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Justice, Justice Shall You Pursue:[1]
Legal Analysis of Religion Issues in the Army

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Introduction

Religious practice in the Army raises highly charged and occasionally newsworthy legal and leadership issues. A judge advocate can expect to grapple with varied questions involving religion. Consider the following:

> A female Muslim soldier in the finance office wants to wear a khimar, the traditional Islamic head scarf, during duty hours.
>
> A company commander protests her battalion commander's initiation of staff meetings with a sectarian Christian prayer. Each meeting the prayers seem to get longer and more "religious." At the last meeting the battalion commander suggested that the company commanders "might want to attend his church on Sundays."
>
> A Jewish soldier gripes about the installation holiday display, located on the parade grounds, because it only contains a crèche scene and not a menorah or other winter season decorations.
>
> A soldier complains that his roommate "keeps preaching at me and asking me to convert and attend church and save my soul, and all that stuff." Other soldiers in the same squad are grumbling about the evangelizing soldier.

These real life scenarios implicate both legal and leadership concerns. A judge advocate must understand the legal consequences of these scenarios to advise commanders competently. Commanders have considerable—but not unlimited—discretion in this area. Limits stem from Department of the Army (DA) and Department of Defense (DOD) regulations, congressional statutes, and case law.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[2] Analyzing a military "religion" issue is a complex task. First, the two constitutional religion clauses yield two very different types of "religion" issues—the government improperly establishing religion and the government preventing an individual's free exercise of religion. The first clause, the Establishment Clause, forbids the creation of a state church or state religion.[3] In addition, this clause normally bars the government from actively supporting or sponsoring religion. The Free Exercise Clause prevents government from unduly interfering with an individual's practice of religion.[4]

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1. *Deuteronomy* 16:20.

2. U.S. CONST. amend. I.

3. *See infra* notes 9-13 and accompanying text.

In the last five years, the Supreme Court has decided six cases that focus, at least in part, on the Establishment Clause. *See* Agostini v. Felton, 521 U.S. 203 (1997) (upholding a program in which federally funded government employees provided remedial instruction to disadvantaged children on sectarian school grounds, if it is provided on a neutral basis); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (holding that when a state school funds various student publications, the denial of funds to a student newspaper, solely on grounds of the newspaper's religious message, violates free speech; providing funds does not violate the Establishment Clause); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (holding that a private, unattended display of a religious symbol, in this case a Ku Klux Klan Cross, in a public forum, does not violate the Establishment Clause); Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (holding that the creation of a special school district on religious grounds violated the Establishment Clause); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that the Establishment Clause does not prevent state government from furnishing a disabled child enrolled in a sectarian school with a sign-language interpreter in order to facilitate his education when the government neutrally provides benefits to a broad class of citizens); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (allowing access to a school premises for presentation of all views about family issues and child rearing except those from a religious standpoint is an unconstitutional violation of free speech; church film series about family rearing in the school, after normal school hours, would not violate the Establishment Clause).

In addition, there are other modern cases that have dealt with the Establishment Clause. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (finding that a nonsectarian prayer offered by a school selected clergyman at a middle school graduation ceremony is unconstitutional); Allegheny v. ACLU, 492 U.S. 573 (1989) and Lynch v. Donnelly, 465 U.S. 668 (1984) (both examining crèche displays under the Establishment Clause); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the practice of opening sessions of the Nebraska State Legislature with a prayer); Lemon v. Kurtzman, 403 U.S. 602 (1971) (deciding three cases involving state support of church affiliated nonpublic schools; set forth three-prong test for impermissible establishment of religion).

The constitutional contours of the two clauses are imprecise and in flux. The Supreme Court has not developed bright line rules in either area.[5]

Tension between the two constitutional clauses further muddies the waters. The military chaplaincy is an example of this tension.[6] In the abstract, direct government funding of clergymen and religious programs would violate the Establishment Clause. The absence of military chaplains, however, would deprive service members of the right to freely exercise religion. Resolving this tension requires balancing the two clauses.[7] In some situations the exercise of religion may implicate the two religion clauses and freedom of speech.[8]

Finally, in all areas of constitutional jurisprudence, the United States Supreme Court urges deference to Congress and the military in military matters;[9] religion is no exception. Particularly in the free exercise area, the judiciary takes a hands-off approach. Thus, legal questions that involve religion in the military focus on statutes and regulations, rather than constitutional theory. For the most part, statutory and regulatory certainties have trumped constitutional nuances. Frequently, a judge advocate need look no further than Army regulations to determine what is permissible.

This article will discuss three types of "religion in the military" problems: limits on the government establishing religion, the limited need to accommodate soldiers' free exercise of religion, and "hybrid" cases—expressions of religion which implicate the Establishment Clause, the Free Exercise Clause, and free speech concerns. Each subsection will explore relevant case law, statutes, and regulations. In the final section, the article will provide a method for analyzing "real-world" religion questions.

The Establishment Clause

Establishment Clause Case Law

In the civilian world:

> [T]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will. . . . No person can be punished . . . for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions.[10]

4. The leading modern Supreme Court Free Exercise Clause cases include: Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (finding that a city ordinance that prohibits ritual animal sacrifices discriminated against religion and was unconstitutional); Oregon v. Smith, 494 U.S. 872, 879 (1990) (affirming a state refusal to grant unemployment benefits to two native Americans who were fired for ingesting peyote as part of religious ceremonies); Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that the state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest); Sherbert v. Verner, 374 U.S. 398 (1963) (denying unemployment compensation for a Seventh Day Adventist who would not accept work on Saturday violated Free Exercise Clause, even though state officials concluded she refused to seek alternative suitable employment).

The Religious Freedom Restoration Act (RFRA) was Congress' reaction to *Oregon v. Smith*. The RFRA stated that any law that substantially burdened a person's exercise of religion was valid only if the law served a compelling state interest and it was the least restrictive means of accomplishing that interest. The Supreme Court, however, held that the RFRA was unconstitutional because it exceeded Congress' legislative powers. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

5. For example, in *Rosenberger*, Justice O'Connor, concurring wrote: "Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging(sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

Justice Thomas, also concurring in *Rosenberger*, wrote "though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus. . . ." *Id.* at 861 (Thomas, J., concurring).

Additionally, each of the Court's recent decisions has produced numerous opinions, making it difficult, if not impossible, to discern a single line of reasoning.

6. *See infra* notes 18-29 and accompanying text. *See also* Julie B. Kaplan, Note, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210 (1986); William T. Cavanaugh, Jr., Note, *The United States Military Chaplaincy Program: Another Seam in the Fabric of Our Society?*, 59 NOTRE DAME L. REV. 181 (1983).

7. *See infra* notes 18-29 and accompanying text.

8. *See infra* notes 107-113 and accompanying text.

9. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (discussing the free exercise of religion, *see infra* notes 58-64 and accompanying text); Rostker v. Goldberg, 453 U.S. 57 (1981) (discussing equal protection; the court held that the male only draft was constitutional, the court used a lesser scrutiny test than in non-military gender discrimination cases); Brown v. Glines, 444 U.S. 348 (1980) (upholding an Air Force regulation over a free speech challenge, that required prior approval by a commander before an airmen could circulate petitions); Parker v. Levy, 417 U.S. 733, 743 (1974) (upholding the court-martial conviction, against vagueness and overbreadth challenges, of an Army Captain who made public statements opposing the Vietnam War and urged others not to go to Vietnam; the Court categorized the military as a "specialized society separate from civilian society"); Korematsu v. United States, 323 U.S. 214 (1944) (condoning internment of Americans of Japanese descent based on military needs).

As the above extract from *Everson v. Board of Education of Ewing Township* shows, the Establishment Clause imposes several apparently absolute standards. But translating those standards into a legal test that draws clear lines separating permissible from impermissible government conduct has proven difficult.[11] The three-prong test that was set forth in 1971 in *Lemon v. Kurtzman*[12] is the Supreme Court's only enduring attempt[13] to develop a single standard to determine whether a government action impermissibly establishes religion. Under *Lemon*, a government statute or program "respecting" religion is constitutional if it has a secular legislative purpose, its principal effect neither advances nor inhibits religion, and it does not foster excessive governmental entanglement with religion.[14]

Two circuit court cases set the parameters for Establishment Clause jurisprudence as applied to the military. In *Katcoff v. Marsh*,[15] the Second Circuit held that the existence of the Army chaplaincy did not violate the Establishment Clause. Thus, even though the government funds and sponsors religion, the chaplaincy does not unconstitutionally establish religion in the military. On the other hand, soldiers cannot be forced to attend religious services. In *Anderson v. Laird*,[16] the Circuit Court for the District of Columbia decided that not even the military educational atmosphere of the military academies justified mandatory chapel attendance.

In light of the constitutional mandate that "Congress shall make no law respecting an establishment of religion,"[17] what justifies government-sponsored, taxpayer-financed religion in the Army? In *Katcoff v. Marsh*,[18] two Harvard law students challenged the Army chaplaincy's existence.[19] The plaintiffs alleged that government financing of the chaplaincy program violated the Establishment Clause of the Constitution.[20] The Second Circuit readily admitted that when "viewed in isolation" the chaplaincy program would violate the *Lemon* test.[21] The Establishment Clause, however, must be "interpreted to accommodate other equally valid provisions of the Constitution, including the Free Exercise Clause [and Congress' War Power Clauses] when they are implicated."[22]

The best defense of the chaplaincy, and of any religious program in the military, is that it preserves a soldier's right to freely exercise his religion. In the absence of government funded chaplains, soldiers would be stymied from practicing religion in situations made necessary by military service. The Free Exercise Clause "obligates Congress, upon creating an Army, to

10. Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 15-16 (1946).

11. *See supra* note 5.

12. 403 U.S. 602 (1971).

13. Although scholars and Justices frequently criticize the *Lemon* test, it has not been overruled. In several cases, the Supreme Court has simply ignored *Lemon*. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983).

As recently as 1997, however, the Supreme Court of Washington applied the *Lemon* test. Defending its decision to use *Lemon*, the court wrote:

> The Supreme Court has indeed declined to apply the *Lemon* test in recent cases; however, it has not overruled *Lemon*. . . . We hold that until the Supreme Court abandons the *Lemon* test, it shall apply to Establishment Clause issues under the First Amendment. Our continued adherence to the *Lemon* test conforms to every circuit court and every state supreme court case directly involving the Establishment Clause during the last two years.

Malyon v. Pierce County, 935 P.2d 1272, 1286 (Wash. 1997).

The *Malyon* court cited numerous recent cases that applied *Lemon*. *Id.* at n.46.

14. *Lemon*, 403 U.S. at 612.

15. 755 F.2d 223 (2d Cir. 1985).

16. 466 F.2d 283 (D.C. Cir. 1972).

17. U.S. CONST. amend. I.

18. 755 F.2d 223 (2d Cir. 1985).

19. *Id.* at 229. The plaintiffs sought an "alternative chaplaincy program which [was] privately funded and controlled." *Id.*

20. *Id.* at 223.

21. *Id.* at 231-32.

22. *Id.* at 233. In addition, the "historical background" of the chaplaincy must be considered if it "sheds light on the purpose of the Framers of the Constitution." *Id.* at 232.

make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them."[23] Further, the Army needs chaplains to accompany soldiers to places where civilian clergy do not go—field training exercises and actual combat.[24] Conceivably, if the Army did not have chaplains it would be violating both the Establishment Clause and the Free Exercise Clause by *inhibiting* religion. Thus, the Free Exercise Clause carves out a limited exception to the Establishment Clause prohibition. In *dicta*, two Supreme Court Justices have endorsed this rationale for a military chaplaincy.[25]

Katcoff also gave great weight to Congress' authority under Article I, Section 8 of the Constitution to "raise and support Armies" and "make Rules for the Government and Regulation of the land and naval forces."[26] The court stopped short of holding that military regulations are "immune from judicial review," but repeated the oft-quoted Supreme Court language that defers to the military: "Judges are not given the task of running the Army . . . the military constitutes a specialized community governed by a separate discipline from that of the civilian."[27] The Second Circuit deferred to Congress' and the Army's judgment that if chaplains were not made available to troops, "the motivation, morale and willingness of soldiers to face combat would suffer immeasurable harm and our national defense would be weakened accordingly."[28]

Katcoff justified the military chaplaincy as an institution.[29] A separate analysis, however, applies to individual religious activities in the military. First, military religious activities must be voluntarily attended. In *Anderson v. Laird*,[30] cadets and midshipmen from the three major service academies brought a class action suit challenging regulations requiring attendance at Prot-

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23. *Id.* at 233.

This argument dates at least back to 1850. *See* Kurt T. Lash, *The Second Adoption of The Establishment Clause: The Rise of The Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1096-97 n.45 (1995).

24. *Katcoff*, 755 F.2d at 228. "The problem of meeting the religious needs of Army personnel is compounded by the mobile, deployable nature of our armed forces, who must be ready on extremely short notice to be transported from bases . . . to distant parts of the world for combat duty." *Id.*

25. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963). In a concurring opinion, Justice Brennan wrote:

> There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provision for churches and chaplains at military establishments for those in the armed services may afford one such example. . . . It is argued such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces . . . those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires.

Id. at 296-98 (Brennan, J., concurring). Similar views were expressed by Justice Stewart in the dissenting opinion.

> Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.

Id. at 308-09 (Stewart, J., dissenting).

26. U.S. CONST. art. I, § 8, cls. 12, 14.

27. Katcoff v. Marsh, 755 F.2d 223, 233-34 (2d Cir. 1985). The Second Circuit stated that the:

> [R]esponsibility for determining how best our Armed Forces shall attend to [the] business [of fighting or being ready to fight wars should the occasion arise] rests with Congress . . . and with the President. . . . while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.

Id.

28. *Id.* at 227. In addition, the historical legacy of the chaplaincy supported the *Katcoff* decision. Military chaplains pre-date the Constitution. "Upon adoption of the Constitution . . . Congress authorized the appointment of a commissioned Army chaplain." *Id.* at 225. The chaplaincy has grown with the military. Thus, it appears that the Framers did not believe that a military chaplaincy violated the Bill of Rights. *Id.*

29. A majority of the court in *Katcoff*, however, had reservations about certain activities of the chaplaincy. Two of the three judges questioned whether the unique nature of military service justified providing a military chaplaincy in "large urban centers, such as the Pentagon in Washington, D.C." or to "retired military personnel and their families." The court remanded the case to the District Court for the Army to make a "showing that [such programs] are relevant to and reasonably necessary for the conduct of our national defense." *Katcoff*, 755 F.2d at 238.

Since the plaintiffs did not pursue the remand, questions about the chaplaincy's "fringe activities" remain unanswered. Fearing that another judicial loss would obligate the plaintiffs to pay the government's legal costs, the plaintiffs opted not to pursue the suit. *See* ISRAEL DRAZIN & CECIL B. CURREY, FOR GOD AND COUNTRY 203-05 (1995).

estant, Catholic, or Jewish chapel services on Sundays.[31] In separate opinions, two of the three judges held that mandatory chapel attendance violated the Establishment Clause.[32]

Chief Judge Bazelon wrote: the Establishment Clause "was written to abolish certain forms of governmental regulation of religion in order to protect absolutely the core values of religious liberty. Attendance at religious exercises is an activity which under the Establishment Clause a government may *never* compel."[33] Judge Bazelon paid little heed to "military necessity" or "deference to the military." Since the prohibition against compulsory church attendance was absolute, he did not "balance" the constitutional infringement against the perceived needs of the military.[34]

Judge Leventhal, concurring in the judgment, considered military exigency, but found that "the government simply has not made the required showing that its interference with religious freedom is compelled by, and goes no further than what is compelled by, the effective training of military officers needed for survival."[35] One judge dissented.[36]

Judge Bazelon's opinion suggests that military members can never be compelled to attend a religious service. His opinion would have a significant impact if "service" encompassed any "religious prayer," since mandatory non-religious ceremonies frequently begin or end with a prayer. Judge Leventhal's opinion, however, suggests a case-by-case balancing of military exigency against Establishment Clause concerns. The Supreme Court has never ruled on this issue.

30. 466 F.2d 283 (D.C. Cir. 1972).

31. *Id.* at 284.

32. The decision included a three sentence *per curiam* opinion, followed by lengthy separate opinions by each of the three judges.

33. *Anderson*, 466 F.2d at 285 (emphasis added).

34. Judge Bazelon wrote that, "secular interests may never justify governmental imposition of church attendance." *Id.* at 294. "[a]lthough free exercise rights may have to bend to military exigencies, I would again emphasize that this is not authority for the military to impose religious exercise on its members." *Id.* at 294 n.70.

In addition, Judge Bazelon found that mandatory chapel attendance violated the Free Exercise Clause: "In this case, rather than conflicting, the two Clauses complement each other and dictate the same result. Abolition of the attendance requirements enhances rather than violates the free exercise rights of cadets and midshipmen." *Id.* at 290.

35. *Id.* at 303 (Leventhal, J., concurring).

36. Judge MacKinnon's dissent rested primarily on "the constitutionally recognized power of the armed services to train the necessary personnel to adequately defend the nation." *Id.* at 307 (MacKinnon, J., dissenting).

Statutory and Regulatory Establishment of Religion

Today's Army chaplaincy has statutory[37] and regulatory[38] bases. Federal law, however, prescribes only a few of a chaplain's duties.[39] Army Regulation (AR) 165-1 defines and supplements the chaplain's statutory duties.[40] The regulation reflects the constitutional justification for establishing religious programs—to vindicate soldiers' rights to freely exercise religion[41]—but explicitly recognizes the constitutional tension between the religion clauses as applied to the military:

> In striking a balance between the "establishment" and "free exercise" clauses, the Army chaplaincy, in providing religious services and ministries to the command, is an instrument of the U.S. government to ensure that soldier's religious "free exercise" rights are protected. At the same time, chaplains are trained to avoid even the appearance of any establishment of religion.[42]

Military religious leaders should respond to a soldier's desire to practice religion, but should not take coercive steps to initiate religious feeling in non-believers.

Anderson v. Laird's voluntariness requirement was not lost on the regulation's drafters: "Participation in religious services by Army personnel is strictly voluntary."[43] Religious activities, however, are a bona fide part of the military mission. Therefore, "personnel may be required to provide logistic support before, during or after worship services or religious programs."[44] *Army Regulation 165-1* balances the voluntariness requirement with the tradition of including a prayer at military ceremonies: "Military and patriotic ceremonies may require a chaplain to provide an invocation, reading, prayer, or benediction. Such occasions are not considered to be religious services."[45] In other words, including an invocation at a mandatory ceremony does not run afoul of the Establishment Clause.[46]

The regulation reflects the prohibition on "preferring one religion" over another[47] and charges commanders with support-

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37. 10 U.S.C.A. § 3073 provides that:

> There are chaplains in the Army. The Chaplains include—
> (1) the Chief of Chaplains;
> (2) commissioned officers of the Regular Army appointed as chaplains; and,
> (3) other officers of the Army appointed as chaplains in the Army.

10 U.S.C.A. § 3073 (West 1998.).

By statute a "chaplain has rank without command." *Id.* § 3581. The significance of this provision is discussed briefly *infra* notes 126-127 and accompanying text.

38. *See infra* notes 40-51 and accompanying text.

39. "Each chaplain shall, when practicable, hold appropriate religious services at least once on each Sunday for the command to which he is assigned, and shall perform appropriate religious burial services for members of the Army who die while in that command." 10 U.S.C.A. § 3547(a).

Chaplains do not accomplish their religious mission alone. Federal statute mandates command support: "Each commanding officer shall furnish facilities, including necessary transportation, to any chaplain assigned to his command, to assist the chaplain in performing his duties." *Id.* § 3547(b).

Another provision establishes the chaplains as a "special branch" to which regular army officers may be appointed, but not assigned. *Id.* § 3064. *See id.* § 3036 (discussing the appointment and duties of the Chief of Chaplains).

40. U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY (27 Mar. 98) [hereinafter AR 165-1]. "The duties of chaplains beyond those specifically mandated by statute are derived duties assigned by the Army." *Id.* para. 1.4b.

41. Commanders will "[s]upport the free exercise of religion for all Army personnel." *Id.* para. 1-16c. "Each chaplain will minister to the personnel of the unit and facilitate the "free-exercise" rights of all personnel." *Id*. para. 4.4b.

42. *Id.* para. 1-4c.

43. *Id.* para. 3-2a.

44. *Id.*

45. *Id.* para. 4-4h.

46. *See infra* notes 134-135 and accompanying text.

47. "The Army recognizes that religion is constitutionally protected and does not favor one form of religious expression over another. Accordingly, all religious denominations are viewed as distinctive faith groups and all soldiers are entitled to chaplain services and support." AR 165-1, *supra* note 40, para. 3-3a.

ing the "free exercise of religion for *all* Army personnel."[48] At the same time, "scheduling priority will be given to worship services conducted by chaplains and services that minister to the largest number of soldiers and family members."[49] The inference is while all religions should receive support, numbers count. Heavily represented faith groups can expect greater access to facilities. The same approach should be taken when approaching the question of religious displays.[50]

Neither the "voluntariness" requirement nor the "no preference" mandate prevented the drafters from authorizing chaplains to conduct a wide range of religious activities. The regulation charges the Chief of Chaplains with providing "comprehensive religious support."[51] In essence, the regulation authorizes chaplains to provide religious programs akin to those provided at a civilian congregation.[52] Further, the chaplain is the "principal staff officer" for the Army's far-reaching Moral Leadership Training Program.[53]

Establishing Religion in the Army—Concluding Comments

Religion is firmly established in the Army. The chaplaincy and many of the religious programs that flow from the chaplaincy have deep historical roots. The military chaplaincy has been validated legally. The Second Circuit's reasoning in *Katcoff* is sound. The dual rationale undergirding the chaplaincy—

48. AR 165-1, *supra* note 40, para. 1-16c (emphasis added). The regulation also provides, "all religious denominations are viewed as distinctive faith groups and all soldiers are entitled to chaplain services and support." *Id*. para. 3.3a. Also, the regulation states: "[E]ach chaplain will minister to the personnel of the unit and facilitate the "free-exercise" rights of all personnel, regardless of religious affiliation of either the chaplain or the unit member." *Id*. para. 4.4b.

49. *Id.* para. 3-3b.

In addition, the rationales supporting government funding of religion only apply to programs directed at military members and their families. Providing chaplain support directly to members of the public would violate the core of the Establishment Clause. Hence, *AR 165-1* provides: Religious services conducted in military chapels and facilities are primarily for military personnel and authorized civilians. The Army is not required to provide religious support to non-DOD authorized personnel; however, military worship services are generally open to the public. *Id.* para. 3-3c.

50. *See infra* notes 130-131 and accompanying text.

51. AR 165-1, *supra* note 40, para. 1-5a.

52. The regulation broadly authorizes chaplains to "provide for religious support, pastoral care, and the moral and ethical well-being of the command." *Id*. para. 4.4a.

Specifically, the regulation requires chaplains to:

[C]ontribute to the spiritual well-being of soldiers and families of the command by:

(1) Developing a pastoral relationship with members of the command by:
(a) Taking part in command activities.
(b) Conducting programs for the moral, spiritual, and social development of soldiers and their families.
(c) Visiting soldiers during duty and off-duty hours.
(d) Calling on families in their homes, as appropriate.
(2) Being available to all individuals, families, and the command for pastoral activities and spiritual assistance.
(3) Contributing to the enrichment of marriage and family living by assisting in resolving family difficulties.
(4) Providing pastoral counseling in CFLC and through family life ministry.
(5) Participating in family advocacy, health promotion, and exceptional family member programs.
(6) Supporting sick and injured soldiers and their families through hospital and home visitations, pastoral counseling, religious ministrations, and other spiritual aid and assistance.
(7) Contributing to the rehabilitation of persons in confinement through worship services and pastoral activities, and by cooperating with other members of the staff and interested boards and committees.

Id. para. 4.4l.

In their roles as staff officers, chaplains "will advise the commander and staff on matters of religion, morals, and morale," to include—

(1) The religious needs of assigned personnel.

(2) The spiritual, ethical, and moral health of the command, to include the humanitarian aspects of command policies, leadership practices, and management systems.

(3) Plans and programs related to the moral and ethical quality of leadership, the care of people, religion, chaplain and chaplain assistant personnel matters and related funding issues within the command.

Id. para. 4-5a.

A chaplain's role differs from a congregational clergyperson in that a chaplain ministers to the needs of soldiers from various faith groups. "Each chaplain will minister to the personnel of the unit . . . regardless of religious affiliation of either the chaplain or the unit member." *Id*. para. 4.4a.

effectuating soldiers' free exercise rights and deference to Congress—is unassailable. The Supreme Court has blessed the chaplaincy in *dicta* and has continued to show deference to the military in various contexts. Nonetheless, the Establishment Clause has not been completely read out of the military. Soldiers must be free to exercise their right to practice religion, but should not come under pressure to do so. The line between making religion available (a protected activity) and "pushing" religion on an unsuspecting soldier (prohibited) is not always self-evident, and deserves further consideration in the analysis section.

Free Exercise Clause—Accommodating Religious Practice in the Military

The Army, as a cross-section of America, is composed of soldiers with diverse religious beliefs and practices. At times, religious practice interferes with the military mission. Conflicts typically arise in the context of time off for worship, wear of religious apparel and jewelry, and religious dietary restrictions. In the civilian world, courts have frequently been called upon to vindicate an individual's right to exercise religion in the face of government interference.[54] The judiciary, however, has provided little relief for military members who seek to exercise their religion against command opposition.[55] Instead, military members must look to statutes and regulations that protect religious practice.

Free Exercise of Religion Case Law

Goldman v. Weinberger is a landmark constitutional case concerning the free exercise of religion in the military. Captain Goldman, an orthodox Jew serving in the Air Force as a clinical psychologist, routinely wore a yarmulke while in uniform. Pursuant to an Air Force regulation, Captain Goldman's hospital commander ordered him to remove the yarmulke while indoors.[56] Goldman refused to obey this order. The next day he received a letter of reprimand and was warned that he could be court-martialed for further disobedience. Captain Goldman sued to enjoin the Secretary of Defense and others from enforcing the regulation.[57] He argued the regulation interfered with the free exercise of his First Amendment rights.[58] In a five to four decision, the Supreme Court rejected Captain Goldman's constitutional challenge.

