 1998	1998 JA Officer Advanced Course, Administrative and Civil Law, January, 1998.
51FLR.EXE	January 1998	51st Federal Labor Relations Deskbook, November 1997.	137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Desk-book, August 1996.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide	145BC.EXE	January 1998	145th Basic Course Criminal Law Desk-book.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	ADCNSCS.EXE	March 1997	Criminal law, National Security Crimes, February 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	ALAW.ZIP	June 1990	<i>The Army Lawyer/ Military Law Review</i> Database ENABLE 2.15. Updated through the 1989 <i>The Army Lawyer</i> Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	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).
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CLAC.EXE	March 1997	Criminal Law Advocacy Course Desk-book, April 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.	CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.	EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.	FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
98JAOACA.EXE	March 1998	1998 JA Officer Advanced Course, Contract Law, January 1998.			
98JAOACB.EXE	March 1998	1998 JA Officer Advanced Course, International and Operational Law, January 1998.			
98JAOACC.EXE	March 1998	1998 JA Officer Advanced Course, Criminal Law, January 1998.			

FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.	JA262.EXE	January 1998	Legal Assistance Wills Guide, June 1997.
			JA263.EXE	June 1998	Legal Assistance Family Law Guide, May 1998.
JA200.EXE	January 1998	Defensive Federal Litigation, August 1997.	JA265.EXE	September 1998	Legal Assistance Consumer Law Guide, September 1998.
JA210.EXE	August 1998	Law of Federal Employment, July 1998.	JA267.EXE	June 1998	Uniformed Services Worldwide Legal Assistance Office Directory, May 1998.
JA211.EXE	January 1998	Law of Federal Labor-Management Relations, January 1998.	JA269.DOC	March 1998	1997 Tax Information Series (Word 97).
JA215.EXE	January 1998	Military Personnel Law Deskbook, June 1997.	JA269(1).DOC	March 1998	1997 Tax Information Series (Word 6).
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.	JA270.EXE	August 1998	Veterans' Reemployment Rights Law Guide, June 1998.
JA230.EXE	January 1998	Morale, Welfare, Recreation Operations, August 1996.	JA271.EXE	January 1998	Legal Assistance Office Administration Guide, August 1997.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.	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.
JA234.EXE	June 1998	Environmental Law Deskbook, June 1998.	JA275.EXE	June 1998	Model Income Tax Assistance Guide, June 1998.
JA235.EXE	March 1998	Government Information Practices, March 1998.	JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA241.EXE	May 1998	Federal Tort Claims Act, April 1998.	JA281.EXE	January 1998	AR 15-6 Investigations, December 1997.
JA250.EXE	May 1998	Readings in Hospital Law.	JA280P1.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, LOMI, September 1998.
JA260.EXE	May 1998	Soldiers' and Sailors' Civil Relief Act Guide, April 1998.			
JA261.EXE	January 1998	Real Property Guide, December 1997.			

JA280P2.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, Claims, August 1998.	JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
			JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
JA280P3.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, Personnel Law, August 1998.	NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
JA280P4.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, Legal Assistance, August 1998.	OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
			RCGOLO.EXE	January 1998	Reserve Component General Officer Legal Orientation Course, January 1998.
JA280P5.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, Reference, August 1998.	RCJAINFO.EXE	June 1998	Reserve Orientation for Judge Advocates, May 1998.
JA285V1.EXE	June 1998	Senior Officers Legal Orientation Deskbook (Volume I), June 1998.	TAXBOOK1.EXE	March 1998	1997 Tax CLE, Part 1.
			TAXBOOK2.EXE	January 1998	1997 Tax CLE, Part 2.
JA285V2.EXE	June 1998	Senior Officers Legal Orientation Deskbook (Volume II), June 1998.	TAXBOOK3.EXE	January 1998	1997 Tax CLE, Part 3.
			TAXBOOK4.EXE	January 1998	1997 Tax CLE, Part 4.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.	TJAG-145.DOC	January 1998	TJAGSA Correspondence Course Enrollment Application, October 1997.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.	WRD97CNV.EXE	June 1998	Word 97 Converter
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.	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.		
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.			
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.			
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.	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).		
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.			

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge

Advocate General's School, Legal Research and Communications Department, ATTN: JAGS-ADL-P, Charlottesville, Virginia 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

5. *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 SEPTEMBER.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: JAGS-ADL-P, 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 stroncj@hq-da.army.mil.

6. Articles

The following information may be useful to judge advocates:

Robert P. Burns, *The Purposes of Legal Ethics and the Primacy of Practice*, 39 WM. & MARY L. REV. 327 (1998).

Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409 (1998).

7. 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 jagsch@hqda.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 reception-

ist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

8. 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-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.