The majority opinion first emphasized the deferential standard of review of military regulations:

> [W]e have repeatedly held that "the military is, by necessity, a specialized society separate from civilian society." Parker v. Levy, 417 U.S. 733, 743 (1974). . . . Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.[59]

53. *Id*. para. 11-1a. *See id*. ch. 11 (describing the Moral Leadership Training Program). Chaplain proponency of this program suggests that a religious approach will be taken to "the full spectrum of moral concerns of the profession of arms and the conduct of war." *Id*. para 11.1a. The "Range of Topics" for the Program is staggering:

> a. The moral dimensions of decision making; b. Personal responsibility; c. Personal integrity; d. Family relationships and responsibilities; e. Drug/alcohol abuse and personal morality; f. Trust and morality in team development; g. Human relationships and moral responsibility; h. Moral dimensions of actions in combat and crisis; i. America's moral/religious heritage; j. Safety and its moral implications; k. Suicide prevention training; l. Sexual harassment prevention training; m. Consideration of others; n. Social, organizational, and individual values; o. Reaction to combat-fatigue, fear, fighting, and surviving; p. Loss, separation, disappointment, illness, and death; q. AIDS, as a medical, social, and moral problem.

Id. para. 11-5

54. *See supra* note 4 and the cases cited therein.

55. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986). *See infra* notes 56-64 and accompanying text (discussing *Goldman*).

56. *Id.* at 504. The order followed Captain Goldman's testimony as a defense witness at a court-martial. Justice Stevens' concurring opinion notes the retaliatory nature of the proceedings against Captain Goldman. *Id.* at 511 (Stevens, J., concurring).

57. *Id.* at 505-06.

58. *Id.* at 506. The district court agreed with Goldman. The Circuit Court of Appeals for the District of Columbia reversed. The Supreme Court granted review. *Id.*

59. *Id.* (most citations and original footnotes omitted).

The Court cited a familiar litany of cases that justified deference to Congress and the military in military matters. For example, "[Judicial] deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Id*. at 508 (citing Rostker v. Godlberg, 453 U.S. 57, 70 (1981)).

Thus, civilian religion jurisprudence had little precedential value on the military.

The Court endorsed the "professional judgment" of the Air Force that the uniform "encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank."[60] The Court did not question the merit of the Air Force's uniform regulation. Rather, the Court was satisfied that the Air Force rules "reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity."[61]

A three-Justice concurrence[62] emphasized the need for uniform treatment of different religious traditions. The three justices reasoned that a contrary result in this case, might open the door to permitting a Sikh to wear a turban or a Rastafarian to wear dreadlocks.[63] The Air Force's neutral and objective rule—"visibility"—passed constitutional muster.[64] Four judges dissented.[65]

Goldman is the only Supreme Court precedent that directly addresses the need for the military to accommodate religion. *Goldman* gives the military unfettered discretion to restrict religious practice, at least by a military member. The Court, in deference to Congress and the military, will accept any rational argument that the needs of morale, discipline, or uniformity trump a service member's desire to practice religion.

In *Hartmann v. Stone*,[66] the Second Circuit may have discovered a boundary beyond which the military cannot restrict free exercise rights. In *Hartmann*, the court found that a regulation that prohibited Army Family Child Care (FCC) providers from conducting any religious activities during FCC day care was unconstitutional.[67] In *Hartmann*, the plaintiffs were civilian child care providers who were family members of soldiers. The plaintiffs alleged that the restriction violated their First Amendment rights to freely exercise religion and to free speech.[68] The court found that the rule discriminated against religion. "If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[69] The Army asserted that avoiding an Establishment Clause violation was a compelling interest.[70] In addition, the Army played its "final trump card"[71]—deference to the military. The military necessity argument did not work. Significantly, the day care providers who

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60. *Goldman*, 475 U.S. at 508.

61. *Id.* at 510.

62. *See id*. at 510-13 (Stevens J., White, J., and Powell J., concurring).

63. *Id.* at 512.

64. *Id.* at 513.

65. Justice Brennan, joined by Justice Marshall, wrote a spirited dissent. *Id.* at 513 (Brennan, J., dissenting). Justice Brennan accused the majority of "evading its responsibility" for "judicial review of military regulations." *Id.* According to Brennan, the majority adopted a "subrational" basis standard of review. Brennan asserted that the military offered no evidence or a "credible explanation of how the contested practice is likely to interfere" with the Air Force's interest in discipline and uniformity. *Id.* at 516 (Brennan, J., dissenting).

A dissent by Justice O'Connor, joined by Justice Marshall, sought to apply a two prong "test" to military free exercise issues. First, when the government denies a free exercise claim, it must show that an unusually important interest is at stake. *Id.* at 530 (O'Connor, J., dissenting). Justice O'Connor agreed with the majority that the need for "military discipline and esprit de corps" is an especially important governmental interest. *Id.* at 531 (O'Connor, J., dissenting). Second, the government must show that granting a requested exemption would do substantial harm to the government's interests. *Id*. at 530 (O'Connor, J., dissenting). Justice O'Connor, echoing Justice Brennan, found that the government presented "no sufficiently convincing proof in this case to support an assertion that granting an exemption of the type requested here would do substantial harm to military discipline and esprit de corps." *Id.* at 532 (O'Connor, J., dissenting).

66. 68 F.3d 973 (6th Cir. 1995).

67. The regulation at issue stated: "The dissemination of religious information (e.g., grace) or materials is prohibited as well as providing program activities that teach or promote religious doctrine. (Programs operated by chaplains are exempted from this restriction.)" U.S. DEP'T OF ARMY, REG. 608-10, PERSONAL AFFAIRS: CHILD DEVELOPMENT SERVICES, para. 1-8 (12 Feb. 1990) [hereinafter AR 608-10] *cited in Hartmann*, 68 F.3d at 977.

Further, the regulation contains a "compliance item" which states: "Religious materials or activities specifically designed to teach or promote religious doctrine are not permitted . . . does not permit Bible stories, pictures, prayers including grace at meals." AR 608-10, *supra*, app. C-10, *cited in Hartmann*, 68 F.3d at 977.

68. *Hartmann*, 68 F.3d at 975. The plaintiffs also alleged that the regulation violated their "Fifth Amendment rights to Equal Protection and 'Parental Liberty.'" *Id.* at 978.

69. *Id.* at 979. In distinguishing the two cases, the court noted that *Goldman* dealt with a *neutral* law which incidentally burdened religion. The *Hartmann* regulation explicitly banned religious practice. *Id*. at 985.

70. *See infra* notes 107-113 and accompanying text (discussing the Establishment Clause aspect of this case in the section concerning "hybrid" issues).

were denied the exercise of religious practices *in their own homes* were civilians.[72] Therefore, the restrictions violated the First Amendment.

Hartmann is extraordinary because it vindicates the First Amendment in the face of the "military necessity" argument. Thus, the case may set a distant outer limit on the "deference to the military" argument in the area of religion. On the other hand, since the religious practitioners in *Hartmann* were not military members, *Hartmann* may have little impact on the lives of service members.[73] Since courts pay great deference to Congress and the military in matters of religious practice, soldiers should look to applicable statutes and regulations to determine their rights to religious freedom.

Statutory and Regulatory Right to Free Exercise of Religion

Federal Statute

Less than two years after *Goldman*, Congress directed that members of the armed forces be allowed to wear "neat and conservative" items of religious apparel while wearing their uniforms.[74] The statute left the details up to the "secretary concerned."[75] The conference report directed the DOD to issue implementing regulations that define "neat and conservative."[76]

The Department of Defense Directive

The DOD implementing directive[77] is not limited to the religious apparel question, but embraces the full range of religious accommodation issues. According to the DOD directive, "requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards or discipline."[78] Thus, the policy presumes accommodation, absent a mission-related reason to deny a request. The directive lays out "goals" and factors that determine whether accommodation is appropriate.[79] The Army adopted these goals in its implementing regulation, *AR 600-20*.[80]

In April 1997, the Department of Defense issued additional interim guidance on the sacramental use of peyote.[81] Native American service members may use, possess, or transport peyote for bona fide traditional religious ceremonial purposes. Peyote use is subject to reasonable limitations to promote military readiness, safety, or to comply with applicable law.[82]

Army Regulation

The Army regulates religious accommodation in two publications: *AR 600-20*,[83] and *Department of the Army Pamphlet (DA Pam) 600-75*.[84] *Army Regulation 600-20* provides:

> The Army places a high value on the rights of its soldiers to observe tenets of their respective religions. It is the Army's policy to approve requests for accommodation of reli-

71. *Hartmann*, 68 F.3d at 983.

72. *Id.* at 985. Specifically, the *Hartmann* court noted:

> [T]he Army has wandered far afield. It stands not in an area where the link to its combat mission is clear, it does not even stand in an area where the link is attenuated but nonetheless discernible (sic). Instead, the link here is far more ephemeral than those found in other cases. First, and most important, it does not necessarily involve the conduct of a member of the armed forces. Instead, in setting the terms of child care for its members, it controls the conduct of people not in the Armed Forces, including spouses and children.

Id.

The concurring opinion in *Hartmann* emphasized that the Supreme Court cases which gave special deference to military regulations, "apply to regulations that directly govern military personnel and their actions. The "regulations in controversy have not been demonstrated to have any direct relationship to . . . military requirements and concerns." *Id.* at 986-87 (Wellford, J., concurring).

73. With the exception of *Korematsu v. United States*, the Supreme Court has been more likely to protect the constitutional rights of civilians from military regulations than to protect the rights of military members. *See* Korematsu v. United States, 323 U.S. 214 (1944) (deferring to military expertise and permitting the internment of American civilians of Japanese descent). *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957) (holding that courts-martial cannot try civilians); Duncan v. Kahanonmoku, 327 U.S. 304 (1946) (dealing with two civilians improperly tried in military tribunals during the Second World War).

74. 10 U.S.C.A. § 774(a), (b) (West 1998). *See generally* Dwight Sullivan, *The Congressional Response To Goldman v. Weinberger*, 121 MIL. L. REV. 125 (1988).

75. 10 U.S.C.A. § 774(c).

76. H.R. CONF. REP. NO. 100-446, at 638 (1987) *cited in* Sullivan, *supra* note 74, at 146-47. The report made clear, however, that "the 'nonuniform' aspect of religious apparel should not be used as the sole basis for determining if an item of religious apparel interferes with military duties except in unique circumstances, such as those involving ceremonial units." *Id.*

77. U.S. DEP'T OF DEFENSE, DIR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICE (3 Feb. 1988) [hereinafter DOD DIR. 1300.17].

78. *Id.* para. C.1.

> gious practices when they will not have an adverse impact on military readiness, unit cohesion, standards, health, safety, or discipline, or otherwise interfere with the performance of the soldier's military duties. However, accommodation of a soldier's religious practices cannot be guaranteed at all times but must depend on military necessity.[85]

The emphasis on operational concerns places the issue primarily in the hands of commanders, not lawyers or chaplains.

Army Regulation 600-20 charges unit commanders with the initial decision to approve or deny requests for accommodation of religious practices.[86] In addition, the regulation introduced the Committee for the Review of the Accommodation of Religious Practices within the U.S. Army (the Committee)[87] as the final arbiter of religious accommodation issues.[88]

Army Regulation 600-20 couples brief descriptions of common types of religious practices with "considerations" to apply when determining whether these practices can be accommodated.[89] Each individual provision reflects the need to balance mission accomplishment with the desire to accommodate. Certain religious practices are more favored than others. For example, worship services "will be accommodated except when precluded by military necessity,"[90] while dietary accommodations are discussed in less mandatory language.[91] A careful review of the regulatory language may provide guidance to a commander or legal adviser on the Army's view of the need to accommodate a specific practice.[92]

The regulation addresses religious dress and appearance. Subject to temporary mission requirements, "soldiers may wear . . . religious apparel, articles, and jewelry that are not visible"

79. *Id.* para. C.2. The pertinent portions of this section include:

> a. Worship services, holy days, and Sabbath observance should be accommodated, except when precluded by military necessity.
> b. The Military Departments should include religious belief as one factor for consideration when granting separate rations, and permit commanders to authorize individuals to provide their own supplemental food rations in a field or "at sea" environment to accommodate their religious beliefs.
> c. The Military Departments should consider religious beliefs as a factor for waiver of immunizations, subject to medical risks to the unit and military requirements, such as alert status and deployment potential.
>
> . . . .
>
> f. Religious items or articles not visible or otherwise apparent may be worn with the uniform, provided they shall not interfere with the performance of the member's military duties . . . or interfere with the proper wearing of any authorized article of the uniform.
> g. Under [10 U.S.C.A. 774], members of the Armed Forces may wear visible items of religious apparel while in uniform, except under circumstances in which an item is not neat and conservative or its wearing shall interfere with the performance of the member's military duties.

Id.

80. *See infra* notes 83-99 and accompanying text.

81. Memorandum, Assistant Secretary of Defense for Force Management Policy, subject: Sacramental Use of Peyote by Native American Service Members (25 Apr. 97). Final guidance will be included in the next revision of *DOD Directive 1300.17.*

82. *Id.*

83. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 5-6 (30 Mar. 88) [hereinafter AR 600-20].

84. U.S. DEP'T OF ARMY, PAM. 600-75, ACCOMMODATING RELIGIOUS PRACTICES (22 Sept. 1993) [hereinafter DA PAM 600-75].

85. AR 600-20, *supra* note 83, para. 5-6.

86. *Id.* para. 5-6f.

87. *Id.* para. 5-6a.

88. The Committee, established by the Deputy Chief of Staff for Personnel (DCSPER), requires each level of command, through the major command commander, to deny a request before the Committee will hear the case. Interview with Major Lindsey Arnold, DCSPER Human Resources Directorate Command Policy Officer, in Charlottesville, Va. (18 Feb. 98) [hereinafter Arnold Interview]. Major Arnold is the primary staff action officer for *AR 600-20*.

By regulation, the Committee provides a recommendation to the commander. AR 600-20, *supra* note 83, para. 5-6a.(2)(b). Committee decisions are final directives. A judge advocate from the Administrative Law Division of the Office of the Judge Advocate General sits on the Committee. Arnold Interview, *supra.*

Department of the Army Pamphlet 600-75 contains the procedural workings of the Committee. DA PAM 600-75, *supra* note 84, chs. 3, 4.

89. AR 600-20, *supra* note 83 , para. 5-6h.

90. *Id.* para. 5-6h(1).

or that would be "authorized for nonreligious reasons."[93] Further, "soldiers may wear an item of religious apparel while wearing the Army uniforms, except when the item would interfere with the performance . . . duties, or when the item is not neat and conservative."[94] The regulation defines "religious apparel"[95] and "neat and conservative" items[96] and also provides factors for determining whether an item "interferes with a soldier's military duties."[97] The regulation allows commanders to prohibit any visible religious items "under unique circumstances" such as "parades, honor or color guards."[98] If the unit commander denies a request for accommodation, any commander in the chain of command "may review and grant" the accommodation. Continued denials lead to a review by the Committee.[99]

Additionally, *DA Pam 600-75*[100] adds gloss to the accommodation analysis by requiring the commander to make a sincerity determination. While "[o]nly sincere religion-based practices will receive consideration,"[101] such "practices are not limited to the mandatory tenets of a religious group," but may be "required by individual conscience or personal piety."[102]

Department of the Army Pamphlet 600-75 provides factors that "promote a standard procedure for resolving difficult questions involving accommodation of religious practices."[103] The pamphlet directs commanders to consider a temporary accommodation or an interim measure, such as alternative duties or alternative duty hours that do not conflict with the soldier's religious practices.[104] The soldier must continue to perform all duties unless he is excused by the commander.[105] Finally, administrative or punitive action may be appropriate in cases of continued conflict.[106]

Accommodating Religious Practice in the Army—Concluding Comments

91. *Id.* para. 5-6h(2). A "soldier with a conflict between the diet provided by the Army and the diet required by the soldier's religious practice may request an exception to policy to ration separately and take personal supplemental rations when in a field/combat environment." *Id.* This language clearly places the burden on the soldier and does not display a strong intent to accommodate.

92. *Id.* para. 5-6h(3). The regulation also contains detailed guidance concerning accommodation of religious medical practices. *Id.*

93. *Id.* para. 5-6h(4)(a).

94. *Id.* para. 5-6h(4)(b).

95. *Id.* para. 5-6h(4)(b)1. "Religious apparel" is defined as articles of clothing worn as part of the observance of the religious faith practiced by the soldier. *Id.*

96. *Id.* para. 5-6h(4)(b)(3). Regarding the wear of religious apparel outside of worship services, the regulation states:

> [N]eat and conservative items of religious apparel are those that are discreet in style and color; do not replace or interfere with the proper wearing of any prescribed article of the uniform; and are not temporarily or permanently affixed or appended to any prescribed article of the uniform.

Id.

97. *Id.* para. 5-6h(4)(b)5. The regulation states:

> Factors in determining whether an item of religious apparel interferes with military duties include, but are not limited to, whether an item may impair the safe and effective operation of weapons, military equipment, or machinery; pose a health or safety hazard to the wearer or others; interfere with the wearing or proper functioning of special or protective clothing or equipment . . .; or otherwise impair the accomplishment of the military mission.

Id.

98. *Id.* para. 5-6h(4)(b)6.

99. *Id.* para. 5-6h(4)(b)7. Soldiers must comply with a commander's prohibition while review is pending. *Id.* para. 5-6h(4)(b)8.

100. DA PAM 600-75, *supra* note 84, para. 1-5 (providing additional guidance in implementing the Army accommodation policy).

101. *Id.* para. 4-1a.

102. *Id.* para. 4-1b. Conscientious objection regulations and case law can shed light on the meaning of a "sincere, religion-based" request. To qualify as a conscientious objector, beliefs need not conform to a traditional view of "religion." Welsh v. United States, 398 U.S. 333, 342-43 (1970). In *Welsh*, only persons whose objection to war "rest[ed] solely upon considerations of policy, pragmatism, or expediency" were not exempt. *Welsh*, 398 U.S. at 342-43.

By regulation, a conscientious objector is "a person who is sincerely opposed, because of religious or deeply held moral or ethical (not political, philosophical, or sociological) beliefs, to participating in war. . . ." U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION, app. D, para. 4-3 (7 Aug. 87) [hereinafter AR 600-43]. The regulation contains "relevant factors that should be considered in determining a person's claim of conscientious objection." AR 600-43, *supra*, para. 1-7a(5)(b). Further, "care must be exercised not to deny the existence of beliefs simply because those beliefs are incompatible with one's own." AR 600-43, *supra*, para. 1-7(5)(c).

For the most part, religious accommodation issues are leadership issues rather than legal ones. The regulations are settled and commanders weigh the facts of each case. Once a commander understands the basic legal premise—accommodate religious practice unless the mission requires otherwise—the commander has great latitude to make a decision. A commander should be able to cogently articulate the basis for his decision, especially a decision to deny an accommodation. A template for making and articulating this decision is contained in the analysis section.

The "Hybrid" Issue: Establishment, Free Exercise and Speech

Individual cases will often implicate both the Free Exercise Clause and the Establishment Clause. For example, an officer may believe that his religion requires him to "witness" to others. He exercises this religious obligation by placing religious quotations on his electronic mail (e-mail) correspondence. In addition, in his e-mails, he "suggests" that his subordinates should attend his church. If his subordinates feel pressure to attend, has the officer improperly "established" religion? Does his right to freely exercise his religion protect the officer? What is the role of freedom of speech in that situation? This expression of religion is a "hybrid" issue, since both religion clauses and free speech apply.

Hartmann v. Stone[107] aptly represents a "hybrid" religion issue, involving the Establishment Clause, the Free Exercise Clause, and freedom of speech concerns. *Hartmann* pitted the child care provider's free exercise and free speech rights against the Army's desire to avoid an Establishment Clause violation.[108] The Army argued that government regulatory oversight and bestowal of benefits would "involve both an advancement of religion and an entanglement with religion."[109] Although the court agreed that avoiding an Establishment Clause violation could be a compelling interest, it found that the providers were "private independent contractors" and not the "Army's alter egos."[110] The Army merely regulated their activities. Therefore, "the relationship between individual FCC providers and the program" did not create "legitimate Establishment Clause concerns."[111]

Hartmann is significant for several reasons. First, the Establishment Clause could, under the proper facts, defeat a free exercise or free speech claim.[112] Second, the free speech and free exercise rights of a civilian, even one linked to the military, are weightier than a military member's rights. Third, the government cannot make out a cogent Establishment Clause violation unless a reasonable observer would perceive that the speaker is acting on behalf of the government. The status of the speaker (in terms of rank and duty position) as well as the nature of the religious comments will be important factors in determining whether the speaker's religious expression violates the Establishment Clause.[113]

Analyzing a Religion Issue

103. DA PAM 600-75, *supra* note 84, para. 4-2. The factors are:

> (1) The importance of military requirements . . .
> (2) The religious importance of the accommodation to the requester.
> (3) The cumulative impact of repeated accommodations of a similar nature.
> (4) Alternative means available to meet the requested accommodation.
> (5) Previous treatment of . . . similar requests.

Id.

104. *Id.* para. 4-2e.

105. *Id.* para. 4-2f.

106. *Id.* para. 4-2g.

107. 68 F.3d 973 (6th Cir. 1995).

108. *Id.* at 979. The Army asserted that avoiding an Establishment Clause violation was an interest sufficiently compelling to overcome the provider's first amendment rights. *Id.*

109. *Id.* at 979-80.

110. *Id.* at 981.

111. *Id.* at 982.

112. *See also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1995).

113. The care providers in *Hartmann* did not represent the government. Further, the care providers were not in a position to apply official pressure or coercion on military members to advance religion. Thus a reasonable observer would not have perceived that the providers actions constituted an official "endorsement" of religion. The appearance that the government is endorsing religion is pivotal to Justice O'Connor's view of the "effect" prong of the *Lemon* test. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

How should a judge advocate analyze a "religion" issue? First, determine which of the three types of religion issues is in question: accommodation/free exercise, establishment of religion, or a hybrid issue. In theory, completely separate analyses apply to either a "pure" free exercise or a "pure" establishment question. This section first discusses how to identify the issue, then provides suggested analyses for each of the three areas.

Identifying the Issue

If the gist of the problem is, "I have a soldier and she wants to do something or not do something because of her professed religious beliefs," this is probably a religious accommodation issue. The most common accommodation problems concern missing duty for a worship service or religious holiday, desiring special foods, or wearing certain items. If the soldier's complaint relates to expressing religious ideas (proselytizing) it may be a hybrid issue.

If a soldier complains that he is being forced to attend a religious event or participate in another person's religious practice, then the judge advocate should look to the Establishment Clause analysis. Extended prayers at ceremonial events and narrowly sectarian prayers may fall into this category. "Too much" of one particular faith group (for instance in a holiday display) should be analyzed under the establishment rubric.

A "hybrid" issue exists, for example, when a religious squad leader says, "you can't tell me to stop 'witnessing.' I have a free speech and free exercise right to discuss religion with my squad members." At the same time, one of the squad members says, "I'm tired of getting all this 'save your soul' stuff thrown at me in formation by my squad leader."

Approaching a Religious Accommodation Issue

The following is a systematic approach for resolving a religious accommodation problem:

> Resolve at the lowest possible level—presume accommodation.
>
> If immediate accommodation is not appropriate, consider interim measures.
>
> Apply the three preliminary criteria: sincerity, religion-based, impact on mission.
>
> Balancing test—"common sense plus." What type of accommodation is requested? Is there prior precedent (in the command? in the Army?). Apply the regulatory factors and other relevant factors. Analogize to non-religion scenarios.
>
> Be able to articulate your reasoning, and keep a record.

Resolve at the Lowest Possible Level—Presume Accommodation

From a leadership standpoint, the best place to resolve a free exercise of religion issue is at the unit level. A company commander, who is informed by senior noncommissioned officers, has the most insight about the soldier, the unit's mission, and the command climate. *Army Regulation 600-20* supports taking action at the lowest level, charging unit commanders with the initial decision.[114] At the initial stage, the commander should be generally aware of the considerations discussed in the succeeding subsections. Most importantly, unit commanders should be reminded that the policy is to accede to a soldier's religious practice desires unless the mission or good order and discipline would suffer. If the commander is inclined to deny the request, the commander should consult with the judge advocate, the unit chaplain, or the next higher commander. Finally, the commander should inform the soldier of the soldier's right under Army regulations to raise the issue to the next level (and all the way up to the Committee). The commander should not discourage the soldier from pursuing other lawful avenues such as the next level commander, chaplain, legal assistance, inspector general, or a congressional.

The requesting soldier should consult with a chaplain. Although the regulation does not require participation by a chaplain, the chaplain may be influential with the chain of command. Further, a soldier would be entitled to legal assistance support.[115] If a soldier considers disobeying a commander's order (despite the clear regulatory guidance that the soldier must comply), the soldier should seek legal guidance. If a soldier wishes to draft a formal request for accommodation, the soldier is also entitled to legal assistance support.

If Immediate Accommodation is not Appropriate, Consider Interim Measures

Unless accommodation would have an immediate and serious negative impact on the unit, the commander should offer an interim solution.[116] The temporary "fix" should accommodate

114. *See supra* note 86 and accompanying text.

115. *See* U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6g (10 Sept. 1995). This would be a "military administrative" matter. *Id.*

116. *See supra* note 104 and accompanying text.

or partially accommodate the soldier's needs. The practical advantages of a quick fix include the appearance of (and being) fair, avoiding the discomfort of being "overruled" by one's superiors, and providing time for the commander to cool off.

For instance, a soldier requests kosher food for training exercises and deployments. At the time of the request, the unit is forty-eight hours away from a two-week field training exercise (FTX) at the local training area. Additionally, in three months the unit expects to deploy for a six-month rotation in Bosnia. The commander does not know anything about procuring special meals. An interim solution might allow the soldier to bring his own food to the FTX. If practicable, the commander could assist in the transportation and storage of the food in the field. The commander should inform the soldier that the solution is temporary and does not ensure that the request can be honored during the Bosnia deployment.

Apply the Three Preliminary Criteria: Sincerity, Religion-Based, Impact on the Mission

A soldier's request must be sincere and have a "religious" grounding. A soldier who is transparently trying to "get over" does not enjoy the protections of the religious accommodation policy. On the other hand, commanders must not doubt a soldier's credibility simply due to the unusualness of the request or of the soldier's beliefs. If the soldier held mainstream religious values, the system probably would have taken care of the problem; for example, absent exigent circumstances most soldiers do not have duty on Christmas Eve or Easter Sunday. The conscientious objection regulation may prove helpful in this area.[117]

If the soldier's request will have an impact on either the mission or on good order and discipline, then the commander can consider denying the request. The command can consider tangible effects (readiness, safety, and security) as well as command climate effects (resentment, cohesion). The need for uniformity is also a valid consideration.[118]

Balancing Test

The heart of the accommodation analysis involves balancing the needs of the mission with the desires of the soldier. *Army Regulation 600-20* provides differing "tests" for the different types of accommodation requests—clothing, food, missing duty, and medical.[119] In addition to consulting the specific subsection of *AR 600-20*,[120] the judge advocate and the commander should investigate whether prior precedent exists. The unit or installation chaplain is likely to be aware of other local cases. Similar cases should be treated similarly. In addition, although the Committee's decisions are not binding precedent on other cases, they should be considered persuasive (particularly if a Committee decision dovetails with the command's desired result). If the action reaches the division or corps level, a call to the Administrative Law Division of the Office of The Judge Advocate General may be appropriate.

If the question is one of first impression, then the commander must balance the competing interests.[121] Beyond operational considerations (safety, security, good order, and morale) that are dictated by regulation or policy, two other factors are worth considering. First, a commander should understand that a religion issue could become a public affairs nightmare.[122] Further, as with an Article 138 complaint,[123] a religious accommodation request that is denied gets high visibility. Every level of the chain of command through the major command must review a denied request before it goes to the Committee at the office of the Deputy Chief of Staff for Personnel.

In addition to weighing factors from the regulations, a commander should step back and weigh a soldier's request in the context of other sincere, but non-religious, motivations. Sports competitions provide a useful analogy. For example, Specialist *A* asks to miss two days of a field exercise for a religious holiday. Specialist *B*, a semi-professional weight lifter, asks to miss two days of the exercise to attend a once-a-year lifting competition for his weight/age class. Second Lieutenant *C*, a recent commissionee and college football star, is offered the chance to attend the Buffalo Bills' try-out camp. Whether *A*'s spiritual needs are more or less weighty than *B* and *C*'s desire for athletic glory is the commander's decision.

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117. *See supra* note 102 and accompanying text.

118. Although Congress overruled the Court's specific factual decision in *Goldman*, the Court's policy determination that "uniformity" enhances good order and discipline is still valid. The Committee puts great credence in the "uniformity" rationale. Arnold Interview, *supra* note 88.

119. *See supra* notes 90-92 and accompanying text.

120. AR 600-20, *supra* note 83, para. 5-6h.

121. AR 600-20, *supra* note 83; DA PAM 600-75, *supra* note 84.

122. *See, e.g.*, Bryant Jordan, *Going To The Chapel / Non-Christian Recruits Complain of Bias And Insensitivity*, AIR FORCE TIMES, Mar. 3, 1997, at 12 (discussing complaints of religious insensitivity on the front page of the *Air Force Times*); *Muslim Woman Fights U.S. Army over Scarf*, THE PLAIN DEALER (Cleveland, Ohio), July 23, 1996 at 2E; *Muslim Army Woman Is Charged Over Scarf*, NEWSDAY, June 7, 1996, at A36; *Muslim Soldier Charged Over Traditional Garb*, THE RECORD (Bergen County, N.J.), June 7, 1996, at A21; James Brooke, *The Military Ends Conflict of Career and Religion*, N.Y. TIMES, May 7, 1997, at A16.

123. 10 U.S.C.A. § 938 (West 1998); *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 20 (24 June 96).

Is a religious aversion to pork more or less weighty than a minor allergic reaction to pork? Which is an acceptable justification for wearing long sleeves in 100 degree heat—the religious need for modesty or the corps surgeon's warning of a one-percent chance of getting Lyme's Disease from a deer tick? That is also the commander's decision.

Be Able to Articulate Reasoning and Keep a Record

Whatever a commander decides, the commander should be able to articulate the relevant concerns. The commander should keep a record so future cases will be treated similarly. In addition, if the commander denies the request, the request will probably go up the commander's chain.

Analyzing an Establishment Clause Problem

Establishment Clause issues, however, present more of a legal challenge. No specific regulation identifies an "Establishment Clause" issue. Further, these issues do not fall into a single, discernible category. The Establishment Clause could turn on an individual incident (the commander ordered his senior noncommissioned officers to attend a prayer breakfast) or could be a policy decision (for example, every year a crèche is set up on the division headquarters lawn). These questions frequently spill over into hybrid issues (discussed in the next section). This section will address four common problem areas: Is participation in religious activities completely voluntary? Is the religious program pluralistic? Does the program support the right persons? What is the role of prayer at military ceremonies? One theme pervades each area: government funding of religion is justified by the need to vindicate soldiers' rights to exercise religion freely.

Voluntary

A soldier must not be coerced to profess a religious belief or to attend a religious event (aside from providing logistical support). Subtle coercion or indirect rewards are the problems that a judge advocate is most likely to encounter. For example, a first sergeant should not regularly give soldiers the "choice" of participating in Sunday morning clean-up details or attending church.[124] Non-belief or non-participation should not result in punishment.

Military leaders (including chaplains) should not take an overly *proactive* approach to garnering attendees for religious events. In essence, the command should be *reactive*—responding to the free exercise needs of soldiers, without pushing them into religious activities. While "mentoring" relationships are an important component of leadership, commanders must be cautious about encouraging their immediate subordinates to participate with the commander in religious events. For example, at a battalion staff meeting, the battalion commander encourages her subordinate commanders to attend her church. When two of the four company commanders attend, they talk "shop" over coffee at the gathering after services. The other commanders complain they are being left out because they do not attend the church. They consider attending to get "face time" with the commander. In this case, the improper "establishment" of religion compounds questions concerning appropriate senior-subordinate relationships.[125]

Military chaplains, in particular, must be cautious. Clearly, military chaplains should not attempt to proselytize soldiers.[126] One reason chaplains "hold rank without command" is to eliminate the formal authority of chaplains to coerce religious participation.[127]

Pluralistic

The chaplain program strives to support all religious groups while reaching as many soldiers as possible. Majority groups will have more resources dedicated to them,[128] but other groups should not be excluded.[129] Holiday displays should strive to be

124. Apparently this choice was presented to airmen in basic training at Lackland Air Force Base. *See* Bryant Jordan, *Going To The Chapel/Non-Christian Recruits Complain of Bias and Insensitivity,* AIR FORCE TIMES, Mar. 3, 1997, at 12.

125. *See generally* AR 600-20, *supra* note 83, para. 4-14.

126. At least one civilian case reflected this idea. *See* Carter v. Broadlawns Medical Ctr., 857 F.2d 448 (8th Cir. 1988). The Eighth Circuit upheld the use of a Christian pastor as a state paid hospital chaplain-counselor. This practice did not have the primary effect of advancing religion because the chaplain "avoided proselytization" and was primarily a counselor with the versatility and training needed to help people of all religious backgrounds as well as those with no religious background at all. *Carter*, 857 F.2d at 455.

127. *See* Rigdon v. Perry, 962 F. Supp. 150 (D.D.C. 1997) (challenging military regulations that purportedly prohibited military chaplains from encouraging their congregants to contact Congress on pending legislation). Judge Stanley Sporkin, found that "when chaplains are conducting worship, . . . they are acting in their religious capacity, not as representatives of the military, or . . . under color of military authority." *Id.* at 160. More broadly, the *Rigdon* opinion suggested that "military chaplains cannot give orders and have no official authority." *Id*. at 157.

The current *AR 165-1* provides: "[I]n performing their duties, chaplains do not exercise command, but exercise staff supervision and functional direction of religious support personnel and activities." AR 165-1, *supra* note 40, para. 4.3a.

128. *See supra* notes 49-50 and accompanying text.

reasonably inclusive.[130] In addition, chaplains are charged with providing services to all soldiers, regardless of a soldier's denomination. If a particular chaplain cannot provide a needed service, the chaplain must find someone qualified to provide the service.[131]

Right Persons Supported

Religious programs must be directed to military members. The constitutional rationales that justify the chaplaincy do not allow religious support to local civilian communities.[132] Although civilians who are unaffiliated with the military may attend religious programs on-post, the majority of attendees will be active duty military members and their families.[133]

Military and Patriotic Ceremonies

Army Regulation 165-1 allows invocations, prayers, and benedictions at military and patriotic ceremonies. However, "military and patriotic ceremonies . . . will not be conducted . . . as religious services."[134] The Army chaplaincy apparently does not have written rules that govern prayer at non-religious ceremonies. Guidance is passed on through informal training and observation.[135] Prayers at ceremonies should be relatively short and non-denominational. These prayers should not reference divinity by any sectarian name (Jesus, Allah) but rather use "generic" terms (Father, Almighty, Source of Goodness).

Commanders should let chaplains give invocations and benedictions. Chaplains are the experts and are the most likely to use the appropriate language. In addition, a soldier is less likely to feel "pressured" by a chaplain than by a line officer who is giving a prayer. If an event is not large enough to merit attendance of a chaplain (for example, a staff meeting), then a prayer is probably not appropriate.

Analyzing a Religious Hybrid Issue—The Expression of Religion

The first step in analyzing a hybrid expression of religion question is to determine if the person who is expressing religion is superior in rank to those affected.

Military Superior

If a battalion commander recites a sectarian prayer at a staff meeting or a division commander orders a religious symbol to be placed on the lawn of the headquarters building, they are expressing religion in ways likely to affect their subordinates. In these cases, the expression of religion would be improper if it violated either of two standards. First, the reasonable listener should not feel coerced to participate in the religious activity. This issue is similar to the "voluntariness" analysis discussed earlier. Second, the reasonable observer should not perceive the "government" or the command as "endorsing" religion. Statements made and actions taken in an official capacity have the greatest likelihood of suggesting official endorsement of religion. Freedom of expression does not "save" speech that clearly endorses a distinctive faith group.

A more subtle issue is generic support for religion or for religious programming. For example, a division commander encourages attendance at the upcoming prayer breakfast. Is he

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129. *See* Kaplan, *supra* note 6, at 1230-32 (emphasizing the importance of even-handed treatment).

130. Civilian case law regarding holiday displays is also instructive. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding a city-owned Christmas display which included a crèche as well as other non-religious objects because it did not have the primary purpose of advancing religion). *But see* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (finding a display unconstitutionally endorsed religion because it contained only a crèche, which displayed a religious passage).

131. Telephone Interview with Lieutenant Colonel Leinwand, Chief, Training Directorate, U.S. Army Chaplain's School (12 Feb. 98) [hereinafter Leinwand Interview].

132. *See supra* note .

133. The free exercise rationale does not seem to justify providing support to retirees. An expenditure of funds aimed at the civilian community (advertising in non-military papers, for instance) would appear to violate the Establishment Clause.

134. AR 165-1, *supra* note 40, para. 4-4h. *See supra* note 45 and accompanying text.

I think some prayers at non-religious ceremonies that require mandatory attendance is constitutionally suspect. The military would have a particularly challenging task defending prayers at Department of Defense elementary, middle and high school graduations. Neither the free exercise rationale nor Congress' War Powers would seem to rebut the Supreme Court's insistence that a faculty sanctioned prayer at a public school graduation is unconstitutional. Lee v. Weisman, 505 U.S. 577 (1992) (nonsectarian prayer at middle school graduation, where attendance was, for practical purposes, obligatory, found unconstitutional).

On the other hand, the Supreme Court has condoned prayers opening state legislative sessions. Marsh v. Chambers, 463 U.S. 783 (1983) (historical prevalence of legislative prayers validated the modern practice).

The question then arises, are military members more like middle school students or state legislators?

135. Arnold Interview, *supra* note 88, Leinwand Interview, *supra* note 131.

improperly "endorsing" or "establishing" religion or simply showing support for a mission-related appropriated fund program? A judge advocate might look to private organization regulations concerning voluntary membership,[136] inducements,[137] and endorsement[138] to get a flavor of an appropriate "hands-off" posture.

Peers or Civilians

If the person who is expressing a religious opinion is not superior to those affected, then the issue boils down to a question of free speech. For example, a specialist is proselytizing several of his peers, including his roommate. In this case, the "endorsement" concern is not present—the specialist does not speak for the government. The listeners will not perceive command pressure or command endorsement. The commander has the inherent authority to prohibit speech "he perceives to be a clear danger to the loyalty, discipline, or morale of troops . . . under his command."[139] The religious soldier cannot use the Free Exercise Clause as a sword to protect his comments if they have a disruptive effect on the unit.[140] Nor should the command use the Establishment Clause to restrict religious comments, aside from their effect on morale and cohesion. Comments by chaplains should be analyzed in this manner. Only in unusual circumstances would a chaplain's religious comments constitute a danger to loyalty or discipline. Civilian religious speech[141] on a military installation would also be subject to military free speech rules.[142]

Conclusion—Applying the Analysis

Returning to the scenarios in the introduction, the female soldier's request to wear a khimar in the finance office is a pure free exercise/accommodation question. The commander has discretion to grant or deny the request. The Deputy Chief of Staff for Personnel Committee has considered the khimar issue, supporting a command denial of the request.[143] Uniformity, and the impact of non-uniformity on morale and cohesion, are valid bases for denying the request, although arguing safety in the finance office would be a stretch. The Army, however, has no mandatory rule so a commander is free to grant the request.

The praying battalion commander is violating the Constitution. In this hybrid case, the commander violates one of the touchstones of establishment clause analysis—voluntary participation. The subordinate commanders do not attend the staff meeting voluntarily and should not be subjected to a religious experience. The staff meeting is not a military or patriotic ceremony in which regulation permits prayer. A reasonable observer may believe that the battalion commander is "endorsing" religion on behalf of the command. "Personal" comments cannot logically be separated from official comments at a staff meeting. At a minimum, subordinate commanders would feel pressure to join their boss in prayer.

Commands should strive to set up reasonably inclusive holiday displays.[144] While few bright line rules exist in this area, a display that celebrates the "holiday season," without an explicitly "religious" outlook is least likely to offend individuals or constitutional principles.

Finally, the commander should treat the preaching roommate just like any other potential morale problem that stems from a soldier's unpopular comments. The subject matter, religion, should neither insulate nor condemn the zealous soldier. In this scenario, as in many religion issues, leadership concerns are primary and legal requirements are secondary. If the commander believes that the religious diatribes have a negative impact on the unit, the commander can order the soldier to stop preaching.

Religion can be a controversial matter. This article has provided a legal framework for judge advocates to use to ensure that their commands neither improperly restrict the free exercise of religion, nor unconstitutionally establish religion.

136. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 210-1, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS, para. 2-5d (14 Sept. 1990).

137. *See, e.g.*, AR 600-20, *supra* note 83, para. 4-11a.

138. U.S. DEP'T OF DEFENSE, DIR. 5500.7R, JOINT ETHICS REGULATION para. 3-209 (C3, 12 Dec. 1997).

139. Brown v. Glines, 444 U.S. 348, 353 (1979). *See* Parker v. Levy, 417 U.S. 733 (1974).

140. Religious groups may try to use religion as a sword to trump other important values. In the past, some religious groups have requested to purchase, use, or display "religious" literature that was anti-Semitic, anti-Catholic or degrading to women. As a command/leadership matter, commanders should deny requests for this type of literature. Leinwand Interview, *supra* note 131. Neither free speech, nor free exercise rights override the commander's obligation to maintain good order and discipline and to effectuate army equal opportunity values.

141. Supervising Department of the Army civilians may be treated like military superiors.

142. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (limiting civilian political speech on a military reservation).

143. Arnold Interview, *supra* note 88. *See*, Karen Jowers, *Army: No Head Scarves with Uniform/Muslim Soldier's Appeal Denied*, ARMY TIMES, Sept. 16, 1996, at 7.

144. See *supra* notes 130-131 and accompanying text.

Disposing of a Deceased Soldier's Personal Effects

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Introduction

Federal statutes and Army regulations prescribe how commanders shall account for, and dispose of, the personal effects of soldiers who die on active duty. When commanders deviate from the rules and improvise, they can create problematic situations. A proactive judge advocate can prevent these problems by teaching commanders the rules before they face the crisis of a soldier's death.

This article summarizes the information that judge advocates must know to advise commanders accurately. First, the article explains the duties of the installation commander's representative. These duties include collection of personal effects, withdrawing certain types of effects, and delivery of the personal effects. Next, this article explains when a summary court-martial should be appointed, and explains the mandatory and discretionary duties of the summary court-martial. Finally, this article addresses some contentious issues that may arise when disposing of a deceased soldier's personal effects.

Overview

A federal statute[1] imposes upon commanders the duty to collect and inventory personal effects of deceased soldiers, and to ship them at government expense to specific persons identified in the statute.[2] When necessary, commanders will appoint officers as summary courts-martial (SCMs) to complete these tasks. Commanders, SCMs, or other appointed individuals who dispose of a soldier's effects under the statute are not acting as executors or administrators of the soldier's estate. They do not transfer title or ownership of the effects to the persons who receive them. Rather, they merely transfer custody of the property to facilitate distribution of the soldier's estate.[3]

The Army explains the command's obligations in two publications: *Army Regulation (AR) 638-2*[4] and *AR 600-8-1*.[5] Judge advocates should consider these sources when interpreting the federal statute. Where the Army regulations provide imprecise or inaccurate guidance, judge advocates should rely on the clear-cut provisions of the federal statute.

The Commander's Duties

When a soldier dies while on active duty, the installation commander, or his designated representative, must collect and inventory the deceased's personal effects left on the installation. He must then withdraw certain items and arrange for delivery of the remaining effects to the appropriate "person eligible to receive effects" (PERE).[6] The deceased soldier's unit commander will typically act as the installation commander's representative, absent instructions to the contrary.[7] The unit commander may delegate the task to a first sergeant, platoon leader, or platoon sergeant, but will bear overall responsibility for seeing that the delegate completes the task.

Collection

As soon as possible after the soldier dies, the installation commander's representative must collect and secure the deceased's personal effects.[8] Personal effects are essentially any personal property that the deceased owned when he died, including cash, negotiable instruments, jewelry, clothing, ste-

1. 10 U.S.C.A. § 4712 (West 1998).

2. *Id*. § 4712(a)-(b), (d). Command authority to collect and deliver personal effects extends only to "effects of the deceased that are . . . in camp or quarters" after the soldier dies. *Id*. § 4712(a)-(b).

3. U.S. DEP'T OF ARMY, REG. 638-2, DECEASED PERSONNEL: CARE AND DISPOSITION OF REMAINS AND DISPOSITION OF PERSONAL EFFECTS, paras. 17-7, 17-8 (9 Feb. 1996) [hereinafter AR 638-2].

4. *See id.* chs. 17-18.

5. U.S. DEP'T OF ARMY, REG. 600-8-1, PERSONAL AFFAIRS: ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE, app. S (20 Oct. 1994) [hereinafter AR 600-8-1]. Judge advocates should take care to use the current issue of *AR 600-8-1*, and not the identically numbered regulation that the Army published in 1986. *See* U.S. DEP'T OF ARMY, REG. 600-8-1, PERSONNEL—GENERAL: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986). The current *AR 600-8-1* and *AR 638-2* superseded the portions of the 1986 publication that dealt with disposition of personal effects.

6. AR 638-2, *supra* note 3, para. 18-1a. For a detailed explanation of precedence among PEREs, *see infra* notes 39-56 and accompanying text.

7. An installation commander should not specifically designate a representative other than the unit commander, because most or all of the soldier's personal effects will be located in the unit's buildings.

reo equipment, and automobiles.[9] Collecting the effects quickly is particularly important if the deceased shared a barracks room with another soldier. The PERE may later claim that the roommate pilfered valuables that the command should have delivered to the PERE. The command will have a hard time refuting the claim if it fails to establish accountability quickly.

The representative must collect and secure effects located only in areas under military control.[10] Thus, he need not—and may not—retrieve property from a soldier's off-post apartment. The representative also need not recover property from the PERE. Accordingly, the representative would not try to recover effects from on-post family quarters.[11] Within these limitations, however, the representative's search for effects must be thorough. At a minimum, the representative should check the deceased's work area for personal effects. If the decedent lived in the barracks, the representative should also check the barracks room, the hold-baggage storage room, and the common areas.[12] The representative should ask the deceased's friends whether he had property in other locations—for example, the deceased might have left tools or other property at the post auto shop.

Occasionally, a soldier will die while moving from one unit to another on the same installation. When this happens, the representative should ensure that the deceased left no property in his former unit. Although the losing commander may attend to this, the representative must make sure that the losing command does not overlook any personal effects.

Once the representative has assembled all the effects, he must inventory them. *Army Regulation 638-2* requires that the representative "record all items of effects sent to the [PERE]" on *Department of Army (DA) Form 54-R.*[13] The representative must list valuable items, such as cameras, watches, video and stereo equipment, and jewelry in block 8 of the form.[14] The representative must also list in block 8 any important documents and credit cards he found among the deceased's effects.[15] Finally, the representative must list in block 9 any funds and negotiable instruments he recovered, and state how he disposed of them.[16] The representative will not include in this inventory any items he has withdrawn from the personal effects.[17]

Withdrawing Certain Items

Army Regulation 638-2 requires that the representative withdraw from the deceased's effects any military property the deceased possessed when he died; any gruesome, obscene, or obnoxious items that would embarrass or sadden the deceased's family or friends if delivered to the PERE; any items of no monetary or sentimental value; any items that could damage other effects; and any items that postal or customs regulations prohibit the representative from shipping.[18] The representative must also screen opened mail, papers, photographs, video

8. AR 638-2, *supra* note 3, para. 18-1a.

9. *See id*. glossary, at 117 (defining "effects"); *see also* AR 600-8-1, *supra* note 5, app. S, para. S-1a (stating that personal effects include all personal property of the deceased). "Effects" include those personal items that are normally with the person, such as watches, rings, jewelry, wallets containing personal papers, pictures, and money. Personal effects also include household goods and automobiles. *See id.* A deceased's effects may include a house trailer or mobile home and its contents, but will not include other types of trailers, tractors, large commercial trucks or busses, or airplanes. *See id*.

10. *See* AR 638-2, *supra* note 3, para. 18-1a (directing the installation commander or representative to collect and safeguard effects located in camp or quarters); *cf. id*. para. 17-9 (noting that a summary court-martial may collect only those effects "found in places under Army jurisdiction and control").

11. *Cf*. AR 600-8-1, *supra* note 5, app. S, para. S-1a (noting that a PERE who is present at the place of death will normally possess all of the deceased's effects, except for items found on the remains and items located in the unit area). *See id*. "Under those circumstances, the items *not already in possession* of the [next of kin (NOK)] will be inventoried by the deceased's commander, or his representative, and delivered to the NOK." *Id*. (emphasis added).

12. Unit commanders sometimes assume that soldiers keep all of their property in their barracks rooms. When these commanders act as representatives or SCMs, this assumption can have tragic consequences. Consider the example of dealing with a mother whose son—an initial entry trainee—had committed suicide. She was convinced that the SCM had not returned all of her son's effects, and named as missing specific items that she knew her son had possessed when he died. The company commander swore he had turned over all of the deceased soldier's effects to the SCM. Five months after the mother gave up in disgust, a platoon sergeant found a large, unmarked carton in the barracks storage room. The carton contained the property of several soldiers. It also held most of the effects that the mother had identified as missing.

13. AR 638-2, *supra* note 3, para. 18-1a(2); *see also id*. para. 18-2a (describing the procedures that the commander or representative must follow when filling out the inventory form). *See generally* U.S. Dep't of Army, DA Form 54-R, Record of Personal Effects (Jan. 1994). A copy of DA Form 54-R for local reproduction is located in *AR 638-2*. *See id*. para. 18-1(a)(1).

14. AR 638-2, *supra* note 3, para. 18-2a(1). The representative must identify electronic items, such as televisions and videocassette recorders, by serial number. *Id*. He must describe jewelry by color of metal (not metal content), by the presence and color of stones, if any, and by any inscriptions appearing on each item. *Id.*

15. *Id*. para. 18-2a(2)-(3). Important documents include, but are not limited to, wills, marriage licenses, divorce decrees, adoption certificates, powers of attorney, and titles to motor vehicles. *See id*. para. 18-2a(2).

16. *Id*. para. 18-2c. The SCM also follows these rules. *See id*. para. 17-17c.

17. *Id*. para. 18-2b. *See generally infra* notes 18-22 and accompanying text.

tapes, and similar media for suitability, and must process and screen exposed film.[19]

The representative has discretionary authority to withdraw offensive items; however, the representative must exercise his discretion carefully.[20] The command ultimately will destroy most, if not all, of the items that he withdraws.[21] This may prove more distressing to the deceased's family or friends than receiving the items might have been.[22]

The representative must prepare a detailed list of all of the items that he withdraws.[23] The list can describe each item in sufficient detail to allow the command to identify the item. The list can also explain briefly why the representative withdrew each item, and must state what the representative did with each item.[24]

Delivering the Effects

The representative may deliver the deceased soldier's effects, less withdrawn items, directly to the soldier's surviving spouse or legal representative, if either is present at or near the installation.[25] Alternatively, if the surviving spouse will receive the effects, the designated casualty assistance officer may deliver the effects and obtain the spouse's signature for them.[26]

18. AR 638-2, *supra* note 3, para. 18-1a(3) (incorporating by reference *AR 638-2* para. 17-11). Government property includes organizational uniforms and TA-50. *Id*. para. 17-11a. It does not include the decedent's personal military clothing. *Id*. para. 17-11b. "Gruesome" items include burned, soiled, or bloodstained clothing or similar items. *See id*. para. 17-11c. For example, a representative should withdraw from a soldier's effects the cracked helmet and shredded and bloody shorts, T-shirt, and running shoes that the soldier wore when he died in a high-speed motorcycle crash. The representative must launder all clothing, whether gruesome or not, but must withhold any items he cannot make presentable. *See id*. para. 17-11d. "Obscene" items include pornography, as well as opened personal correspondence, photos, and videos revealing the decedent's involvement in "inappropriate personal relationships or activities." *Id*. paras. 17-11c, 17-18. The regulation does not define obnoxious items, but these could include racist literature and drug paraphernalia. Items of no monetary or sentimental value include opened food items, such as a partially consumed jar of peanut butter, used personal hygiene items, such as old toothbrushes and partially expended bottles of shampoo. *Id*. para. 17-11f. Items that could damage other effects include shoe dye, lighter fluid, and leaky batteries. *See id*. Items prohibited by customs and postal regulations include bottles and cans containing alcoholic beverages and some privately owned weapons and ammunition. *See id*. para. 17-11h.

19. *Id*. para. 17-11e. The regulation expressly states that the SCM must only screen these items. *See id*. This screening, however, is an unavoidable prerequisite to withdrawing offensive items—a task the regulation specifically directs the representative to perform. *See id*. para. 18-1a(3).

20. *See id*. paras. 17-18, 18-1a(3).

21. *See id*. para. 17-18. *See generally infra* note 35 and accompanying text.

22. For example, in one case the author was involved with a commander who wanted to withdraw from a soldier's effects a number of books, notebooks and drawings that related to the soldier's involvement in the role-playing game "Dungeons and Dragons." Because the commander associated this game with satanic worship, he feared that including these items with the soldier's other property would offend the soldier's parents. He later learned, however, that the parents already knew their son had played the game. They had actually given their son some of the books that the commander wanted to withhold—and they wanted them back. Ultimately, the commander did not withdraw the items.

23. *See* AR 638-2, *supra* note 3, para. 7-11i ("A list will be made of all prohibited items [sic] withdrawn and their disposition.").

24. *Army Regulation 638-2* does not require the representative to describe the items or to explain his reasons for withdrawing them. Nevertheless, these are sensible precautions. Should the PERE later question the command about the missing items, the detailed information will help the command—and the representative—frame a reasonable response.

25. *See* 10 U.S.C.A. § 4712(a) (West 1998) (stating that "the commanding officer of the place or command shall permit the legal representative or surviving spouse of the deceased, if present, to take possession of the effects"); *cf*. AR 638-2, *supra* note 3, para. 17-3a (requiring appointment of a SCM only "when the surviving spouse or legal representative is not present to take possession of the personal effects [of the] deceased soldier"). Unfortunately, the guidance that *AR 638-2* offers is, overall, confusing and contradictory. The regulation also directs the installation commander or representative to deliver effects to "the PERE [if that person] is present at the installation where [the] effects are located." AR 638-2, *supra* note 3, para. 18-1a(4) (emphasis added). If the soldier died unmarried, and has no legal representative, the person eligible to receive his effects might be the soldier's father, mother, or sibling. *See* 10 U.S.C.A. § 4712(b); AR 638-2, *supra* note 3, para. 17-10a. The federal statute confers no authority on the commander's representative to deliver the effects directly to these individuals. The command should interpret and execute the regulation in a manner consistent with the statute. Thus, only the spouse and legal representative can take the effects directly from the commander's representative.

The regulation's use of the term "legal representative" is similarly confusing. The regulations preceding *AR 638-2* identified the legal representative as "[a]n administrator or executor of a decedent's estate who has been duly appointed or approved by an appropriate court, *or an individual authorized by power of attorney to act in behalf of the person to receive the person's effects.*" U.S. DEP'T OF ARMY, REG. 600-8-1, PERSONNEL—GENERAL: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS, glossary, at 193 (18 Sept. 1986) (emphasis added); U.S. DEP'T OF ARMY, PAM. 643-50, PERSONAL PROPERTY: DISPOSITION OF PERSONAL EFFECTS OUTSIDE COMBAT AREAS, para. 2d (13 Oct. 1965) (emphasis added). This definition conflicts with the Army's current interpretation of the federal statute. 10 U.S.C.A. § 4712. *See* AR 638-2, *supra* note 3, para. 17-10a(1)(a) ("An individual to whom the deceased . . . person gave a power of attorney is not a legal representative within the meanings of the statute and regulation, and has no rights to delivery of personal effects.") This language appears plain enough. Regrettably, *AR 638-2* also includes in its glossary the Army's old definition of legal representative. *See id*. glossary at 117. A commander's representative who relies on old standard operating procedures (SOPs) and the current glossary definition may deliver a decedent's effects to a mere attorney-in-fact, in violation of express Army policy.

Judge advocates can prevent most misunderstandings that could result from these regulatory vagaries by periodically teaching commanders the correct rules for disposing of effects. They should also review SOPs and letters of instruction to ensure that old regulations are not used.

The spouse or legal representative may arrange with the installation travel office to have the effects shipped to a particular destination at government expense. He may do this before or after the commander's representative delivers the effects to the PERE.[27]

Duties of the Summary Court-Martial

If the soldier died without a spouse or legal representative, or if neither the spouse nor the legal representative is present, a commander with summary court-martial convening authority (SCMCA) over the soldier's unit will appoint an SCM to arrange delivery of the personal effects to the PERE.[28] If the soldier died leaving personal effects at two or more locations, an SCMCA at each location will appoint an SCM to care for the personal effects.[29] The SCM appointed by the SCMCA for the soldier's unit of assignment will bear primary responsibility for all the personal effects.[30]

The SCM's mandatory duties consist of collecting and safeguarding the effects, determining the PERE, and delivering or shipping the effects to the PERE.[31] The SCM's discretionary duties are the collection and payment of local debts.[32]

26. *See* AR 600-8-1, *supra* note 5, app. S, para. S-1a (describing in detail the procedures for shipping a deceased soldier's effects to a particular destination at government expense). Unfortunately, *AR 600-8-1* suffers from imprecise language similar to that which undermines *AR 638-2*. *Army Regulation 600-8-1*, appendix S authorizes the command to ship a deceased's effects to the place directed by the NOK—not the PERE. The two terms are not synonymous. The friend of a deceased soldier named as the executor of his estate is the decedent's legal representative. He thus may be the PERE. *See* AR 638-2, *supra* note 3, para. 17-10a(1)(a). The friend is *not* the deceased soldier's NOK. *See* AR 600-8-1, *supra* note 5, para. 4-1 (defining the NOK in terms of an individual's familial relationship with the deceased). Of the two regulations, *AR 638-2* complies more closely with the governing statute. *See* 10 U.S.C.A. § 4712(d) (naming the decedent's *legal representative*, along with the spouse, as the person most entitled to receive shipment of the decedent's effects at government expense).

27. *See* AR 638-2, *supra* note 3, para. 18-3 ("If the PERE is present, the commander . . . or a designated representative will deliver the effects in person . . . . [Alternatively, at the PERE's request] he . . . will arrange for packing and shipment of effects at government expense . . . ."); *see also* AR 600-8-1, app. S, para. S-2b (implying that the casualty assistance officer will help the NOK arrange shipping of effects after the NOK receives them from the command).

28. AR 638-2, *supra* note 3, para. 17-3a. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M 1301(a) (1996) [hereinafter MCM]. The appointing officer will typically be the deceased soldier's former battalion commander. *Cf.* MCM, *supra*, R.C.M. 1301(a). The individual serving as SCM must be a commissioned officer. AR 638-2, *supra* note 3, para. 17-4; *see* MCM, *supra*, R.C.M. 1301(a). Rule for Courts-Martial 1301 states that "[w]henever practicable" this officer should hold the rank of captain or higher. MCM, *supra*, R.C.M. 1301(a). The frequency with which first and second lieutenants serve as SCMs to dispose of a deceased soldiers' personal effects suggests that commanders rarely find that appointing a higher ranking officer for this duty is "practicable."

29. AR 638-2, *supra* note 3, para. 17-3b.

30. *Id.*

31. *Id*. para. 17-6.

32. *Id.*

Collection

The SCM's duty to collect, inventory, and safeguard the deceased's personal effects is essentially identical to that of the installation commander's representative. If the representative has been thorough, the SCM should be able to secure all of the deceased's effects simply by receiving them from the representative. Nevertheless, the SCM should not assume that the representative has recovered everything. He must verify that no effects remain unsecured.[33]

Withdrawal

The SCM's duty to withdraw certain effects is similar to the withdrawal duties of the commander's representative.[34] The SCM serves as a back-up, ensuring that no items that meet the *AR 638-2* criteria for withdrawal pass to the PERE. Like the representative, the SCM may destroy any withheld item.[35] The SCM evidently may also sell some withdrawn items at a public sale.[36] The sale must be in the best interests of the government and the PERE, and the PERE must specifically consent to the sale.[37] *Army Regulation 638-2* stresses, however, that the SCM normally should avoid becoming responsible for selling such items.[38]

Identifying the PERE and Shipping the Effects

After collecting the deceased soldier's effects and money, the SCM must identify to whom the effects should be sent. Once that individual is identified, the SCM should send the effects at the expense of the United States.

The SCM should first determine whether the deceased soldier has a surviving spouse or legal representative.[39] If the deceased soldier has a surviving spouse, the SCM need not verify a spouse's claim for personal effects if the claimant is listed as the spouse in the deceased soldier's military records.[40] The SCM should seek legal advice when the spousal relationship derives from a common-law marriage, or when the couple was separated pending divorce.[41]

The SCM should recognize an individual as the decedent's legal representative only if that individual presents duly certified copies of letters testamentary, letters of administration, or other evidence of final qualification issued by a proper civil court of competent jurisdiction.[42]

If the deceased soldier does not have a surviving spouse or legal representative, the SCM should deliver the effects to a natural or adopted child of the deceased.[43] If several children survived the deceased, the SCM will deliver the effects to the eldest child.[44]

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33. The SCM's authority to seek out the decedent's personal effects is subject to the same jurisdictional limits that restrict the representative's collection efforts. *Army Regulation 638-2* emphasizes that the SCM "is not authorized or permitted to secure personal effects not found in places under Army jurisdiction or control. Accordingly, [before acting, the SCM must determine] the status of the place where personal effects are located." *Id.* para. 17-9.

34. Both the representative and the SCM must apply the same criteria when deciding whether to withdraw an item. *See id*. para. 7-11. *See generally supra* notes 18-22 and accompanying text. The principle difference between the two is that the SCM normally screens the effects for withdrawal only after the representative has already done so.

35. *See* AR 638-2, *supra* note 3, para. 7-18 (describing criteria and procedures for destroying withheld items). The SCM will destroy these items by incineration, shredding, or mangling. *Id*. The SCM must ensure that no one recovers items marked for destruction. *See id*. The SCM must destroy the items completely, rendering the items useless and worthless, and obliterating any trace of the former owner's identity. *Id*.

36. *See id*. para. 17-17.

37. *Id.* These requirements implicitly prohibit sale of gruesome, obscene, or offensive effects. Selling these items would not be in the best interest of the government or the PERE. *Cf. id.* para. 17-17a(4) (noting that "[e]xamples of items that usually meet [the] criteria [for sales] are . . . electrical appliances used outside the United States that are not designed to work with standard U.S. electrical currents, and automobiles that are inoperable or cannot be shipped to CONUS").

To conduct the sale, the SCM must obtain a power of attorney from the PERE to sell the property. *See id*. para. 17-17a(3). The SCM must conduct the sale publicly and must document all sales on the DA Form 54-R. *See id.* para. 17-17b-c.

38. *Id*. para. 17-17.

39. 10 U.S.C.A. § 4712(d)(1) (West 1998); AR 638-2, *supra* note 3, para. 17-10a(1)-(2). In discussing PERE precedence, *AR 638-2* suggests that the spouse has lower priority than a legal representative does. *See id*. This distinction is unsupported by law. The federal statute assigns both the same priority. *See* 10 U.S.C.A. § 4712(d)(1).

40. AR 638-2, *supra* note 3, para. 17-10a(2)(a).

41. *Id*. The judge advocate who advises the SCM will determine the claimant's marital status under the law of the decedent's state of domicile. *See id*.

42. *Id*. para. 17-10a(1)(a). If the decedent has more than one legal representative, the SCM will deliver the effects to the first representative to submit a claim. *Id*. para. 17-10a(1)(b). The SCM should also advise each representative that delivery merely transfers possession of, and not title to, the decedent's personal effects. *See id.*

If the deceased soldier does not have a surviving spouse, legal representative, or child, the SCM should deliver the effects to a parent of the deceased.[45] If both parents survived the deceased, and are currently married, the SCM will deliver the effects to the elder parent, unless the elder parent abandoned support of the family while the deceased was still a minor.[46] The same rule applies if both parents survive, but were divorced after the deceased achieved majority.[47] If the parents divorced while the deceased was still a minor, or if the parents were never married, the parent who had primary custody of the deceased during his minority will receive the effects.[48] Adoptive parents have priority over biological parents, and the above rules apply when both adoptive parents still live.[49] Stepparents do not qualify for delivery under this provision, although they may receive the effects in priority below that of the next of kin (NOK).[50]

If the deceased soldier is not survived by any of the relations listed above, the SCM will deliver the effects to the deceased soldier's eldest brother or sister.[51] When the deceased has full siblings and half siblings, the SCM will attempt to locate full siblings, by order of seniority, and then half siblings, by order of seniority. The decedent's stepsiblings are not PEREs. Adoptive siblings are considered as full siblings.[52]

The SCM may send the deceased soldier's effects to the NOK when the decedent has no legal representative and is not survived by a spouse, children, parents, or siblings.[53] In order of priority, the blood relatives are grandparents, in order of seniority; aunts and uncles, in order of seniority; and cousins, in order of seniority.[54] Relations by marriage are not PEREs.[55]

If the deceased soldier is not survived by an NOK, the SCM should deliver the effects to any other individual whom the deceased named as a beneficiary in his will.[56]

When preparing to ship the effects, the SCM should follow the specific packing instructions in *AR 638-2*.[57] The SCM will then send the effects directly to the PERE, or to where the PERE requests.[58] The United States will normally pay all the costs of shipping. Some types of personal effect, however, are not covered.[59] The SCM should contact the transportation office for specific guidance.[60] If the government intends to decline to pay any part of the shipping cost, the SCM should notify the PERE before shipping the effects.

43. *See* 10 U.S.C.A. § 4712(d)(2); *see also* AR 638-2, *supra* note 3, para. 17-10a(3) (noting that the child may be born in or out of wedlock).

44. AR 638-2, *supra* note 3, para. 17-10a(3). Delivering the deceased soldier's personal effects to a minor child will give the child's surviving parent or guardian effective control over the effects. This may cause intense inter-family friction. To avoid entanglement, the SCM should closely follow the guidance that appears in *AR 638- 2. Id.* para. 17-10a(3)(a)-(c).

45. 10 U.S.C.A. § 4712(d)(3); AR 638-2, *supra* note 3, para. 17-10a(4).

46. AR 638-2, *supra* note 3, para. 17-10a(4)(a).

47. *Id*. para. 17-10a(4)(b).

48. *Id*. para. 17-10a(4)(c)-(d). *See id.* para. 17-10a(4)(e) (providing guidance on how to avoid friction between a decedent's divorced or never-married parents).

49. *Id*. para. 17-10a(4)(f).

50. *See id*. para. 17-10a(4)(g). *See generally infra* note 56.

51. 10 U.S.C.A. § 4712(d)(4) (West 1998); AR 638-2, *supra* note 3, para. 17-10a(5).

52. AR 638-2, *supra* note 3, para. 17-10a(5).

53. 10 U.S.C.A. § 4712(d)(4); AR 638-2, *supra* note 3, para. 17-10a(5).

54. AR 638-2, *supra* note 3, para. 17-10a(6).

55. *Id*.

56. 10 U.S.C.A. § 4712(d)(6); AR 638-2, *supra* note 3, para. 17-10a(8). *Army Regulation 638-2* recognizes a class of PERE not mentioned in the federal statute: persons standing *in loco parentis* to the decedent—for example, foster parents and stepparents. *Army Regulation 638-2* places these individuals after the decedent's blood relatives, but ahead of his beneficiaries. *See* AR 638-2, *supra* note 3, para. 17-10a(7).

57. *See* AR 638-2, *supra* note 3, para. 17-16d.

58. *Id.* para. 17-16a (stating that "effects will be shipped to the PERE"); *see* AR 600-8-1, *supra* note 5, app. S, para. S-2c (stating that the SCM will "send the effects . . . to the place requested by the NOK"). *See generally supra* note 26 (rationalizing the Army's use of the terms PERE and NOK).

59. *See, e.g.*, AR 638-2, *supra* note 3, para. 17-16e-f (describing regulatory limits on shipping motor vehicles and mobile homes); AR 600-8-1, *supra* note 5, app. S, para. S-1b (noting that the government will pay to ship an automobile to the NOK only if it is "operable and the value of the automobile is commensurate with the shipment").

Duties of the Summary Court-Martial: Discretionary Duties

The federal statute authorizes the SCM "to collect debts due the decedent's estate by local debtors, pay undisputed debts of the deceased to the extent permitted by money of the deceased in the SCM's possession, and take receipts for those payments."[61] Nevertheless, *AR 638-2* encourages SCMs to "make every effort to avoid becoming involved with collection and payment of . . . debts."[62] The regulation also stresses that a SCM must not enter into any civil or legal actions in an effort to collect or pay disputed debts."[63]

Contentious Issues

When the Summary Court-Martial Cannot Find a PERE

If the SCM cannot find a PERE, he will securely package and seal the effects and place them in temporary storage.[64] If the SCM finds any money or checks among the effects, he will deposit them with the local finance and accounting office (FAO).[65] The SCM will then submit an interim report to the appointing authority. The report will state that the SCM could not locate a PERE, and describe his efforts to safeguard the effects while awaiting instructions from the U.S. Army Total Personnel Command (PERSCOM).[66] Once the appointing authority has reviewed and approved the report, the SCM will file it with PERSCOM.

If PERSCOM cannot find a PERE, it will direct the SCM to sell by public sale all personal effects except sabers, insignia, decorations, medals, watches, trinkets, and articles valuable chiefly as keepsakes.[67] The SCM will include a complete record of all sales in his final report, and will attach notarized copies of all bills of sale to the report.[68] The SCM should deposit the proceeds of the sale with the local FAO.[69] Any mementos and other effects that the SCM could not lawfully sell, he should send to the PERSCOM.[70]

Effects Held in Law Enforcement Investigations

Civilian and military law enforcement agencies may keep personal effects as evidence as long as required. When a civilian agency retains some effects, the SCM will give the PERE the agency's address and telephone number, and advise the PERE to submit inquiries to the agency.[71] When a military law enforcement agency holds the effects, the SCM will advise the evidence custodian to deliver any released effects to the SCM as the regulation and the statute require.

One of the most difficult situations that a SCM can encounter arises when the PERE wants the SCM to release effects that the United States Army Criminal Investigation Command (CIDC) agents have seized as evidence in a suicide investigation. The CID typically proceeds very slowly and carefully

60. *See* AR 600-8-1, *supra* note 5, app. S, para. S-1e.

61. 10 U.S.C.A. § 4712(c). The SCM must file the receipts with his final report. *See id*. *See generally infra* note 68 (discussing reporting requirements).

62. AR 638-2, *supra* note 3, para. 17-6.

63. *Id*.

64. *Id*. para. 17-20b(3).

65. *Id*. para. 17-20b(2). The FAO will issue the SCM a receipt for these items. *Id*.

66. *Id*. para. 17-20b(4).

67. AR 638-2, *supra* note 3, para. 17-20d. The Army regulation limits the SCM's statutory authority by requiring a public sale. The statute alone would permit the SCM to sell the effects publicly or privately. *Compare* AR 638-2, *supra* note 3, para. 17-10a(9), *with* 10 U.S.C.A. § 4712(e) (West 1998).

68. AR 638-2, *supra* note 3, para. 17-20d(1) (implementing 10 U.S.C.A. § 4712(e)). The SCM submits the final report to the PERSCOM after review and approval by the appointing authority. *Id*. para. 17-20d(3). *See id*. fig. 17-6 (providing a sample report).

69. *Id.* para. 17-20d(1).

70. *Id*.; *see* 10 U.S.C.A. § 4712(f). Items in this category include not only keepsakes, but also important documents—such as wills—that relate to the decedent's estate, and bonds, securities, and similar instruments. 10 U.S.C.A. § 4712(f); AR 638-2, *supra* note 3, para. 17-20d(3). The PERSCOM commander will forward all these items through the Army secretariat to the director of the Armed Forces retirement home. *See* 10 U.S.C.A. § 4712(f). *See also* 24 U.S.C.A. § 420 (West 1998) (describing how the retirement home manages these effects).

71. AR 638-2, *supra* note 3, para. 17-14a. The SCM should not become involved with the civilian agency. For example, a SCM persuades the police department to release to him a weapon that the decedent used to kill himself. The SCM then includes the weapon in the personal effects that he sends to the decedent's parents. The SCM violated the Army's policy in two ways. First, he sought and collected an item that was located outside of military jurisdiction and control. *See id*. para. 17-9. Second, he sent the PERE an effect that probably added to the parents' grief. *See id*. para. 17-11c.

when it reviews reports of investigation. Until it completes this review, it will not permit agents to release effects with evidentiary value. The SCM can do nothing to hurry this process. If the PERE is anxious, the SCM must simply endure the PERE's anxiety.

Conclusion

To dispose of a deceased soldier's effects properly need not be difficult. Commanders' representatives and SCMs can avoid failure through adequate preparation. A knowledgeable judge advocate can ensure that they receive the preparation they need.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Internal Revenue Service Restructuring and Reform Act of 1998

Introduction

On 22 July 1998, President Clinton signed into law the Internal Revenue Service (IRS) Restructuring and Reform Act of 1998[1] (hereinafter the 1998 Act) which constitutes the most profound changes at the IRS in over four decades. In addition, the legislation includes the provisions of the Tax Technical Corrections Act of 1998[2] which contains technical, clerical, and conforming amendments to the Taxpayer Relief Act of 1997[3] [hereinafter the 1997 Act] and other recently enacted legislation. This legislation culminates a year of congressional investigations and hearings over the future of the IRS. The new law creates comprehensive changes in the IRS as it governs itself, institutes new taxpayer rights, increases supervision of the agency, and mandates emphasis on electronic tax filing. The 1998 Act contains over sixty provisions to fortify taxpayer rights and improve customer service. Technical corrections and changes were made in the areas of the supplemental child tax credit, educational credits, Individual Retirement Arrangements (IRAs), capital gains, Earned Income Credit (EIC), and the sale of principal residences. This note does not fully analyze the 1998 Act, but discusses the changes that are most likely to effect the military community and the practice of military law.

Electronic Filing of Tax and Information Returns[4]

Over the past decade, the number of taxpayers who filed their tax returns electronically has increased dramatically. An electronically filed return is a composite return (electronically transmitted data and certain paper documents mailed to the IRS) in lieu of a paper return. "During the 1997 tax filing season, the IRS received approximately 20 million individual income tax returns electronically."[5] In 1996, 192,233 federal tax returns were filed electronically by offices that were operating under the Army Legal Assistance Tax Program.[6] By 1997, the number of federal returns filed electronically by the Army Legal Assistance Tax Program had increased by seven percent to 205,117.[7] The 1998 Act sets a goal for the IRS to have at least eighty percent of all federal tax and information returns filed electronically by the year 2007.[8] Congressional policy requires the IRS to "cooperate with and encourage the private sector by encouraging competition to increase electronic filing."[9] The IRS can now implement procedures that provide for the payment of appropriate incentives for electronically filed returns.[10]

Currently, tax forms must be signed by taxpayers "as directed by the Secretary of the Treasury."[11] Although taxpayers have filed electronic returns for years, the IRS will not accept the return unless it also receives a signed Form 8453. The 1998 Act provides for the development of "procedures for the acceptance of signatures in digital or other electronic form."[12] Until these procedures are in place, the Secretary of

1. Pub. L. No. 105-206, 112 Stat. 685 (codified as amended in scattered sections of 26 U.S.C.A.).

2. *Id.* §§ 6001-6024, 112 Stat. at 790-826.

3. Pub. L. No. 105-34, 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.A.).

4. Internal Revenue Service Restructuring and Reform Act § 2001, 112 Stat. at 723 (codified at I.R.C. § 6011 (West 1998)).

5. H.R. CONF. REP. NO. 105-599, at 94 (1998).

6. Information Paper, DAJA-LA, subject: Tax Year 1997 Highlights & Trends, para. 2d (14 Aug. 1998).

7. *Id.*

8. Internal Revenue Service Restructuring and Reform Act § 2001(a)(2), 112 Stat. at 723.

9. *Id.* § 2001(a)(3).

10. I.R.C. § 6011(f)(2).

11. *Id.* § 6061.

12. Internal Revenue Service Restructuring and Reform Act § 2003(a), 112 Stat. at 724 (codified at I.R.C. § 6061(b)).

the Treasury can "waive the requirement of a signature or provide for alternative methods of signing returns."[13]

The 1998 Act mandates that beginning after 31 December 1998, the IRS will maintain "all tax forms, instructions, and publications from the past five years available for access on the [i]nternet in a searchable database."[14] The release on the internet is to correspond with the release of paper forms. Currently, the IRS provides access to all these documents on its internet site at www.irs.ustreas.gov. However, previously there was no requirement that mandated the timeliness of the document placement on the internet.

One of the goals of the 1998 Act is to strive for a "user-friendly" IRS. In the next nine years, the IRS will develop procedures to implement a "return-free tax system" whereby individuals will not have to file a tax return.[15] Within the next eight years, a taxpayer who files an electronic return will be able to examine his account electronically if all safeguards which protect the privacy of the account are in order.[16]

Taxpayer Protection and Rights

Relief from Joint and Several Liability on a Joint Tax Return: Innocent Spouse Relief

Under prior law, to secure relief from joint and several liability stemming from a joint federal tax return, taxpayers (referred to as the "innocent spouse") were required to meet strict requirements and "understatement of tax thresholds."[17] The 1998 Act makes innocent spouse relief easier to obtain. There are now three ways for an innocent spouse to obtain relief: by expanded innocent spouse relief,[18] a separate liability election,[19] and equitable relief.[20] Possible relief from joint and several liability on a joint return under these rules is allowed without concern to community property laws.[21]

The 1998 Act expands the application of innocent spouse relief by eliminating the requirement that the understatement of taxes be "substantial" and "grossly erroneous."[22] Simply specifying that the understatement of tax is attributable to an "erroneous item" instead of "grossly erroneous items" will now suffice.[23] The innocent spouse must demonstrate that in signing the return he "did not know, and had no reason to know, that there was an understatement."[24] A "separate liability election" is now available that allows the taxpayer to elect to have the responsibility for any deficiency restricted to the share of the shortage that is attributable to the items allocable to the taxpayer.[25] In effect, the return of the innocent spouse taxpayer is viewed as if the taxpayer had filed a separate return. In order to make the election, the innocent spouse taxpayer cannot be "married to or legally separated from, the individual with whom they filed the joint return." In addition, the innocent spouse must not be "a member of the same household as the individual with whom a joint return was filed at any time during the twelve month period ending on the date the election is filed."[26] The new election provision does have "fraudulent

13. *Id.* (codified at I.R.C. § 6061(b)(1)).

14. *Id.* § 2003(d), 112 Stat. at 725.

15. *Id.* § 2004(a), 112 Stat. at 726.

16. *Id.* § 2005(a).

17. Under prior law, relief of a spouse from joint tax liability could only be obtained if a joint return was filed, and there was a "substantial (in excess of $500) understatement of tax attributable to grossly erroneous items of one spouse; and the other spouse did not know and had no reason to know there was substantial understatement at the time the return was signed; and it would be inequitable to hold the innocent spouse liable for the deficiency attributable to the substantial understatement. Taking into account all the facts and circumstances, the spouse would be relieved of liability for the tax to the extent that the liability was attributable to the substantial understatement." Finally, the tax liability had to exceed a certain percentage of the innocent spouse's adjusted gross income. I.R.C. § 6013(e), *repealed by* Internal Revenue Service Restructuring and Reform Act § 3201(e), 112 Stat. at 740 (codified at I.R.C. § 6015(b)).

18. Internal Revenue Service Restructuring and Reform Act § 3201, 112 Stat. at 734 (codified at I.R.C. § 6015(b)).

19. *Id.* at 735 (codified at I.R.C. § 6015(c)).

20. *Id.* at 739 (codified at I.R.C. § 6015(f)).

21. *Id.* at 735 (codified at I.R.C. § 6015(a)(2)).

22. I.R.C. § 6013(e), *repealed by* Internal Revenue Service Restructuring and Reform Act § 3201(e), 112 Stat. at 740 (1998) (codified at I.R.C. § 6015(b)).

23. Internal Revenue Service Restructuring and Reform Act § 3201, 112 Stat. at 735 (codified at I.R.C. § 6015(b)(1)(B)).

24. *Id.* (codified at I.R.C. § 6015(b)(1)(C)).

25. *Id.* (codified at I.R.C. § 6015(b)(2)).

26. *Id.* at 736 (codified at I.R.C. § 6015(c)(3)(A)).

scheme" protections that make certain elections invalid.[27] Taxpayers who elect innocent spouse protection under the expanded rules[28] or the separate liability election[29] must make the election no later than two years after the IRS begins collection activities.

In addition to the two types of innocent spouse relief, a taxpayer may request "equitable relief."[30] Equitable relief is available if "taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency."[31] The Secretary of the Treasury has the authority to provide "equitable relief" when relief under the first two provisions is not available, but it would be inequitable to hold the individual liable for any unpaid tax or deficiency.[32]

The 1998 Act gives the Tax Court jurisdiction over disputes that involve innocent spouse relief.[33] An individual may petition[34] the Tax Court to determine the "appropriate relief available" under the innocent spouse provisions. The new law also requires the IRS to notify taxpayers of their rights under the "innocent spouse relief" provisions and whenever possible, send the notifications separately to each spouse.[35] One of the strongest features of the expansion of the innocent spouse provisions relates to its effective date. The expanded innocent spouse relief, separate liability election, and authority to provide equitable relief not only apply to liabilities for taxes that arise after the date of enactment, but are applicable for any liability beginning on or before the date of the act that remains unpaid on the date of enactment (22 July 1998).[36] Taxpayers who currently have unpaid tax liabilities and are undergoing collection actions will be able to seek the innocent spouse relief. Since the IRS has not yet issued implementing regulations and guidance, it is unknown under what situations the IRS will grant equitable relief when the other two provisions of the innocent spouse rules do not apply.

Disclosures to Taxpayers

Several sections of the 1998 Act require the IRS to provide disclosures or explanations to taxpayers about rights or procedures that benefit taxpayers.[37] The IRS is now required to inform taxpayers who filed a joint return of joint and several liability. Now the IRS is required to redraft various forms, publications, and notices to alert joint filers of its ability to assert joint and several liability for taxes.[38] In addition, the IRS is now specifically required to provide information to taxpayers about the availability of "innocent spouse relief" under new Internal Revenue Code sections of the 1998 Act (the Code).[39] These notification procedures must be in place by 18 January 1999.[40]

Presently, the IRS is required to provide information to taxpayers explaining their rights regarding audits, appeals, refund claims, and complaints.[41] The 1998 Act requires the IRS to revise Publication 1, "Your Rights as a Taxpayer," to notify taxpayers more clearly of their rights to be represented at interviews with the IRS by any person authorized to practice before the IRS, and to have the interview suspended if the taxpayer

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27. *Id.* (codified at I.R.C. § 6015(c)(3)(A)(ii)).

28. *Id.* at 735 (codified at I.R.C. § 6015(b)(1)(E)).

29. *Id.* at 736 (codified at I.R.C. § 6015(c)(3)(B)).

30. *Id.* at 739 (codified at I.R.C. § 6015(f)).

31. *Id.*

32. *Id.*

33. *Id.* at 738 (codified at I.R.C. § 6015(e)).

34. *Id.* The petition should be filed within ninety days after the IRS mails a notice to the taxpayer denying innocent spouse relief. If the IRS does not act upon the filing of a request for innocent spouse relief within six months, the taxpayer may file the petition after the close of the six-month period. *Id.*

35. *Id.* § 3201(d), 112 Stat. at 737.

36. *Id.* § 3201(f), 112 Stat. at 739.

37. *See id.* §§ 3501–3509, 112 Stat. at 770-72.

38. *Id.* § 3501(a), 112 Stat. at 770.

39. *Id.* § 3501(b) (codified at I.R.C. § 6015).

40. *Id.* § 3501(a).

41. I.R.C. § 7521 (West 1998).

requests to consult with such a person.[42] The revision of Publication 1 will be complete by 18 January 1999.[43]

Currently, the IRS is not required to explain why or how certain taxpayers are picked for examinations. The 1998 Act requires the IRS to include information in Publication 1 in "nontechnical terms" about the criteria and methods it uses to select taxpayers for an examination.[44] This provision, however, does not require the IRS to notify individual taxpayers of the basis for their selection for examination. In addition, the new provision does not require the IRS to disclose information that would be harmful to law enforcement.[45]

Suspension of Statute of Limitations on Filing Refund Claims During Periods of Disability

Generally, a taxpayer has to file a tax refund claim within three years of the date of filing a return or two years from the payment of a tax.[46] As a practical matter, the IRS would automatically reject as untimely a refund claim that is not filed within the time period. Previously, the Code contained special provisions that related to certain credits and special limitations, but the law did not contain any special provisions or exceptions about the tolling of the statute of limitations during periods of disability of the taxpayer.[47] Under the 1998 Act, the running of periods of limitation for credits or refunds is "suspended while the taxpayer is unable to manage financial affairs due to disability."[48] The running of the statute of limitations is now suspended during periods that a taxpayer is "financially disabled."[49] The practical effect of the change allows the statute of limitations to be suspended during the period of financial disability and allows refund claims outside the normal time periods as specified in the Code. Despite the change, a taxpayer will not be considered "financially disabled" during "any period that the individual's spouse or any other person is authorized to act on their behalf in financial matters."[50]

The IRS must implement new regulations and further guidance before taxpayers can apply this provision. Presently, there is no clear guidance for taxpayers on how they can comply with this new provision. The IRS will have to establish procedures for the submission of claims for suspension of the statute of limitations during periods of "financial disability" that include a claim and review process. Claimants who request suspension of the statute of limitations will undoubtedly have to submit documentary evidence or proof to the IRS in order to establish that they have a disability.[51] It is unclear who in the IRS will process these claims and exactly what documentary proof will be required. Despite the uncertainty in applying this new provision, the changes are effective and apply to "periods of disability before, on, or after the date of enactment" (22 July 1998).[52]

Suspension of Interest and Certain Penalties Where the IRS Fails to Contact an Individual Taxpayer

Generally, interest and penalties accrue during periods when taxes remain unpaid, regardless of whether the IRS notifies the taxpayer about the outstanding taxes.[53] The 1998 Act amends prior law in the case of taxpayers who file their income tax

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42. Internal Revenue Service Restructuring and Reform Act § 3502, 112 Stat. at 770 (codified at I.R.C. § 7521(b)(2)).

43. *Id.*

44. *Id.* § 3503(a), 112 Stat. at 771.

45. *Id.*

46. I.R.C. § 6511(a) (West 1998).

47. *See generally id.* § 6511.

48. Internal Revenue Service Restructuring and Reform Act § 3202 (a), 112 Stat. at 740 (codified at I.R.C. § 6511(h)).

49. *Id.* (codified at I.R.C. § 6511(h)(2)(A)).

> An individual is financially disabled if such individual is unable to manage his financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the secretary may require.

Id.

50. *Id.* (codified at I.R.C. § 6511(h)).

51. *Id.* (codified at I.R.C. § 6511(h)(2)(A)).

52. *Id.* § 3202(b), 112 Stat. at 741.

53. H.R. CONF. REP. NO. 105-599, at 124 (1998).

returns in a timely fashion, but the IRS fails to furnish notice to the taxpayer regarding an alleged tax liability.[54] Now, if the IRS fails to notify taxpayers of their liability and the basis for their liability, the "imposition of interest, penalties, addition to tax, or additional amounts with respect to any failure relating to the return" will be suspended.[55] The suspension of interest and penalties for the failure of the IRS to contact an individual taxpayer does not apply in some situations, particularly regarding penalties for failure to file a tax return or failure to pay a tax.[56] Unlike many other provisions of the 1998 Act, this provision does not apply until tax years after 1998.[57]

Abatement of Interest on Underpayments by Taxpayers in Presidentially Declared Disaster Areas

Previously, taxpayers who lived in "Presidentially declared disasters areas" would not receive an abatement of interest for underpayments[58] even if they were granted an extension in time to file and pay taxes because of a catastrophe or disaster. The 1998 Act adds a new subsection to the Code that allows the IRS to abate the levy of interest for taxpayers in "Presidentially declared disaster areas."[59] The change provides that if the IRS extends the date for filing income tax returns[60] and the time for paying income taxes,[61] the IRS will "abate" the levy of any interest for the same time as the extension period.[62] The change applies to disasters declared after 31 December 1997,[63] and will provide immediate relief and tax assistance to taxpayers.

Notice and Computation of Interest Charges

Presently, the Code does require the IRS to incorporate in its notice a point by point computation of the interest that it charges, nor a reference to the Code section supporting the interest charge. The 1998 Act adds a new section to the Code that relates to notice requirements for interest.[64] All notices that are sent by the IRS after 31 December 2000, that include the levy of interest against a taxpayer must include a precise calculation of the interest charged and a citation to the Code section that supports the charge.[65]

Procedural Requirements for Imposition of Penalties and Interest

Currently, the IRS is not required to provide notice to taxpayers that details the computation of penalties. In addition, several penalties exacted are devoid of any supervisory control or approval process. The 1998 Act added a new section to the Code that deals specifically with "procedural requirements" that demand compliance by the IRS in the area of penalties and interest.[66] The new law requires that the notice designate the penalty name, the Code section under which there is an assessment of a penalty, and a numeration of the penalty.[67] Additionally, the 1998 Act explicitly mandates approval by IRS management to charge all "non-computer" generated penalties

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54. Internal Revenue Service Restructuring and Reform Act § 3305, 112 Stat. at 743 (codified at I.R.C. § 6404(g)).

55. *Id.* § 3305, 112 Stat. at 743 (codified at I.R.C. § 6404(g)(1)(A)). The suspension period begins eighteen months (twelve months for taxable years beginning after 31 December 2003) after the date on which the return is timely filed, or the due date of the return without regard to extensions whichever is later. The suspension period ceases twenty-one days after the day the requisite notice is issued by the IRS. *Id.*

56. *Id.* § 3305(a), 112 Stat. at 743; I.R.C. § 6404(g)(1)(B)(2). Exceptions to the suspension include any penalties imposed pursuant to I.R.C. § 6651. Specifically, exceptions include cases involving fraud, relating to tax liabilities shown on the return, and any criminal penalties. *Id.*

57. Internal Revenue Service Restructuring and Reform Act § 3305(b), 112 Stat. at 743.

58. *Id.* § 3309, 112 Stat. at 745 (1998) (codified at I.R.C. § 6404(h)(2)). A "Presidentially Declared Disaster Area," for purposes of this section, means "with respect to any taxpayer, any area which the President has determined warrants assistance by the [f]ederal [g]overnment under the Disaster Relief and Emergency Assistance Act." *Id.*

59. *Id.* (codified at I.R.C. § 6404(h)).

60. I.R.C. § 6081.

61. I.R.C. § 6161.

62. Internal Revenue Restructuring and Reform Act § 3309, 112 Stat. at 745 (codified at I.R.C. § 6404(h)).

63. *Id.*

64. *Id.* § 3308(a), 112 Stat. at 744 (codified at I.R.C. § 6631).

65. *Id.* § 3308.

66. *Id.* § 3306 (codified at I.R.C. § 6751).

67. *Id.* § 3306(a) (codified at I.R.C. § 6751(a)).

unless specifically excepted by the Code.[68] These changes will be phased into operation by the IRS and become effective for the issue of notices and the assessment of penalties after 31 December 2000.[69]

Notice of IRS Contact of Third Parties

Formerly, the IRS could contact people other than the taxpayer to gather information in pursuit of collecting taxes without notifying the taxpayer of whom they intended to contact or did contact. The 1998 Act prohibits contacts by the IRS with any person other than the taxpayer regarding the collection of taxes and determinations of tax liability unless they provide "reasonable notice to the taxpayer."[70] The new provision requires the IRS to warn a taxpayer that it might contact third parties about tax liabilities. The IRS must keep accurate records of who they contact, and provide the information regarding any third party contacts to the taxpayer systematically and whenever the taxpayer requests the information.[71] Exceptions to the notice requirements include: a prior authorization by the taxpayer,[72] a showing by the IRS that the notice would jeopardize collection,[73] and criminal investigations.[74] The new notice requirements are effective 18 January 1999.[75]

Prohibition on Executive Branch Influence over Taxpayer Audits

Historically, there were no code provisions that explicitly prohibited high-level Executive Branch influence over taxpayer audits and collection activities. A new provision makes it unlawful[76] for certain Executive Branch officers[77] and employees to request (directly or indirectly) any IRS employee to conduct or terminate a tax audit or other investigation of any particular taxpayer (subject to three exceptions).[78]

Application of Certain Fair Debt Collection Procedures to IRS Communications with Taxpayers

The 1998 Act adds a new section to the Code aimed at eliminating concerns that the IRS has used or would use abusive or harassing techniques in its communications with taxpayers.[79] The addition, entitled "Fair Tax Collection Practices," aims to apply restrictions that are similar to the a Fair Debt Collection Practices Act[80] to tax collection communications with taxpayers.[81] Similar to debt collection practices rules, the new Code section limits the time, place, and manner in which the IRS can

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68. I.R.C. § 6751(b)(2) (West 1998). The assessment of all penalties must be approved by IRS management except penalties under I.R.C. § 6651 for failure to file and pay. I.R.C. § 6651 (West 1998). *See* I.R.C. § 6654 (West 1998) (regarding individual estimated tax); I.R.C. § 6655 (West 1998) (regarding corporate estimated tax, and "any other penalty automatically calculated through electronic means").

69. Internal Revenue Service Restructuring and Reform Act § 3306(c), 112 Stat. at 744.

70. *Id.* § 3417(a), 112 Stat. at 757 (codified at I.R.C. § 7602(c)).

71. *Id.* § 3417.

72. *Id.* § 3417(a) (codified at I.R.C. § 7602(c)(3)(A)).

73. *Id.* (codified at I.R.C. § 7602(c)(3)(B)).

74. *Id.* (codified at I.R.C. § 7602(c)(3)(C)).

75. *Id.* § 3417(b), 112 Stat. at 758.

76. *Id.* § 1105, 112 Stat. at 711 (codified at I.R.C. § 7217(d)). A willful violation or failure to report a prohibited request shall be punished by a maximum fine of $500, or imprisonment of not more than five years. *Id.*

77. *Id.* (codified at I.R.C. § 7217(e)). The prohibition applies to the President, the Vice President, and employees of the executive office of both, as well as any individual serving in a cabinet level position (which includes the Secretary of Defense, Secretary of Veterans Affairs, and the Director of National Drug Control Policy).

78. *Id.* (codified at I.R.C. § 7217(c)). Executive Branch employees can make three types of written requests to the IRS. First, the prohibition does not apply to a written request made to an Executive Branch employee by a taxpayer or on behalf of a taxpayer that is then forwarded by that employee to the IRS. Second, an audit or investigation by the IRS of a presidential nominee for appointed positions as part of a background check. Finally, a written request can be made by the Secretary of the Treasury because of the implementation of a change in tax policy. *Id.*

79. Internal Revenue Service Restructuring and Reform Act § 3466, 112 Stat. at 768 (codified at I.R.C. § 6304).

80. 15 U.S.C.A. § 1692b (West 1998).

81. Internal Revenue Restructuring and Reform Act § 3466, 112 Stat. at 768 (codified at I.R.C. § 6304).

contact the taxpayer.[82] The IRS is restricted from engaging in "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any unpaid tax."[83] There are specific prohibitions regarding harassment, abuse, and the type of conduct that violates the new section.[84] Violations of the new Code section can form the basis of a civil action for "unauthorized collections actions."[85]

IRS Employee Contacts

Under the 1998 Act, the IRS must provide taxpayers with the name, telephone number, and "unique identifying number" of an employee whom they may contact regarding any manually prepared correspondence.[86] The IRS is now required, to the extent practicable, to assign one IRS employee to handle a taxpayer's matter until it is resolved.[87]

Due Process in IRS Collection Actions

The 1998 Act attempts to protect taxpayer rights by enacting statutory protections that safeguard "due process" requirements whenever the IRS seeks to collect taxes by levy, lien, and the seizure of property. The Act adds several new sections to the Code that relate to "notice and opportunity for a hearing upon the filing of a lien,[88] notice and opportunity for a hearing before levy,[89] and the review of levy and lien proceedings by special trial judges."[90] Previously, there was no requirement for the IRS to notify a taxpayer of the filing of a tax lien. Now, the IRS must notify a taxpayer in writing that it filed a tax lien.[91] The notice must contain information on the amount of the lien, the right to request a hearing, appeals, and the process for the release of liens.[92] Taxpayers now have a right to "notice and opportunity for a hearing before the levy" of property or assets.[93] No levy is permitted unless the IRS notifies the taxpayer in writing prior to the levy.[94] The notice is required to contain information that relates to the "amount of unpaid tax, the right to request a hearing, recitations of applicable Code provisions relating to levy and sale, appeals, alternatives available to the taxpayer, and the applicable law relating to redemption of property and release of liens."[95] The due process protections included in the 1998 Act apply to collection actions initiated after 18 January 1999.[96]

Civil Damages for Collection Actions

The 1998 Act permits the award of civil damages if there is a finding that any employee of the IRS negligently, recklessly, or intentionally disregarded provisions of the Internal Revenue

82. *Id.* § 3466(a) (codified at I.R.C. § 6304(a)). Without the prior consent of the taxpayer, the IRS cannot contact a taxpayer at "any unusual time or place or a time or place known or which should be known to be inconvenient to the taxpayer." Likewise, the IRS cannot contact a taxpayer when someone authorized to practice before the IRS represents him. The IRS cannot contact a taxpayers at his place of employment if they "know or have reason to know that the taxpayer's employer prohibits the taxpayer from receiving such communication." Convenient times for communicating with taxpayers are defined as "after 8 a.m. and before 9 p.m., local time at the taxpayer's location." *Id.*

83. *Id.*

84. *Id.* (codified at I.R.C. § 6304(b)). The IRS cannot "use or threaten to use violence or other criminal means to harm the physical person, reputation, or property of any person." Restrictions apply to the use of "obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Excessive telephone calls or "causing the telephone to ring" excessively or repeatedly, along with engaging in telephone conversation which would annoy, abuse or harass the person called is prohibited. *Id.*

85. *Id.* (codified at I.R.C. §§ 6304(c), 7433).

86. *Id.* § 3705(a), 112 Stat. at 777.

87. *Id.* § 3705(b).

88. *Id.* § 3401(a), 112 Stat. at 746 (codified at I.R.C. § 6320).

89. *Id.* § 3401(b), 112 Stat. at 747 (codified at I.R.C. § 6330).

90. *Id.* § 3401(c), 112 Stat. at 749 (codified at I.R.C. § 7443(b), (c)).

91. *Id.* § 3401(a), 112 Stat. at 746 (1998) (codified at I.R.C. § 6320(a)).

92. *Id.* (codified at I.R.C. § 6320(a)(3)).

93. *Id.* § 3501(b), 112 Stat. at 747 (codified at I.R.C. § 6330).

94. *Id.* § 3401(b), (codified at I.R.C. § 6330(a)(1)).

95. *Id.* (codified at I.R.C. § 6330(a)(3)).

96. *Id.* § 3401(d), 112 Stat. at 750.

Code or Treasury Regulations.[97] The recovery of damages is limited to $100,000 in the case of negligence and up to $1 million for reckless or intentional acts.[98] Previously, there was no "requirement that administrative remedies be exhausted" before a civil action could be initiated. The 1998 Act requires that no judgment for damages can be awarded unless the "plaintiff has exhausted the administrative remedies available" within the IRS.[99]

In addition, the 1998 Act provides for "civil damages for IRS violations of bankruptcy procedures."[100] If the IRS attempts to collect federal taxes in violation of bankruptcy provisions "relating to automatic stays" or "relating to effect of discharge," the taxpayer can petition the bankruptcy court "to recover damages against the United States."[101]

IRS Procedures Relating to Appeals of Examinations and Collections

The 1998 Act strengthens procedures to resolve examination and collection issues as early as possible and fully use dispute resolution through mediation and arbitration.[102] Before the 1998 Act, the IRS had various mediation and arbitration programs in place, but the new legislation codified these programs. Similar to prior practice, the 1998 Act requires the establishment of procedures so that taxpayers can request an early referral of unresolved issues from the "examination or collection division to the IRS Office of Appeals."[103] The act does not require a minimum dollar threshold before a taxpayer can use these alternative dispute resolution procedures. Taxpayers or the IRS Office of Appeals can now request non-binding mediation on any unresolved issue after the completion of the appeals process or after the failure to reach a closing agreement or compromise.[104] Binding arbitration is now available pursuant to a pilot program where the taxpayer and the IRS Office of Appeals can jointly ask for it on any unresolved issue after the completion of the appeals process or failure to reach a closing agreement or compromise.[105] The alternative dispute resolution procedures require that "appeals officer(s)" be regularly accessible within each state[106] and directs the IRS to "consider" using "videoconferencing of appeals conferences between appeals officers and taxpayers" in "rural and remote areas."[107] The result of this new emphasis on alternative dispute resolution should be more cases resolved through these procedures and fewer cases that reach litigation.

Approval Process for Liens, Levies, and Seizures

Section 3421 of the 1998 Act does not implement or amend a section of the Code, but requires the Commissioner of the IRS to "develop and implement procedures" that relate to the "approval process for liens, levies, and seizures."[108] The IRS complied with the 1998 Act pursuant to a memorandum from the Assistant Commissioner (Collection) to all "Regional Chief Compliance Officers and Assistant Commissioners (International)" dated 30 July 1998.[109] The determination to file a "notice of lien or levy, or to levy or seize, any property, where appropriate, must be reviewed by a supervisor of the employee before the action is taken."[110] Failure to comply can result in

97. *Id.* § 3102, 112 Stat. at 730 (codified at I.R.C. §§ 7433, 7426).

98. *Id.* (codified at I.R.C. § 7426(h)). The amount of damages is limited to the lesser of the statutory limit or the "actual, direct, and economic damages sustained as a proximate result" of the disregard of tax provisions by the employee in addition to the costs of the action. *Id.*

99. *Id.* § 3102(a)(2) (codified at I.R.C. § 7433(d)(1)).

100. *Id.* § 3102(c) (codified at I.R.C. § 7433(e)).

101. *Id.* (codified at I.R.C. § 7433(e)(1)).

102. *Id.* § 3465, 112 Stat. at 767 (codified at I.R.C. § 7123).

103. *Id.* § 3465(a) (codified at I.R.C. § 7123(a)).

104. *Id.* (codified at I.R.C. § 7123(b)).

105. *Id.* (codified at I.R.C. § 7123(b)(2)).

106. *Id.* § 3465(b), 112 Stat. at 768.

107. *Id.* § 3465(c).

108. *Id.* § 3421(a), 112 Stat. at 758.

109. Memorandum, Assistant Commissioner (Collection), Internal Revenue Service, to Regional Chief Compliance Officers, Assistant Commissioner (International), subject: Approval Process for Notices of Levy, Liens, and Seizures, sec. 3421 of the Restructuring and Reform Act (30 July 1998), *available at* <http://www.irs.ustreas.gov/prod/tax_regs/rra2-3421.html> (visited 1 Oct. 1998) [hereinafter Assistant Commissioner Memorandum].

110. Internal Revenue Service Restructuring and Reform Act § 3421(a)(1), 112 Stat. at 758.

disciplinary action against the employee or supervisor.[111] The supervisory "review process" requires the examination of the taxpayer's data, confirmation of an unpaid balance, and an endorsement whether a levy or seizure "is appropriate given the taxpayer's circumstances."[112] The implementing memorandum requires supervisory approval of determinations to file tax liens by employees below the grade of GS-9, and institutes new instructions for IRS management regarding approval of levies and seizures.[113] These changes became effective on the date of enactment of the 1998 Act.[114]

Procedures for Seizure of Residences and Businesses

Before the 1998 Act, principal residences were "exempt" from levy, but levy was allowed if approval was obtained from a "district director or assistant district director of the IRS, or if the Secretary of the IRS found the collection of a tax was in jeopardy."[115] The new legislation changes the exemption rules and approval requirement. Principal residences are now exempt from levy if the amount of the deficiency does not exceed $5000.[116] Any approval of a levy of a principal residence now rests with a judge or magistrate of a United States District Court, and they have "exclusive jurisdiction" to approve these types of levies.[117] The practical effect of this change is the requirement for judicial approval or intervention before a principal residence is seized. The legislative history indicates that Congress intended this requirement to extend to the taxpayer's spouse, former spouse, and minor children.[118] These changes became effective upon enactment.[119]

Offers-in-Compromise

In some cases taxpayers agree to accept an IRS determination of a tax liability, but cannot fulfill the tax obligation in full or all at one time. In these situations, the IRS routinely enters "offers-in-compromise"[120] usually coupled with a payment plan pursuant to an installment agreement.[121] The 1998 Act expands and liberalizes the IRS's authority for granting offers-in-compromise. In addition, the IRS must develop "standards for evaluation of offers-in-compromise" for use by IRS employees in deciding whether an offer is satisfactory.[122] The "standards" are to ensure that taxpayers who enter payment plans with the IRS maintain "adequate means to provide for basic living expenses"[123] by the development and use of schedules.[124] Of particular concern is the fair treatment of "low-income taxpayers."[125] The IRS is not allowed to refuse an offer-in-compromise from a low-income taxpayer simply based upon the amount of the offer.[126] This is good news for many military taxpayers due to limited income restrictions.

Not only does the 1998 Act expand the rules that relate to offers-in-compromise, but part of its focus is to ensure that taxpayers are made aware of the availability of offers-in-compromise and installment agreements.[127] The legislation requires

111. *Id.* § 3421(a)(2), 112 Stat. at 758.

112. *Id.* § 3421(b).

113. Assistant Commissioner Memorandum, *supra* note 109.

114. Internal Revenue Service Restructuring and Reform Act § 3421(c), 112 Stat. at 758.

115. *Id.* § 3445(a), 112 Stat. at 758 (codified at I.R.C. (6334(a)(13)).

116. *Id.* § 3445(a), 112 Stat. at 762.

117. *Id.* § 3445(b), 112 Stat. at 763 (codified at I.R.C. § 6334(e)(1)).

118. H.R. CONF. REP. No. 105-599, at 133 (1998) (requiring that notice of the judicial hearing be provided to residents of the property).

119. Internal Revenue Service Restructuring and Reform Act § 3445(d), 112 Stat. at 763.

120. I.R.C. § 7122 (West 1998).

121. *Id.* § 6159.

122. Internal Revenue Service Restructuring and Reform Act § 3462(a), 112 Stat. at 764 (codified at I.R.C. § 7122(c)).

123. *Id.* (codified at I.R.C. § 7122(c)(2)).

124. *Id.* (codified at I.R.C. § 7122(c)(2)(B)).

125. The legislation did not define the term "low income taxpayer." The IRS will most likely issue guidance that defines "low income taxpayer," along with procedures that are based upon that designation.

126. Internal Revenue Service Restructuring and Reform Act § 3462(a), 112 Stat. at 764 (codified at I.R.C. § 7122(c)(3)(A)).

127. *Id.* § 3462(d), 112 Stat. at 766.

the IRS to provide taxpayers with statements in "nontechnical terms" about offers-in-compromise and the right of a taxpayer to appeal a rejection of an offer by the IRS.[128] The rejection of offers-in-compromise or installment agreements must now undergo "independent" administrative review before a taxpayer is notified of the rejection.[129] In addition, taxpayers can now appeal a rejection of an offer or agreement to the IRS Office of Appeals.[130]

These provisions will require the development of new regulations and guidance to implement the procedures. Although schedules and procedures have not yet been issued, the legislation was effective upon enactment.[131] Even without detailed guidance or regulations, the IRS will have to be more "thoughtful" in considering allowances for living expenses, offers-in-compromise, and installment agreements. In addition, it is likely that the number of offers and agreements will greatly increase as taxpayers are properly notified of the new rules.

Guaranteed Availability of Installment Agreements

Previously, the Code "authorized" the IRS to enter installment agreements for the payment of taxes if it was determined that the agreement would "facilitate collection of such liability."[132] The IRS was not required to enter into installment agreements in any particular type of cases. The 1998 Act does require the IRS to enter installment agreements in certain cases.[133] By contrast, the IRS is required to enter an installment agreement with a taxpayer if the taxpayer's total liability does not exceed $10,000, and in the prior five taxable years the taxpayer has not failed to file a tax return, failed to pay any tax, or entered into a prior installment agreement.[134] Finally, if a taxpayer requests an installment agreement, the IRS must determine whether he is financially unable to pay the tax liability in full. If these criteria are met and the taxpayer agrees to complete an installment payment within three years,[135] he has a "right" to an installment agreement.[136]

Confidentiality Privileges Relating to Taxpayer Communications: The "Accountant-Client Privilege"

One of the more controversial sections of the 1998 Act relates to the "accountant-client privilege."[137] The new code section establishes and applies the "same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney" to "communications between a taxpayer and any federally authorized tax practitioner[138] to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney"[139] concerning "tax advice."[140] This privilege applies to "any noncriminal tax matter before the IRS" and in "any noncriminal tax proceeding in federal court."[141] The legislative history indicates that the "accountant-client privilege" does not apply to disclosure of information "for the purpose of preparing a tax return."[142]

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128. *Id.*

129. *Id.* § 3462(c) (codified at I.R.C. § 7122(d)).

130. *Id.*

131. *Id.* § 3462(e).

132. I.R.C. § 6159 (West 1998).

133. Internal Revenue Service Restructuring and Reform Act § 3467, 112 Stat. at 769 (codified at I.R.C. § 6159(c)).

134. *Id.* § 3467(a) (codified at I.R.C. § 6159(c)(2)).

135. *Id.* (codified at I.R.C. § 6159(c)(3)).

136. *Id.* § 3467(b), 112 Stat. at 770.

137. *Id.* § 3411, 112 Stat. at 750 (codified at I.R.C. § 7525).

138. *Id.* § 3411(a) (codified at I.R.C. § 7525(a)(3)(A)). "Federally authorized tax practitioner" is defined as any "individual who is authorized under federal law to practice before the IRS if such practice is subject to federal regulation under section 330 of title 31, United States Code." *Id.*

139. *Id.* (codified at I.R.C. § 7525(a)(1)).

140. *Id.* (codified at I.R.C. § 7525(a)(3)(B)). "Tax advice means advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice" as a "federally authorized tax practitioner." *Id.*

141. *Id.* (codified at I.R.C. § 7525(a)(2)).

142. H.R. CONF. REP. NO. 105-599, at 135 (1998).

Burden of Proof

Before the 1998 Act, a rebuttable presumption existed that an IRS determination of tax liability was correct. The taxpayer not only had the burden to prove that the IRS determination was incorrect, but also had to prove the merit of his claim by a preponderance of the evidence if a case was litigated.[143] Placing the burden of proof on the taxpayer created a perception that he was "guilty until proven innocent." The 1998 Act shifts the burden of proof in judicial proceedings.[144] When a taxpayer introduces "credible evidence regarding any factual point relating to determining their tax liability, the IRS will have the burden of proof on the issue."[145] In order for the burden shift to occur, the taxpayer must have complied with substantiation requirements for an item, maintained all required records, and cooperated with any IRS request for information.[146] If a taxpayer has complied with the substantiation and recordkeeping requirements of the Code, the government must then prove that the taxpayer's determination of accountability was incorrect. This change in the burden of proof only applies to judicial proceedings. It does not apply to audits and investigations. Consequently, the IRS will place more emphasis on meticulous investigations and audits of a tax issue before it initiates litigation. Because of the threshold requirements of substantiation and cooperation that are placed upon the taxpayers, audited taxpayers should expect an increase in requests for detailed information and documentation by the IRS.

During some judicial proceedings relating to an item of income (usually relating to unreported income), the IRS uses "statistical information on unrelated taxpayers." The 1998 Act requires the IRS to have the burden of proof in court proceedings regarding any component of income that the IRS reconstructs "entirely by using statistical data on different taxpayers."[147] There is no prerequisite that taxpayers provide records or cooperate with the IRS in its use of this type of statistical data.

Offset of Past-Due, Legally Enforceable State Income Tax Obligations against Overpayments

Currently, under the Tax Refund Offset Program, the IRS may offset over payments for support and collection of debts owed to federal agencies.[148] However, "past-due, legally enforceable state income tax obligations"[149] have not been a part of the Tax Refund Offset Program. The 1998 Act allows states to participate in the "Tax Refund Offset Program" starting after 31 December 1999.[150] When the IRS receives notice from any state that a taxpayer owes a "past-due, legally enforceable state income tax obligation," the IRS can decrease the amount of any overpayment (refund) payable by the amount of the state income tax debt.[151] This new offset program could have a potential impact on military taxpayers because of their mobility from state to state. However, military practitioners should be aware of various procedural requirements of the new provision that provide adequate safeguards and protections to military taxpayers. In order for the IRS to apply an offset for a tax year, the address as listed on the taxpayer's federal tax return for the year of overpayment must be the same as the state that is requesting the offset.[152] Additionally, the state must comply with strict notice and "consideration of evidence"

143. Danville Plywood Corp. v. United States, 16 Ct. Cl. 584 (1989).

144. *Id.* § 3001(a), 112 Stat. at 726 (codified at I.R.C. § 7491).

145. *Id.* (codified at I.R.C. § 7491(a)(1)).

146. *Id.* (codified at I.R.C. § 7491(a)(2)).

147. *Id.* (codified at I.R.C. § 7491(b)).

148. I.R.C. § 6402 (West 1998).

149. Internal Revenue Service Restructuring and Reform Act § 3711(a), 112 Stat. at 779 (codified at I.R.C. § 6402(e)(5)). "Past-due, legally enforceable state income tax obligation means a debt which resulted from a judgment rendered by a court of competent jurisdiction which has determined an amount of state income tax to be due; or a determination after an administrative hearing which has determined an amount of state income tax to be due; and which is no longer subject to judicial review; or which has been assessed but not collected, the time for redetermination of which has expired, and which has not been delinquent for more than ten years." In addition, "state income tax" includes any local income tax administered by the tax agency of the state. *Id.*

150. *Id.* § 3711(d), 112 Stat. at 781 (1998).

151. *Id.* § 3711(a), 112 Stat. at 779 (codified at I.R.C. § 6402(e)(1)).

152. *Id.* (codified at I.R.C. § 6402(e)(2)).

requirements before the IRS will consider an offset.[153] Legal assistance attorneys who encounter offsets for state income tax obligations should make sure that the state met these notice and evidentiary requirements.

Elimination of the Eighteen-Month Holding Period for Capital Gains

Last year, the 1997 Act[154] lowered capital gains rates for individuals,[155] but required property to be held more than eighteen months to receive a more favorable rate.[156] The 1998 Act reduces the period of time required for holding "long-term capital gains" from eighteen months to twelve months.[157] The practical effect of the 1998 Act, when coupled with the 1997 Act, is to reduce the long-term capital gains rate from twenty-eight percent to twenty percent. For those taxpayers in the fifteen percent tax bracket, the rate will be reduced to ten percent.[158] The change in the long-term holding period from eighteen months to twelve months is retroactive to 1 January 1998.[159] A result of the change in the holding period for long-term capital gains is the elimination of the very complex computations that were required on Form 1040,[160] Schedule D last year. The change in the holding period is a clear benefit that allows taxpayers to receive a favorable tax rate on capital gains for what in reality is a fairly short holding period. Taxpayers should carefully examine their assets to take advantage of the preferred capital gains rates over ordinary income tax rates.

Tax Technical Corrections Act of 1998

The Tax Technical Corrections Act of 1998[161] was originally a separate bill introduced in 1997 to make various corrections and amendments primarily to code provisions from the 1997 Act. Although it is totally unrelated to restructuring and reforming the IRS, it was included as a part of the 1998 Act.

Amendments to the Child Credit

For tax year 1998, there is a tax credit of $400 ($500 in 1999) for each qualifying child[162] of a taxpayer under the age of seventeen.[163] The child tax credit is limited or phased out subject to adjusted gross income.[164] The maximum amount of the child tax credit for a taxable year is restricted to the excess of a taxpayer's regular tax liability over his tentative minimum tax

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153. *Id.* (codified at I.R.C. § 6402(e)(4)).

> a. Notice; Consideration of Evidence – No state may take action under this subsection until such state-
> b. notifies by certified mail with return certified mail with receipt the person owing the past-due state income tax liability that the state proposes to take action pursuant to this section;
> c. gives such person at least sixty days to present evidence that all or part of such liability is not past-due or not legally enforceable;
> d. considers any evidence presented by such person and determines that an amount of such debt is past-due and legally enforceable; and
> e. satisfies such other conditions as the secretary may prescribe to ensure that the determination made under subparagraph (c) is valid and that the state has made reasonable efforts to obtain payment of such state income tax obligation.

Id.

154. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.A.).

155. *Id.* § 311(a), 111 Stat. at 831 (codified at I.R.C. § 1(h)(1)(E)) (West 1997)).

156. *Id.* at 832 (codified at I.R.C. § 1(h)(8)(A) (West 1997)).

157. Internal Revenue Service Restructuring and Reform Act § 5001(a), 112 Stat. at 787 (codified at I.R.C. §§ 1(h), 1223(11), (12)).

158. I.R.C. § 1(h) (West 1998).

159. Internal Revenue Service Restructuring and Reform Act § 5001(b), 112 Stat. at 788.

160. U.S. Internal Revenue Serv., Form 1040, Income Tax Return for Single and Joint Filers (1998).

161. Internal Revenue Service Restructuring and Reform Act § 6001, 112 Stat. at 790.

162. *Id.* § 24(c). A qualifying child is an individual for whom the taxpayer can claim a dependency exemption and who is a son or daughter of the taxpayer, a stepchild, or an eligible foster child of the taxpayer. *Id.*

163. *Id.* § 24(a).

164. *Id.* § 24(b). The child tax credit is reduced by $50 for each $1000 by which the taxpayer's "modified adjusted gross income exceeds the threshold amounts." The "threshold" amount is $110,000 in for joint returns, $75,000 for single filers, $55,000 for filers of a married filing separate return. *Id.*

liability.[165] Additional rules and credits apply for families with three or more qualifying children.[166]

The 1998 Act clarifies the rules for the child tax credit by treating the refundable portion of the child credit in the same manner as other refundable credits.[167] After the application of all other credits according to the "stacking rules" of the income tax limitation, the refundable credits are applied to first decrease the tax liability, and then to provide a credit in excess of the income tax liability for the year.[168] A portion of the child credit[169] is treated as a "supplemental child credit" under the "earned income credit"[170] and an offsetting reduction of the child credit.[171] The offset does not affect the total tax credits allowable or available to the taxpayer.[172] However, it does decrease the normally allowable "nonrefundable child credit" by the amount of the "supplemental child credit" which is a "refundable credit."[173] The 1998 Act also details how the "supplemental child credit" is computed.[174]

Amendments to Educational Incentives

Under the 1997 Act,[175] an individual could make a nondeductible contribution of up to $500 per year to an education IRA.[176] The education IRAs was established to pay for qualified higher education expenses for a specified person.[177] Generally, the earnings on an education IRA are not subject to taxation at distribution if they are used to pay for qualified educational expenses.[178] However, distributed earnings that are not used to pay higher educational expenses are included in income, and result in a ten-percent penalty.[179] The 1997 Act was not clear regarding the distribution and taxation of the balance of education IRAs upon the death of a named beneficiary. The 1998 Act treats all the residue of an education IRA as distributed within thirty days after the date the beneficiary attains the age of thirty or dies.[180] Taxpayers can avoid the ten percent penalty and income tax by rolling over the remaining balance of an education IRA to another family member's (who is under the age of thirty) education IRA. Taxpayers can also avoid the penalty and income tax by changing the beneficiary designation on the existing IRA to another family member within thirty days after the original beneficiary turns thirty or dies.[181]

The 1998 Act also addresses how a taxpayer can treat distributions from an educational IRA when the taxpayer elects to claim a Hope Scholarship Credit or Lifetime Learning Credit with respect to a beneficiary. In these situations, the new law allows for a waiver of the ten percent penalty tax for distributions from an education IRA if the following criteria are met: (1) the distributions were used to pay qualified higher education expenses; (2) the beneficiary waives the tax-free handling of distributions from an education IRA; and (4) the dispersal is

165. *Id.* § 26.

166. *Id.* § 24(d). Taxpayers with three or more qualifying children are limited to a child tax credit to the greater of the normal amount computed, or an amount equal to the excess sum of the taxpayer's regular income tax liability and the social security taxes for the taxable year.

167. Internal Revenue Service Restructuring and Reform Act § 6003(a), 112 Stat. at 790 (codified at I.R.C. § 24(d)).

168. *Id.*

169. I.R.C. § 24 (West 1998).

170. *See generally id.* § 32.

171. Internal Revenue Service Restructuring and Reform Act § 6003(b), 112 Stat. at 791 (codified at I.R.C. § 32(n)).

172. *Id.* (codified at I.R.C. § 32(n)(2)).

173. *Id.* (codified at I.R.C. § 32(n)(1)).

174. *Id.* (codified at I.R.C. § 32(n)). The sum of the "supplemental child credit" is the lesser of the amount of the taxpayer's total nonrefundable personal tax credits that are increased by reason of the child credit, or the taxpayer's total tax credits, including the earned income credit over the sum of the taxpayer's regular income taxes and social security taxes. The earned income credit "phase-out rules" do not apply to the "supplemental child credit." *Id.*

175. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788.

176. *Id.* § 213(a), 111 Stat. at 812 (codified at I.R.C. § 530 (West 1997)).

177. I.R.C. § 530(b)(2) (West 1998).

178. *Id.* § 530(d).

179. *Id.* § 530(d).

180. Internal Revenue Service Restructuring and Reform Act § 6004(d), 112 Stat. at 793 (codified at I.R.C. § 530(b)(1)(E)).

181. *Id.* (codified at I.R.C. § 530(d)(5) - (8)).

made on or before the beneficiary's income tax return due date for the year.[182] This change is important because taxpayers who elect a tax-free distribution from an education IRA cannot claim the Hope Scholarship Credit or Lifetime Learning Credit.[183] Generally, most taxpayers will benefit more from using the Hope Scholarship Credit or Lifetime Learning Credit than from having a tax-free distribution from the education IRA. The 1998 Act allows the taxpayer to make this election and in effect, elect to waive what would otherwise be a ten-percent penalty tax.[184] Finally, the 1997 Act did not answer whether an education IRA could be created for an unborn child or grandchild. The 1998 Act makes it clear that the education IRA contribution must be for a "life in being" or a living person.[185]

The 1997 Act introduced a new code provision that allows taxpayers who have paid interest on qualified education loans (student loans) after 31 December 1997, to claim an above-the-line deduction for the interest expense up to a maximum amount ($1000 annually in 1998).[186] The 1998 Act clarifies the Code to specify that the deduction of interest on qualified education loans is only available to the taxpayer who is legally obligated to make interest payments on the loan.[187] Therefore, taxpayers should decide or plan who will be legally obligated on the loan (usually parent or student), and therefore able to deduct the student loan interest. The 1998 Act also specifies that no deduction is allowed unless the loan is used solely to pay higher education expenses.[188] The practical effect of this provision is to exclude interest of various forms of credit (for example, revolving credit) unless the taxpayer had agreed to use the line of credit exclusively to pay for qualified education expenses.

Roth IRA Changes

The 1997 Act introduced a new type of retirement plan called a "Roth IRA."[189] The Roth IRA is popular with taxpayers because distributions of earnings from the Roth IRAs are excludable from income taxation if the taxpayer maintains the account for at least five years and fulfills various other qualifying factors.[190] One of the attractive features of the 1997 Act relating to Roth IRAs was the ability of taxpayers with up to $100,000 of "modified adjusted gross income"[191] to rollover or to convert their savings from traditional IRAs into Roth IRAs.[192] Despite the ability to rollover or to convert a traditional IRA into a Roth IRA, the rollover is treated as a taxable liquidation of the traditional IRA.[193] Pursuant to the 1997 Act, rollover from a traditional IRA before 1 January 1999, requires the taxpayer to include the distribution in their gross income "ratably over the four-taxable year period beginning with the taxable year in which the payment or distribution is made."[194] The 1998 Act now makes the four-year spread of income taxes relating to the distribution of a traditional IRA optional rather than mandatory.[195] Based upon the individual situation, some taxpayers may find it more beneficial to include the distribution in their income in the one-year versus including it ratably over four years.

The 1998 Act provides relief for the taxpayer who makes a contribution or rollover conversion and subsequently determines that he was not eligible to make some or all of the contribution because he exceeded the adjusted gross income limitations.[196] The taxpayer is now allowed to shift the excess contribution to a regular IRA without a penalty being assessed.

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182. *Id.* (codified at I.R.C. § 530(d)(4)(C)).

183. I.R.C. § 25A(e) (West 1998).

184. Internal Revenue Service Restructuring and Reform Act § 6004(d), 112 Stat. at 793 (codified at I.R.C. § 530(d)(4)).

185. *Id.* (codified at I.R.C. § 530(b)(1)).

186. I.R.C. § 221 (West 1998).

187. Internal Revenue Service Restructuring and Reform Act § 6004(b), 112 Stat. at 792 (codified at I.R.C. § 221(e)).

188. *Id.*

189. Taxpayer Relief Act of 1997 § 302(a), Pub. L. No. 105-34, 111 Stat. at 825 (codified at I.R.C. § 408A (West 1997)).

190. I.R.C. § 408A(d) (West 1998).

191. *Id.* § 408(c)(3).

192. *Id.* § 408A(d)(3).

193. *Id.*

194. *Id.* § 408A(d)(3)(A)(iii).

195. Internal Revenue Service Restructuring and Reform Act § 6005(b)(4), 112 Stat. at 797 (codified at I.R.C. § 408A(d)(3)(A)(iii)).

196. *Id.* § 6005(b)(6), 112 Stat. at 799 (codified at I.R.C. § 408A(d)(6)).

The transfer, however, must be made before the filing due date for the income tax return for the year of contribution.[197]

The 1997 Act created a situation under which a five-year holding period began for purposes of deciding whether a distribution of an amount attributable to a conversion is a qualified dispersion for each separate individual rollover.[198] Under the old provision it was important to separate Roth IRA rollover accounts due to the separate five year holding period for each rollover. Now the five-year holding period begins with the tax year in which the first contribution was made to a Roth IRA.[199] A more recent conversion of amounts from traditional IRAs will not begin the running of a new five-year term.

Because the 1998 Act eliminated the requirement for separate or segregated accounts for annual contributions and rollovers of contributions to a Roth IRA, some type of "ordering rules" were required to account for the Roth IRA. One Roth IRA can include amounts from annual contributions, one or more rollover contributions from traditional IRAs, and the earnings generated from the IRA.[200] Under the "ordering rules," withdrawals are deemed to have been withdrawn first from annual after tax contributions or regular Roth IRA contributions. This first order is always determined to be tax and penalty-free. The second order is considered to have come from rollover contributions to a Roth IRA.[201] Finally, after all contributions have been "withdrawn" from the Roth IRA, ensuing withdrawals contain the earnings accumulated. These withdrawals are generally tax and penalty-free if certain criteria are met.[202]

One concern following the 1997 Act was the apparent disqualification of many taxpayers to make Roth IRA conversions because the definition of adjusted gross income appeared to include the amount of the rollover and prevented taxpayers from qualifying because their adjusted gross income exceeded $100,000.[203] The 1998 Act clarifies the calculation of adjusted gross income for purposes of the Roth IRA to exclude or subtract the conversion amounts.[204] Changes are also included which address premature distributions from Roth IRAs that were converted from a traditional IRA and are still within the four-year income-averaging period.[205] Withdrawn amounts during the four-year income-averaging period are subject to a disadvantageous income-acceleration rule.[206]

A perplexing question ensued following the enactment of the 1997 Act relating to how to handle the death of a taxpayer during the four-year income-averaging period. Generally, the leftover rollover income must be included in the final return of the deceased taxpayer.[207] Nevertheless, a surviving spouse who is a beneficiary of a 1998 Roth IRA conversion can elect to continue to spread income over the remainder of the four-year income-averaging period.[208]

Amendments to the Earned Income Credit (EIC)

The EIC[209] is subject to "phase-out" rules for taxpayers who are above a certain level of income.[210] Individuals that qualify for the EIC who have earned income within the phase-out range have the applicable credit ratably reduced. If earned income exceeds the phase-out, the taxpayer is not entitled to the credit. The Code specifies what is excludable or "disregarded" in computing a "modified adjusted gross income" for purposes of the

197. *Id.*

198. Taxpayer Relief Act of 1997, § 302(a), Pub. L. No. 105-34, 111 Stat. at 827 (codified at I.R.C. § 408A(d)(2)(B)(ii) (West 1997)).

199. Internal Revenue Service Restructuring and Reform Act § 6005(b)(3), 112 Stat. at 797 (codified at I.R.C. § 408A(d)(2)(B)).

200. *Id.* § 6005(b)(5)(A), 112 Stat. at 798 (codified at I.R.C. § 408A(d)(4)).

201. *Id.* § 6005(b)(5)(A) (codified at I.R.C. § 408A(d)(4)(B)(ii)(II)). If the Roth IRA is composed of several rollover contributions, withdrawals will be considered to be apportioned on a "first in, first out" basis. *Id.*

202. *Id.* § 6005(b)(3), 112 Stat. at 797 (codified at I.R.C. § 408A(d)(2)). Withdrawal of earnings is considered tax and penalty free if the withdrawal occurs more than five years after the initiation of the year commencement of the Roth IRA and after age 59.5, death, or disability. *Id.*

203. Taxpayer Relief Act of 1997 § 302(a), 111 Stat. at 825 (codified at I.R.C. § 408A(c) (West 1997)).

204. Internal Revenue Service Restructuring and Reform Act § 6005(b)(2), 112 Stat. at 797 (codified at I.R.C. § 408A(c)(3) (West 1998)).

205. *Id.* § 6005(b)(4)(B) (codified at I.R.C. § 408A(d)(3)(E)).

206. *Id.*

207. *Id.* (codified at I.R.C. § 408A(d)(3)(E)(ii)).

208. *Id.*

209. *See generally* I.R.C. § 32 (West 1998).

210. *Id.* § 32(b), (f).

EIC.[211] The 1998 Act specifies that two nontaxable amounts are now added or included in the "modified adjusted gross income" for purposes of the EIC.[212] Tax exempt interest and amounts received from pensions, annuities, or retirement plans, to the extent they are not normally included in gross income, are included in the EIC computation of "modified adjusted gross income."[213]

Amendments to Exclusion of Gain from the Sale of Principal Residence

Following the 1998 Act, taxpayers who comply with a two-year ownership and use test[214] are allowed to exclude a maximum of $500,000 of principal residence gain on a joint return or $250,000 on a single return.[215] In the event a taxpayer fails to meet the two-year ownership and use test because of a change in employment, health problems, or other unexpected circumstances, he is still able to obtain some benefit from the gain exclusion rules. The 1998 Act amends the Code to make it clear that the reduced exclusion available to the taxpayer is a pro rata share of the full exclusion limitation ($500,000 for married) as opposed to a pro rata portion of the taxpayer's gain on the sale.[216]

Conclusion

The 1998 Act significantly changes the manner in which the IRS operates on a daily basis. The changes were designed to strengthen taxpayer rights and curb perceived abuses by the IRS. In addition, procedural due process protections were codified in order to eliminate arbitrary actions on the part of the IRS. The gains and protections to taxpayers instituted by the 1998 Act are negated if taxpayers are not informed of the recent changes. Legal assistance attorneys should inform the military community of the significant changes pursuant to preventive law programs and be prepared to provide services to military tax clients. Major Rousseau.

Update for 1998 Federal Income Tax Returns

It is that time of year when legal assistance attorneys begin preparing for the 1998 federal income tax filing season. The following article is a brief update of important changes for taxpayers in the military community. This note is not intended to serve as an in-depth review or explanation of each topic discussed, but to inform legal assistance attorneys of updates in taxation and numerology for the upcoming tax season.

Key Changes for 1998

Child Tax Credit

Beginning in 1998, taxpayers can claim a child tax credit of $400 for each "qualifying child"[217] under the age of seventeen.[218] The amount of the child tax credit is subject to limitations based upon the taxpayer's modified adjusted gross income (MAGI).[219] For most taxpayers, the credit is nonrefundable and subject to other limitations based upon tax liabilities.[220] However, special rules apply for families with three or more qualifying children.[221] Families with three or more qualifying children may be able to take the credit as a refundable amount.[222]

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211. *Id.* § 32(c)(5).

212. Internal Revenue Service Restructuring and Reform Act § 6010(p), 112 Stat. at 816 (codified at I.R.C. § 32(c)(5)(C)).

213. *Id.*

214. I.R.C. § 121(a) (West 1998).

215. Internal Revenue Service Restructuring and Reform Act § 6005(e), 112 Stat. at 805 (codified at I.R.C. § 121(b)).

216. *Id.* (codified at I.R.C. § 121(c)(1)).

217. I.R.C. § 24(c) (West 1998). A "qualifying child" is a son, daughter, stepchild, eligible foster child, or other descendant for whom the taxpayer can claim a dependency deduction for the tax year. The "qualifying child" must also be a citizen or resident of the United States. *Id.*

218. *Id.* § 24.

219. *Id.* § 24(b). For joint taxpayers, the amount of the credit will be reduced by $50 for every $1000 of MAGI above $110,000. Likewise, it will be reduced in a similar manner for unmarried individuals with MAGI above $75,000 and those taxpayers that are married filing separately with a MAGI in excess of $55,000. *Id.*

220. *Id.* § 26.

221. *Id.* § 24(d). The additional credit is computed by adding the taxpayer's social security taxes paid for the tax year to the tax liability limitations of I.R.C. § 26, and subtracting that amount by all nonrefundable credits, and the earned income credit (not including the supplemental child credit as specified in I.R.C. §32(n)). *Id.*

222. *Id.*

Of all the tax changes for 1998, the Child Tax Credit should have the broadest impact on military taxpayers for the upcoming tax season. The credit directly reduces tax liability on a dollar-for-dollar basis. Military taxpayers with children who did not adjust their federal income tax withholding in 1998 may see their overall tax liability decrease or the size of refunds increase. Military taxpayers who receive a large refund because of the child tax credit should consider a corresponding reduction in wage withholding. The reality of a large tax refund is that the taxpayer most likely inaccurately computed the withholding of taxes. A taxpayer can have more money in his paycheck each month by carefully reviewing his withholding allowances on an IRS form W-4.

Education Incentives

The Hope Scholarship Credit allows taxpayers to elect to take a nonrefundable tax credit against federal income taxes up to $1500 per student for "qualified tuition and related expenses"[223] paid during the tax year on behalf of a student.[224] The maximum Hope Scholarship Credit in 1998 is $1500 for each eligible student. The credit is subject to phase-out rules for joint taxpayers with MAGI between $80,000 to $100,000 (single taxpayers with MAGI of $40,000 to $50,000).[225] Married taxpayers must file jointly in order to claim the credit.[226] The ability to claim the Hope Scholarship Credit is only available to those taxpayers who can claim a dependency exemption for the student.[227] The Hope Scholarship credit is allowable for the expenses of students who have not completed the first two years of post-secondary education.[228] In addition, the election of the credit is allowable for only two tax years.[229] To be eligible, the student must carry at least one-half the "normal full-time workload for the course of study the student is pursuing."[230] Taxpayers should be careful to reduce the qualified tuition and related expenses by any scholarship amounts that are excludable to income[231] that the taxpayer received during the tax year.[232] Nevertheless, a reduction in qualified tuition and expenses does not have to be made for amounts paid or received by gift, bequest, devise, or inheritance.[233]

While the Hope Scholarship Credit only applies to the first two years of post-secondary education, the Lifetime Learning Credit is available for students who are enrolled in undergraduate or graduate education to acquire or improve job skills.[234] Special rules disqualify students for the Lifetime Learning Credit if they are eligible for the Hope Scholarship Credit.[235] For qualified expenses that are paid after 30 June 1998, taxpayers can claim a Lifetime Learning Credit up to twenty percent of $5000 of qualified tuition and related expenses paid during the tax year.[236] It is important to note that the Hope Scholarship Credit is available for qualifying expenses for each qualifying student,[237] but the Lifetime Learning Credit is available only per taxpayer.[238] Therefore, the maximum Lifetime Learning Credit available in 1998 is $1000 per taxpayer. The same rules previously mentioned for the Hope Scholarship Credit relating to phase-out limitations, definition of qualified tuition and expenses, reductions for scholarships, ability to claim depen-

223. *Id.* § 25A(f). "Qualified tuition and expenses means tuition and fees required for enrollment or attendance of the taxpayer, spouse or any tax dependent of the taxpayer" at a post-secondary educational institution. They do not include books, room and board, student activities, insurance, equipment, transportation, or similar personal or living expenses. *Id.*

224. *Id.* § 25A.

225. *Id.* § 25A(d).

226. *Id.* § 25A(g)(6).

227. *Id.* § 25A(g)(3).

228. *Id.* § 25A(b)(2).

229. *Id.*

230. *Id.* § 25A(b)(3).

231. *Id.* § 117.

232. *Id.* § 25A(g)(2).

233. *Id.*

234. *Id.* § 25A(c)(2).

235. *Id.*

236. *Id.* § 25A(c)(1).

237. *Id.* § 25A(b)(1).

238. *Id.* § 25A(c)(1).

dency exemption, and requirement for married couples to file jointly all pertain to the Lifetime Learning Credit. However, the Lifetime Learning Credit is distinguishable from the Hope Scholarship Credit because it expands the timing and types of educational courses that are allowable for the credit. There is no requirement that taxpayers attend an educational course on a half-time basis. Rather, taxpayers merely have to attend any course of instruction to "acquire or improve job skills."[239] The Lifetime Learning Credit can be used for credit and non-credit courses, professional seminars, and similar classes by educational institutions. Although the rules for the Hope Scholarship Credit restrict the ability to claim the credit for two-years,[240] there are no such restrictions for the Lifetime Learning Credit.

Taxpayers should be aware that educational payments that are made during one tax year for an academic period that begins within three months of the next tax year, can still be claimed as a qualified expense in the year paid.[241] This provision allows parents to consider paying spring term tuition in December in order to maximize the amount of the credit for the current year.

Beginning in 1998, taxpayers who are legally obligated to pay student or educational loans can take an above-the-line deduction or adjustment to income for the interest paid on qualified loans up to a maximum of $1000 per year.[242] Similar to the tax credits already mentioned, this adjustment to income is extremely valuable because taxpayers can claim the adjustment even if they do not itemize. In order to claim the adjustment, taxpayers must claim the student as a dependent on their federal tax returns.[243] The deduction is subject to phase-out rules for married taxpayers who file a joint return with MAGI between $60,000 to $75,000 (single taxpayers with MAGI between $40,000 to $55,000).[244] The deduction is available for the first sixty months in which interest payments are due.[245] If a student loan is deferred, the months when payments do not have to be made will not count against the sixty-month period. Unlike the Hope Scholarship Credit and the Lifetime Learning Credit, the deduction for student loan interest is not only for tuition and fees, but also room, board, books, and other necessary expenses.[246] To be eligible, the student must carry at least one-half the "normal full-time workload for the course of study the student is pursuing."[247]

Taxpayers are allowed to prepay college tuition, fees, books, and equipment pursuant to "qualified state tuition" programs. Any distribution or earnings under the programs are not included in the taxpayers gross income.[248] Beginning in 1998, individuals can prepay room and board expenses on the same tax-exempt and deferred basis.[249]

Another new education incentive in 1998 is the creation of education IRAs.[250] These new IRAs are for paying the beneficiary's qualified education expenses.[251] Taxpayers can make an annual contribution of up to $500 per beneficiary, but a corresponding tax deduction or adjustment to income is not allowed.[252] Nevertheless, education IRAs are exempt from taxation, and distributions for qualified higher education expenses are tax-free.[253] Taxpayers cannot contribute to an education IRA after the beneficiary turns eighteen years of age.[254] The contribution limit does phase out for joint filers with MAGI

239. *Id.* § 25A(c)(2)(B).

240. *Id.* § 25A(b)(2).

241. *Id.* § 25A(g)(4).

242. *Id.* § 221.

243. *Id.* § 221(c).

244. *Id.* § 221(b).

245. *Id.* § 221(d).

246. *Id.* § 221(e)(2).

247. *Id.* § 221(e)(3).

248. *Id.* § 529(c).

249. *Id.* § 529(e)(3)(B).

250. *Id.* § 530.

251. *Id.* § 530(b)(1).

252. *Id.* § 530(b)(1)(A).

253. *Id.* § 530(a).

254. *Id.* § 530(b)(1)(A).

between $150,000 and $160,000 ($95,000 and $110,000 for single filers).[255] It is important to note that a taxpayer is not permitted a Hope Scholarship Credit or Lifetime Learning Credit for education expenses for a tax year if there has been a tax-free education IRA distribution.[256] However, there is an election whereby a taxpayer can waive the income exclusion of the education IRA. This waiver would be beneficial in situations where a greater tax savings was produced by the education credits instead of the exclusion by the education IRA rules.[257]

Individual Retirement Arrangements

More service members will be eligible to take a deduction for IRAs in 1998 due to an increase in the phase-out limitations. Because service members are active participants who are covered by a pension or retirement plan, deductible IRA contributions are subject to limitations.[258] For 1998, taxpayers that are married and filing a joint return are subject to phase-out limitations if their MAGI exceeds $50,000 and eliminated if MAGI exceeds $60,000 (married filing separately phase-out limitations are $0 - $10,000; $30,000 - $40,000 phase-out limitations for all other filers).[259]

Before 1998, if one spouse was an active participant in a retirement plan (for example, a service member), both spouses were subject to the dollar limitations for the deductibility of IRA contributions.[260] Now, even if a spouse is an active participant in a retirement plan (for example, a service member), the non-active participant spouse may be able to deduct a contribution to an IRA with higher phase-out limitations (phase-out begins at MAGI of $150,000).[261]

A new type of IRA was initiated in 1998 called the Roth IRA.[262] Contributions to Roth IRAs are non-tax deductible, but, unlike regular IRAs, withdrawals are tax-free provided the withdrawals take place at least five years after the establishment of the Roth IRA and the taxpayer is fifty-nine and a half years of age.[263] A taxpayer can make annual nondeductible contributions that are made to a Roth IRA up to $2000, but that amount is reduced by the amount of contributions made to all other IRAs for the tax year.[264] Many taxpayers made rollovers from regular IRAs to Roth IRAs during 1998. Taxpayers with an AGI of $100,000 or less were allowed to rollover distributions from regular IRAs to Roth IRAs within sixty days of withdrawal.[265] The rollover or conversion is subject to taxation as if it was not rolled over.[266] However, the rollover will not be subject to a ten percent tax for premature distribution.[267] The taxpayer can elect whether to pay the entire tax for the rollover in 1998 or elect to spread the tax out over four tax years beginning in 1998.[268]

Two new penalty-free withdrawals from IRAs took effect in 1998. Certain first-time homebuyers can withdraw up to $10,000 from an IRA penalty-free.[269] The term "first time homebuyer" is broadly defined as one who had no ownership interest in a principal residence in the two years before buying the new home.[270] Taxpayers can also make a withdrawal from a regular IRA for qualifying education expenses without paying

255. *Id.* § 530(c).

256. *Id.* §§ 25A(e), 530(d)(2).

257. *Id.*

258. *Id.* § 219(g).

259. *Id.* § 219(g).

260. *Id.* § 219(g)(1).

261. *Id.* § 219(g)(7).

262. *Id.* § 408A.

263. *Id.* § 408A(d).

264. *Id.* § 408A(c).

265. *Id.* § 408A(c)(3)(B).

266. *Id.* § 408A(d)(3).

267. *Id.* § 408A(d)(3).

268. *Id.* § 408A(d)(3)(A)(iii).

269. *Id.* § 72(t).

270. *Id.* § 72(t)(8).

the ten-percent penalty on early withdraw.[271] Despite the ability to withdraw from an IRA without paying the early withdrawal penalty, taxpayers should be aware that amounts withdrawn are still subject to regular income taxation.

271. *Id.* § 72(t).

1998 Numerology[a]

Tax Rates

The 1998 tax rates are: 15%, 28%, 31%, 36%, and 39.6%. The 1998 tax rates by filing status are:

Married filing jointly and Qualifying Widow(er):

Taxable Income	Marginal Tax Rate
$1 - 42,350	15%
42,350 - 102,300	28%
102,300 - 155,950	31%
155,950 - 278,450	36%
over 278,450	39.6%

Single:

$1 - 25,350	15%
25,530 - 61,400	28%
61,400 - 128,100	31%
128,100 - 278,450	36%
over 278,450	39.6%

Head of household:

$0 - 33,950	15%
33,950 - 87,700	28%
87,700 - 142,000	31%
142,000 - 278,450	36%
over 278,450	39.6%

Married filing separately:

$1 - 21,175	15%
21,175 - 51,150	28%
51,150 - 77,975	31%
77,975 - 139,225	36%
over 139,225	39.6%

Estates and trusts:

$1 - 1700	15%
1700 - 4000	28%
4000 - 6100	31%
6100 - 8350	36%
over 8350	39.6%

a. *Id.* § 1; Rev. Proc. 97-57.

Standard Deduction

Married filing jointly or qualifying widow(er)—$7100 ($6900 in 1997).
Single—$4250 ($4150 in 1997).
Head of household—$6250 ($6050 in 1997).
Married filing separately—$3550 ($3450 in 1997).

Reduction of Itemized Deductions

Otherwise allowable itemized deductions are reduced if AGI in 1998 exceeds:
Married filing separately—$52,250.
All other returns—$124,500.

Personal Exemptions

Personal exemption deduction—$2700 ($2650 in 1997).
Phase-out of Personal Exemptions:

Filing Status	**Phase-out Begins After**
Married filing jointly	$186,800
Single	$124,500
Head of household	$155,500
Married filing separately	$ 93,400

Earned Income Credit

Number of Children	Maximum Amount of the Credit	Earned Income Amount	Threshold Phase-out Amount	Completed Phase-out Amount
1	$2271	$6680	$12,260	$26,473
2 or more	$3756	$9390	$12,260	$30,095
None	$341	$4460	$5570	$10,030

Principle 4: Preventing Unnecessary Suffering

The following note is the fifth in a series of practice notes[272] that discuss concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense (DOD) Law of War Program.[273]

The principle of preventing unnecessary suffering is closely related to both the principle of military necessity and the principle of minimizing harm to civilians.[274] While the other principles seek to protect civilians, this principle focuses on restraining the suffering inflicted on enemy combatants. It is, perhaps, the most obvious example of the "desire to diminish the evils of war."[275] According to *Field Manual (FM) 27-10*, this is the fundamental purpose of the law of war. *Field Manual 27-10* states that "the conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by [p]rotecting both combatants and noncombatants from unnecessary suffering."[276]

The preamble to the 1907 Hague Convention IV also reflects this "desire to diminish the evils of war."[277] The 1907 Hague Convention IV is one of the first multilateral law of war treaties that attempts to comprehensively regulate the methods and means of warfare. The language in the preamble, known as the "Martens Clause,"[278] has been replicated in subsequent law of war treaties.[279] The preamble states: "in cases not covered by the attached regulations, the belligerents remain under the protection and the rule of the principles of the law of nations as derived from the usages established among civilized people, the laws of humanity and the dictates of the public conscience."[280]

Describing the purpose of this clause, A.P.V. Rogers explains that it was intended to ensure that humane limits existed in warfare for all those affected, not only civilians. A.P.V. Rogers states that:

The purpose of the clause was not only to confirm the continuance of customary law, but also to prevent arguments that because a particular activity had not been prohibited in a treaty it was lawful. Humanity is, therefore, a guiding principle which puts a brake on the undertakings which might otherwise be justified by the principle of military necessity.[281]

Regarding lawful enemy combatants, this principle must be reconciled with the concept of military necessity. Warfare obviously justifies subjecting an enemy to massive and decisive force, and the suffering that it brings. Military necessity justifies the infliction of suffering upon an enemy combatant.[282] Since 1868, however, it has been explicitly recognized that military necessity only justifies the infliction of as much suffering as is necessary to bring about the submission of an enemy.[283] Prohibiting the infliction of suffering upon enemy combatants, beyond what is necessary, is the "brake" that A.P.V. Rogers describes. The St. Petersburg Declaration of 1868 clearly articulated this prohibition:

> The only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men;

272. *See* International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War,* ARMY LAW., June 1998, at 17; International and Operational Law Note, *Principle 1: Military Necessity,* ARMY LAW., July 1998, at 72 [hereinafter *Principle 1*]; International and Operational Law Note, *Principle 2: Distinction,* ARMY LAW., Aug. 1998, at 35 [hereinafter *Principle 2*]; International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians,* ARMY LAW., Oct. 1998, at 54 [hereinafter *Principle 3*].

273. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). *See also* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

274. *See Principle 1, supra* note 272; *Principle 2, supra* note 272; *Principle 3, supra* note 272.

275. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 3 (July 1956) [hereinafter FM 27-10].

276. *Id.*

277. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 22 [hereinafter Hague IV], *reprinted in* U.S. DEP'T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956).

278. This was the name of the Russian representative who drafted the language. *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 6 n.36 (1996).

279. *See id.* at 7 n.37.

280. Hague IV, *supra* note 277, at preamble.

281. ROGERS, *supra* note 278, at 7.

282. *See Principle 1, supra* note 272.

283. *Id.* at 72 nn.161-62 (citing the St. Petersburg Declaration of 1868).

> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable . . . . That the employment of such arms would, therefore, be contrary to the laws of humanity.[284]

One text summarizes the intersection between the necessity to destroy an enemy force and the dictates of humanity as follows:

> Not all means or methods of attaining even a 'legitimate' object of weakening the enemy's military forces are permissible under the laws of armed conflict. In practice, a line must be drawn between action accepted as 'necessary' in the harsh exigencies of warfare and that which violates basic principles of moderation.[285]

As this quote highlights, the law of war requires a balance between destruction and humanity. This balance applies not only where noncombatants are concerned, but also when violence is inflicted upon an enemy force. In practice within the United States armed forces, this balance arguably takes two forms, one well accepted and the other less apparent.

The well accepted form of this balance or "brake" explicitly prohibits employing arms that are calculated to cause unnecessary suffering. This prohibition is found in *FM 27-10*, and is based on the express language of Article 23 of Hague IV, which states: "It is especially forbidden . . . to employ arms, projectiles, or other materiel calculated to cause unnecessary suffering."[286] According to *FM 27-10's* interpretation of this provision:

> What weapons cause "unnecessary injury" can only be determined in light of the practice of states in refraining from the use of a given weapon because it is believed to have that effect . . . . Usage has, however, established the illegality of the use of . . . irregular-shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring of the surface or the filing off of the hard cases of bullets.[287]

Department of Defense Directive 5000.1 mandates the legal review of new weapon systems to ensure that they comply with this treaty obligation.[288] This review is performed at the service secretary level. Judge advocates, however, should not assume that no further responsibility exists simply because a weapon system was reviewed before it was fielded. As the quoted interpretation states, it is not only the weapon system itself that can run afoul of this prohibition, but also the projectile. Weapons and ammunition that are found to comply with this treaty obligation could later be modified in the field. Because a modification could violate the treaty, judge advocates at every level of command must ensure that soldiers understand that such modifications are prohibited.

The second aspect of this principle is found in revised paragraph 41, *FM 27-10*.[289] This paragraph is entitled "Unnecessary Killing and Devastation,"[290] a 1976 change to the original 1956 wording[291] states:

> [L]oss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated . . . .[292]

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284. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 1 A.J.I.L. 95-96 *reprinted in* THE LAWS OF ARMED CONFLICT 102 (Dietrich Shindler & Nigel Jiri Thomas eds., 3d ed. 1988).

285. HILLAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 226 (1992).

286. Hague IV, *supra* note 277, art. 23.

287. FM 27-10, *supra* note 275, at 18.

288. U.S. DEP'T OF DEFENSE, DIR. 5000.1, DEFENSE ACQUISITION (15 Mar. 1996).

289. FM 27-10, *supra* note 275, at 5.

290. *Id.*

291. *Id.* at 1. Note that this modification occurred during the negotiation of 1977 Protocol I to the Geneva Conventions of 1949.

292. *Id.*

This language is nearly identical to the "proportionality" test[293] of Articles 51 and 57 of the 1977 Protocol I.[294] It establishes a test for determining when "incidental" losses become unnecessary; thereby, violating the law of war. The inherent balancing test contained in this paragraph implicitly acknowledges that most suffering is unavoidable. The paragraph, however, categorizes unavoidable suffering as "unnecessary" when it is "excessive" in relation to the concrete and direct military advantage anticipated.

The language used in *FM 27-10*, however, contains one interesting difference from that used in Protocol I—the absence of the word "civilian." Unlike the "proportionality" test of Protocol I, which relates to "incidental" harm caused to *civilians*, the *FM 27-10* prohibition against "unnecessary killing and devastation" appears to extend the "proportionality" test to harm inflicted upon both noncombatants and combatants. The test established by the quoted language is general in nature and is not limited to situations involving noncombatants.

Applying a "proportionality" test to enemy combatants seems consistent with the principle of preventing unnecessary suffering. This principle is based on the notion that infliction of suffering upon an enemy that is not "necessary" to achieve the submission of that enemy must be prohibited. Without this prohibition, war would license the infliction of suffering for inhumane purposes, such as revenge or plunder.[295] It is also thoroughly consistent with the *FM 27-10* "purpose statement," quoted above. The "purpose statement" identifies the prevention of unnecessary suffering of noncombatants, and the restoration of peace, as key components of the purpose of the law of war.[296] Prohibiting the infliction of suffering on enemy forces, which would be "excessive" in relation to the anticipated military advantage, clearly serves both of these ends.

In spite of the appeal of this logic, determining that the use of force against a valid military objective might be excessive is an extremely controversial proposition. It seems to contradict the right of a belligerent to apply "overwhelming" or "decisive" force. There is no basis to support such a conclusion. The right of a belligerent to inflict extensive suffering on a legitimate opponent is implied within this standard. But no right in war is without limit, and at some exteme, this test might be applicable. What is certain is that if applicable, the standard must be more permissive than the standard used to protect non-combatants.

This rule, therefore, should not be read to prohibit a military force from assaulting a lawful military objective with "overwhelming" force. Rather, it suggests that there might be some limit to the methods and means of warfare that can lawfully be used against a military objective, even if the exact determination of "excessive force" is undefined. At a minimum, rule is restricts employing an otherwise lawful means of warfare in a method that is calculated to cause unnecessary suffering on the enemy.

The principle of preventing unnecessary suffering clearly applies to Operations Other Than War. It applies equally to the use of weapons that cause unnecessary suffering, and to the use of force that is excessive in relation to the anticipated military advantage. In fact, the relationship between preventing unnecessary suffering and mission legitimacy is arguably more pronounced during these types of operations than during international armed conflict. Judge advocates must ensure that the use of force during all military operations, including isolated uses of force deemed necessary during non-conflict operations, comports with this principle. Regarding weapon systems, this requires that all members of the force understand the dangers related to "home-grown" modifications of weapons and ammunition. These modifications could fundamentally alter the characteristics of a weapons system that was deemed to comport with this principle when it was fielded. When a weapons system is later modified, it could result in a conclusion that the actual use of the weapon was intended to cause unnecessary suffering.[297]

Concerning the use of weapons systems during non-conflict operations, the judge advocate must apply the same analysis that is used in armed conflict. Specifically, he must ensure that the infliction of unnecessary suffering is not the purpose of using the weapons system. This analysis is relatively straight forward—ensuring that commanders understand that infliction

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293. Practitioners should ensure that they distinguish between the proportionality test discussed herein, which is related to the legality of the conduct of combatants, and the proportionality test related to when the use of force by a nation complies with the requirements of Article 51 of the United Nations Charter. *See Principle 3*, *supra* note 273.

294. 1977 Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, arts. 51, 57, *reprinted in* 16 I.L.M. 1391.

295. *See* ROGERS, *supra* note 278, at 6.

296. FM 27-10, *supra* note 275, at 3.

297. Applying this test arguably requires commanders to make a good faith assessment of both the anticipated benefits of applying force, and whether any anticipated "suffering" will be excessive in relation to this benefit. As the discussion of *FM 27-10* indicates, applying the proportionality test to determine when suffering caused by a military operation becomes "unnecessary" arguably applies to suffering caused to both non-combatants and combatants. While the definition of "excessive" suffering must certainly vary between these two categories of individuals, the basic analysis remains the same.

of suffering for no other purpose than to cause suffering is not justified even by armed conflict.

Commanders must ensure that the use of military force will not result in "unnecessary" suffering. According to *FM 27-10*, suffering is unnecessary when it is "excessive" in relation to the military benefit expected to be gained from employing the force causing the suffering. The use of force has always caused some amount of suffering to both combatants and non-combatants. Prohibiting suffering that is unnecessary or excessive, however, is a fundamental "check" on the destructive power of combatants. This "check" applies across the spectrum of military operations, and should help judge advocates analyze the legality of supported military operations. Major Corn.

The Art of Trial Advocacy

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Voir Dire: Making Your First Impression Count

Introduction

Voir dire is an essential, but frequently overlooked, aspect of trial advocacy.[1] Voir dire is your first opportunity to make an impression on the panel.[2] If it is done correctly, voir dire can give you a head start on educating, persuading, and building rapport with the panel.[3] If you do voir dire poorly, however, you will spend the rest of the trial trying to overcome the damage.

Like every other aspect of trial work, success during voir dire is directly proportional to pretrial preparation. No counsel can orchestrate an adequate voir dire without having already established both the theory and theme for the case. No counsel can develop a workable theory or theme without a complete understanding of the facts and applicable law.

As a framework for preparing for voir dire, try this three-step process. First, develop your theme and theory for the case. Second, as parts of your theme and theory, identify the general topics you want to address on voir dire. Finally, from these general topics, draft your specific voir dire questions.

The next two sections are "Do's" and "Don'ts" for voir dire. These sections suggest methods that will help you make the most of this advocacy opportunity:

DO: Look at the Forrest, Then the Trees

Establish your Theory and Theme for the Case FIRST

You cannot know where you need to go during voir dire unless you know your ultimate destination.

Decide Whether You Will need Voir Dire

Ask yourself, is this is a panel case? Deciding this issue is a function of knowing your case, the military judge, and the panel to which your case has been referred. You already know your case and, if you are experienced in your jurisdiction, you probably have a good idea of how your military judge or panel would react to your type of case. If you are unfamiliar with either the panel or the military judge, check old reports of results of trial (some jurisdictions keep special trial reports as a tracking tool), talk to local counsel and other counsel who have practiced before your panel or military judge, and read the panel member questionnaires.

Know Your Players

Both the government and the defense need to know who is supposed to be in the panel box. The only way to do this is to check the referral on the back of the charge sheet, get the appropriate convening order (with all amendments) and "scrub" them (that is, confirm who is supposed to be present).

Have a Purpose for Your Questions

Once you have established your theory and your theme, you can tailor your questions to the specific aspects of your case. For example: "How do you feel about the reliability of eyewitness identifications"; " What do you think about soldiers who drink"; "How do you feel about the right to remain silent"; "How would you feel if Sergeant ____ chose to remain silent in this case?"

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1. THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS (Supp. 1998) (containing an excellent module on voir dire). Any counsel who is involved in trial work should get his supervisor to use this resource.

2. Do not forget about your ability to voir dire the military judge. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 902(d)(2) (1995) [hereinafter MCM]. This is particularly important in co-accused cases or in cases in which the military judge may have a particular predisposition (for example, carnal knowledge case with a military judge who has a teenage daughter at home, or a barracks larceny case when the military judge's home was recently burglarized).

3. Counsel need to be constantly aware that while voir dire may have these collateral effects, the point of voir dire is to gain information for the intelligent exercise of challenges against members. *See* MCM, *supra* note 2, R.C.M. 912(d) discussion. *See also* United States v. Smith, 24 M.J. 859 (A.C.M.R. 1987), *aff'd*, 27 M.J. 25 (C.M.A. 1988). In *Smith* the court stated that "we believe the standard for measuring the legitimacy of voir dire is a question's relevance in the context of laying a foundation for possible challenges." *Smith*, 24 M.J. at 861. *The Advocacy Trainer* lists fourteen bases for disqualification of panel members. *See* THE ADVOCACY TRAINER, *supra* note 1, voir dire module.

The same holds true for voir dire of the military judge. *See* United States v. Small, 21 M.J. 218 (C.M.A. 1986). *See also* MCM, *supra* note 2, R.C.M. 912(f). Regarding disqualification of the military judge, R.C.M. 902(a) states that: "[a military judge] shall disqualify himself or herself . . . [when the] military judge's impartiality might reasonably be questioned." *Id.* Rule for Courts-Martial 902(b) has the five specific (but not exclusive) grounds for disqualification of the military judge. MCM, *supra* note 2, R.C.M. 902(b). Counsel should always be prepared to tell the military judge why a particular question will help counsel when it comes time to make challenges.

Remember Primacy and Recency

We have all heard about this concept in relation to closing argument. The same concept applies to voir dire. Hit your best and most important points first and last (ending with the strongest). Bury the less favorable specific aspects of the case in the middle.

DO: Be Creative

Ask the Military Judge to Allow Additional Questions in the Panel Member Questionnaires[4] and READ THEM When They Come Back

Panel member questionnaires contain a wealth of information that will help you focus your questions (panel members and some military judges get anxious with lengthy voir dire). With the permission of the military judge, you can customize the questionnaire to your particular case to narrow your focus further.

Know the Preliminary Questions the Military Judge Will Ask

You may want to build or expand on a question the military judge just asked. For example, you could say: "I want to expand on the military judge's question about _____." If you think the question may have more impact or is better suited coming from the judge, ask the military judge to present your submitted question to the panel.

DO: Keep it Simple and Listen

Ask Simple, Open-Ended, Straightforward Questions

For example, you could ask: "How does it make you feel that the victim of the assault is now blind in one eye?" You could also ask: "If the decision was yours, what would the Army's policy be on adultery?"

LISTEN to the Answers

Write out the questions, but remain flexible; do not be wedded to the questions you have prepared. They may become moot, based on the answers provided. If not, you can come back later. Exploit opportunities for follow-up questions. For example, should a panel member tell you he believes a life sentence is "inappropriate" in your homicide case, you should ask: "What do you mean when you say that a life sentence is not appropriate in a homicide case?"

Record the Responses

Make it Clear how the Members are to Respond

If the military judge does not do so, tell the members they should raise their hands to indicate a positive response. Head nods sometimes get missed. Remember, you need to indicate for the record which panel member responded which way, for example: "Positive responses from Major Jones and Captain Harvey"; "Negative responses from all members."

Have Someone Help You

You are focused on the questions and the answers (from the perspective of follow-up questions). An assistant (either at counsel table or behind the rail) can record the answers to use in deciding whom to individually voir dire and who to challenge. Your assistant can also note body language and nonverbal cues (these are sometimes more telling than verbal answers).

DO: Think About Your Challenges

Be Aware of the Numbers

Because the military normally does not require unanimous decisions (on findings or sentence, except in capital cases), the number of members on the panel is an important consideration for each side.[5] You may decide you do not want to make a challenge, even though you have one.

Preserve your Denied Causal Challenges

Know the rules so that you will not waive your objection to a denied challenge.[6]

DON'T: Waste Your First Chance to Make a Good Impression

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4. MCM, *supra* note 2, R.C.M. 912(a)(1).

5. *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, at 55, 75 (30 Sept. 1996) (containing tables listing the number of members required for a decision in courts-martial).

6. *See* MCM, *supra* note 2, R.C.M. 912(f)(4). *See also* United States v. Jobson, 31 M.J. 117 (C.M.A. 1990); United States v. Ingham, 36 M.J. 990 (A.C.M.R. 1993) (setting out the requirements for preserving denied challenges for cause).

If You are Going to Do It, Do It Well

No rule says you must conduct voir dire. Even though not doing it wastes an advocacy opportunity, doing it poorly is worse than not doing it at all. Conversely, taking the time to do it right is better than not doing it at all.

Don't Plow Old Ground

Listen to what the military judge asks, as well as the questions from the other side. You also may get the answer to one question through another question. Be particularly careful to not ask questions that the members have already answered in their questionnaires. You appear unprepared and apathetic to the value of the members' time if you plow the same ground twice.

Will You Taint the Entire Panel?

During group voir dire, be careful not to ask a question which may generate an answer that could taint the entire panel. For example, if a panel member says he has prior knowledge of the case, ask him about that knowledge on individual voir dire. The military judge may stop you if you ask such a question on group voir dire, but having the military judge stop you certainly does not help your rapport with the panel.

DON'T: Forget that Panel Members are Human

Avoid Leading or Confusing the Members

Leading questions suggest an answer. As counsel, you normally want to know what the panel member thinks and feels about a subject; you do not want them to just adopt what you think.[7] Confusing and conclusory questions do not help; you are not able to elicit their thoughts and feelings if the panel members do not understand your question. Try transition comments when moving from one general topic to another: "Now I'd like to turn your attention to _____."

Stay Away from Legalese

Do not ask: "Do you understand that a soldier, when he reasonably believes that bodily harm is about to be wrongfully inflicted on him, is entitled to offer, but not actually apply or attempt to apply, a means or force that would be likely to cause death or grievous bodily harm?" (Let the record reflect blank stares from all panel members). It would be better to ask the military judge to read the instruction on self-defense. Then ask the panel: "How do you feel about a soldier's right to defend himself when he is threatened?"

Embarrassing Panel Members is Bad

Many panel members are already uncomfortable about being involved in a process they probably do not fully understand. Now you are asking them potentially personal and invasive questions. If you are unable to avoid the probing question, save it for individual voir dire. At a minimum, preface it with a question such as: "I know that this may be difficult, but in order to make sure (the government)(my client) gets a fair trial, I really need to ask you about _____." Asking condescending questions ("Do you understand that . . . ?") or calling them by the wrong or mispronounced name also will not help put them at ease.

Talk to the Panel like People

Voir dire is your chance to "connect" with the panel. Get out from behind the podium or your table, get into the well (without notes, if possible), make eye contact with the members, and "talk" with them. Strive for a conversation, not an inquisition.

Conclusion

Voir dire is an important, but little used, advocacy tool.[8] Because it is not required, many judge advocates take the easy way out by completely avoiding it, thus wasting an advocacy opportunity. Hopefully, these "Do's and Don'ts" will encourage you to make use of this advocacy tool. Voir dire is your first chance to make an impression on the panel; make it count. Major Hargis.

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7. Leading questions would be appropriate if you are trying to get the panel to adopt your theory or theme for the case, or to get them to make a promise or commitment (for example, hold the government to the burden of proof). Leading questions would also be appropriate if you are trying to "lock in" a response to support a challenge.

8. Advocacy opportunities are everywhere, even in seemingly bland areas like the "boilerplate" and preliminary witness matters. Make sure you have the nature of the charges. Memorizing and confidently announcing the nature of the charges, in your best command voice, shows your mastery of the case. You can also demonstrate your control of the courtroom by firmly taking charge of a witness when the witness first comes into the courtroom ("Sergeant _____, stand on the green X in front of the witness chair, turn, face me, and raise your right hand," all in your best command voice).

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

The average pretrial and post-trial processing times for general and bad-conduct (BCD) special courts-martial for the first, second and third quarters Fiscal Year (FY) 1998 are shown below. For comparison, the previous FY 97 processing times are also shown below.

General Courts-Martial

	FY 97	1Q, FY 98	2Q, FY 98	3Q, FY 98
Records received by Clerk of Court	712	182	185	183
Days from charges or restraint to sentence	67	67	68	64
Days from sentence to action	90	87	96	98
Days from action to dispatch	10	19	17	8
Days en route to Clerk of Court	10	11	10	9

BCD Special Courts-Martial

	FY 97	1Q, FY 98	2Q, FY 98	3Q, FY 98
Records received by Clerk of Court	156	34	37	28
Days from charges or restraint to sentence	44	42	41	47
Days from sentence to action	75	58	86	97
Days from action to dispatch	10	11	16	8
Days en route to Clerk of Court	9	9	9	11

Courts-Martial and Nonjudicial Punishment Rates

Second Quarter, FY 97

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.38 (1.52)	0.37 (1.46)	0.60 (2.41)	0.36 (1.42)	0.92 (3.70)
BCDSPCM	0.14 (0.57)	0.13 (0.54)	0.29 (1.17)	0.09 (0.36)	0.46 (1.85)
SPCM	0.01 (0.04)	0.01 (0.06)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.21 (0.85)	0.28 (1.12)	0.02 (0.07)	0.02 (0.09)	0.00 (0.00)
NJP	22.61 (90.43)	24.04 (96.17)	20.47 (81.89)	23.50 (93.98)	25.89 (103.56)

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.32 (1.29)	0.31 (1.26)	0.51 (2.03)	0.25 (1.02)	0.94 (3.75)
BCDSPCM	0.13 (0.53)	0.12 (0.48)	0.31 (1.23)	0.08 (0.34)	0.00 (0.00)
SPCM	0.01 (0.03)	0.01 (0.03)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.30 (1.19)	0.37 (1.49)	0.09 (0.36)	0.11 (0.42)	0.00 (0.00)
NJP	21.22 (84.88)	22.50 (90.01)	19.15 (76.58)	21.88 (87.53)	22.01 (88.03)

Figures in parenthesis are the annualized rates per thousand.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, 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 10, is reproduced in part below.

Debate Over the EPA UST Penalty Authority Continues

The Environmental Protection Agency (EPA) has been assessing fines against several Department of Defense (DOD) installations for alleged violations of the underground storage tank (UST) provisions of the Resource Conservation and Recovery Act (RCRA).[1] An opinion from the Department of Justice (DOJ) Office of Legal Counsel (OLC) which defined the EPA's Clean Air Act (CAA) enforcement authorities fueled this action. The DOD is now challenging the EPA's enforcement actions, while engaging in discussions over the EPA's authority to assess punitive penalties against federal agencies. This debate, however, has no effect on an installation's inability to pay state-imposed fines for alleged UST violations.

In early 1997, the EPA began issuing Notices of Violation (NOV) to Army, Air Force, and Navy installations for alleged "minor" violations of the RCRA UST requirements. The EPA requested payment of relatively small (generally less than $1000) punitive penalties. All the DOD services protested, questioning the EPA's authority to impose these punitive fines on other federal agencies, as well as the agencies' statutory authority to pay such penalties. The EPA told the services that if they did not promptly pay these "field citations," the affected installations would be assessed inflated penalties as part of formal enforcement actions. The Army and Navy chose to pay their fines, but made it clear that these payments were made "under protest." The Air Force declined to pay a $600 field citation and soon afterward was assessed a $70,734 administrative fine. The Air Force and Army have each received an additional NOV. These NOVs have assessed over $90,000 for alleged UST violations. The authority of the EPA to issue UST NOVs is now being challenged in three pending enforcement actions against Air Force and Army installations.

The EPA's shift toward assessing UST fines was a spin-off from a debate with the DOD over the EPA's CAA penalty authorities. This discussion led the OLC to write an opinion in July of 1997, which was favorable to the EPA.[2] In reaching its conclusions, OLC relied upon the language of certain CAA provisions[3] that granted the EPA authority to impose penalties against "persons"—a definition that includes federal agencies. The OLC further examined the legislative history of the CAA to conclude that Congress had made a sufficiently "clear statement" of its intent to allow the EPA to penalize other agencies. The EPA's power could be constitutionally exercised because sufficient controls exist to preclude the need for litigation between agencies.

Relying on the OLC's CAA opinion, the EPA now asserts that a sufficiently "clear statement" of the EPA's authority exists under both RCRA and UST statutes. Specifically, the EPA asserts that it is authorized to include penalties in compliance orders issued for UST violations.[4] According to the EPA,

1. 42 U.S.C.A. §§ 6991-6992 (West 1998).

2. *See* Memorandum from Dawn E. Johnson, Acting Assistant Attorney General Counsel, Department of Defense, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, Judith A. Miller, General Counsel, Department of Defense, subject: Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act (16 July 1997).

3. *See* 42 U.S.C.A. §§ 7413, 7602(e).

4. *Id.* § 6991e(c).

these compliance orders apply to any "person.[5] For purposes of the UST statutes, the definition of "person" includes "the United States Government."[6] The EPA further argues that RCRA expressly provides it with authority to commence an administrative enforcement proceeding against any Federal agency "pursuant to the enforcement authorities contained in this Act."[7] The EPA asserts that these "authorities" include the RCRA's UST sections.

The DOD Office of General Counsel asserts that the CAA situation is not consistent with UST statutory provisions. Congress amended RCRA via the Federal Facilities Compliance Act (FFCA)[8] to address the limitations of RCRA recognized in *United States Department of Energy v. Ohio*.[9] There, the United States Supreme Court looked at the language of 42 U.S.C. § 6961 and ruled that the RCRA did not sufficiently express an intent to allow state regulators to enforce punitive penalties against federal agencies.[10] In amending the RCRA, Congress targeted the language of 42 U.S.C. § 6961(a), which relates only to RCRA requirements involving "disposal or management of solid waste or hazardous waste." Congress did not similarly amend the related provision under the RCRA UST section.[11] In the UST-specific language, the RCRA's applicability to federal facilities is more limited. In *United States Department of Energy v. Ohio*, the Court found that the imposition of punitive penalties was improper in the face of language that limits legal applicability. The DOD concluded that the RCRA UST section does not contain the "clear statement" of the congressional intent that would allow the EPA to assess punitive fines against other agencies. Thus, the RCRA example is distinct from its CAA counterpart.

The DOD has also expressed concern over whether it can legally authorize its components to pay punitive penalties for alleged UST violations, citing Comptroller General authority, the requirements of 31 U.S.C. § 1301, and Article I of the Constitution. Finally, the DOD has raised sovereign immunity issues. It contends that by imposing punitive UST penalties, the EPA violated the FFCA requirement that grants federal agencies the opportunity to confer with the EPA administrator before an administrative order or decision (such as a penalty) becomes final.[12]

Presently, the question of the EPA's authority to impose punitive sanctions on other federal agencies for UST violations has not been submitted to DOJ's OLC. If an installation receives an NOV (or other notice of an EPA administrative action) that seeks to impose penalties for UST violations, the environmental law specialist should immediately consult the servicing major command environmental law specialist and ELD for further assistance. Captain Richards.

Contracting-Out Initiative

The DOD is presently examining all employee positions for opportunities to contract out those positions to the private sector.[13] All positions are to be examined, and must be coded in one of three ways: as inherently governmental in nature, as a commercial activity exempt from competition under Office of Management and Budget Circular A-76, or as a commercial activity that is eligible for competition. Even installation environmental staffs, normally considered governmental in nature, are being coded during this process.

Environmental law specialists should be aware of current statutory and regulatory authority which designates many positions on environmental staffs as governmental in nature. Under the Sikes Act,[14] positions that implement and enforce integrated natural resource management plans cannot be contracted-out. This interpretation is further supported by explicit legislative history that states that activities related to fish and wildlife management and policy activities are inherently governmental responsibilities.[15] *Department of Defense Instruction 4715.3* and *Army Regulation 200-3* also reiterate this point.[16] Environmental law specialists should ensure that responses to the DOD

5. *Id.* § 6991e(a).

6. *Id.* § 6991(6).

7. *Id.* § 6961(b)(1).

8. *Id.* §§ 6961-6964.

9. 503 U.S. 607 (1992).

10. *Id.* at 628.

11. 42 U.S.C.A. § 6991(f).

12. *Id.* § 6961(b)(2).

13. As part of the Defense Reform Initiative Directive No. 20, the services were directed to submit an inventory of inherently governmental and commercial activities not later than 31 October 1998.

14. Sikes Act, Pub. L. No. 99-561, § 3, 100 Stat. 3149, 3150-51 (1986) (including extensions and amendments) (codified as amended at 16 U.S.C.A. § 670a (d)).

15. H.R. REP. NO. 100-129(I), at 6 (1986), *reprinted in* 1986 U.S.S.C.A.N. 5254, 5257.

tasker accurately code these positions. Lieutenant Colonel Polchek.

Fines and Penalties Update

At the close of the third quarter of FY 1998, four new fines had been assessed against Army installations. Of the 172 fines assessed against Army installations since FY 1993, RCRA fines (96) continue to predominate, followed by the CAA (44), the Clean Water Act (23), the Safe Drinking Water Act (6), and the Comprehensive Environmental Response and Compensation and Liability Act (CERCLA) (3).

Interestingly, in the latest reporting quarter, fines have been assessed under the CAA almost as frequently as those assessed under RCRA. Because these two statutes have differing waivers of sovereign immunity, the scope of federal liability also differs. State regulators are often confused by an installation's ability to pay punitive fines and penalties assessed under RCRA, but not the CAA. Installation environmental law specialists must get involved with state agencies early in the process to ensure that they are aware that payments of fines and penalties by Army installations are governed by, inter alia, the Supreme Court decision of *United States Department of Energy v. Ohio*.[17] Major Egan.

How to Tell One Superfund Preliminary Assessment from Another

This is a quick guide to help you distinguish two documents that bear similar names—the Preliminary Assessment (PA) and the Preassessment Screen (PAS). Each considers different aspects of a hazardous substance cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund.[18] A PA supports the selection of a cleanup remedy. The second document, a Natural Resource Damage (NRD) PAS, is an initial examination of environmental damages that may remain after cleanup. Both the PA and PAS can dovetail. For example, the CERCLA Response PA can focus on remedying environmental concerns caused by contamination. Conversely, the NRD PAS uses the CERCLA remedy as a baseline to determine residual damages to natural resources. With so much overlap, confusion naturally arises. The following information should help environmental law specialists distinguish a PA from a PAS.

A CERCLA Response Preliminary Assessment is the initial screening device used to determine the level of cleanup needed to counter a hazardous substance release.[19] The EPA uses the Response PA to determine if a site should be placed on a list for priority cleanup. A lead agency uses this PA to determine whether cleanup is needed at a particular site, and whether it should initiate a removal or remedial action.[20] The PA provides a review of existing data, including management practices and information from potentially responsible parties (PRPs). This information forms the basis for later response actions.[21]

There are two types of CERCLA Response PAs: the Remedial PA and Removal PA. Both are prepared at the beginning of a cleanup and involve an initial assessment of a site.[22] The Remedial PA looks at available facts to determine the level of cleanup. This includes information on the source and nature of the release, exposure pathways and targets, and recommendations on further action.[23] The Removal PA examines the same sort of information, but focuses on immediate threats to health or the environmental to determine if quick action is needed. When a response action is unclear, the PA provides the first informational round-up for a decision-maker who will later choose between a removal and remedial action. All of these PAs have one thing in common, though—they focus on public health concerns posed by a release.[24]

Like the PA (generally used by a lead agency), a NRD PAS is an initial information screen. It is generally compiled for the benefit of the NRD trustee (usually a federal or state official or Native American tribe).[25] According to the Department of Inte-

16. *Department of Defense Instruction 4715.3* states that functions regarding the management and conservation of natural and cultural resources shall not be contracted. U.S. DEP'T OF DEFENSE, INST. 4715.3, ENVIRONMENTAL CONSERVATION PROGRAM (3 May 1996). Similarly, *Army Regulation 200-3* states that management and conservation of natural resource functions are inherently governmental functions. U.S. DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES-LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 2-7a (28 Feb. 1995).

17. 503 U.S. 607 (1992).

18. 42 U.S.C.A. §§ 9601-9675.

19. 40 C.F.R. § 300.5 (1998).

20. 42 U.S.C.A. §§ 9616(b); 40 C.F.R. §§ 300.410(a), 300.420(a), (b).

21. *See* 40 C.F.R. § 300.410(c)(2).

22. *See generally id.* §§ 420(b), 300.410(a), (b).

23. *Id.* § 300.420(a), (b).

24. *Id.* §§ 410, 415(a).

rior's regulations, the NRD PAS provides a trustee with data about the natural resources affected by a hazardous substance release, identifies other potential trustees, and gives guidance on whether a CERCLA response remedied environmental injuries.[26] The PAS also states whether a trustee could maintain a successful legal claim[27] that would justify undertaking a more rigorous damage assessment.[28]

Unlike the CERCLA Response PA, the NRD PAS is primarily focused on environmental injuries, rather than matters of human health. Likewise, it does not focus on a risk assessment, but examines whether contamination at a site exceeds specific concentration levels for pollutants.[29] Another key difference is timing. The NRD PAS follows the remedy that the Response PA helped to define. This is because the NRD PAS looks to residual damages—environmental damages not corrected by the CERCLA remedy—though it may use relevant information gathered in the Response PA.[30]

Five Similarities Between the PA and the PAS:
Both documents…

1. Look to existing data, including exposure pathways and initial sampling.

2. Seek to detect and quantify a potential hazardous substance release.

3. Identify some of the key players (lead agencies, trustees, PRPs).

4. Provide the first compilation of information for later documents.

5. Act as a screen to determine subsequent action, including emergency responses.

Five Differences Between the PA and the PAS:

1. The CERCLA Response PA concerns multifaceted elements of a cleanup action, while the NRD PAS examines restoration of the environment.

2. The CERCLA Response PA focuses on how to respond to any potential threats to human health and environment. The NRD PAS examines the environmental damages remaining after that response action is complete.

3. The CERCLA Response PA is more action-oriented than its NRD counterpart. The Response PA guides the lead agency's decision to undertake a removal or remedial action, or it justifies no-action. The NRD PAS informs the Trustee on whether to write another document (the NRD Assessment).

4. The CERCLA Response PA focuses on potential human and environmental risks. The NRD PAS does not examine risk per se, but predetermined exposure levels.

5. A CERCLA Response PA focuses on cleanup, not subsequent legal claims. The opposite is true for the PAS. The NRD Trustee uses the PAS, in part, to demonstrate the likelihood of success in making a claim for damages.

If you have any further questions about PAs or PASs, contact this office. Ms. Barfield.

Litigation Division Notes

Military Retiree Medical Care—Broken Promises or Failure to Read the Fine Print?

Introduction

Few military personnel issues have provoked as much emotion and media interest as have recent lawsuits by military retirees challenging restrictions on their access to medical care.[31] This note discusses recent litigation over the alleged erosion of medical benefits enjoyed by military retirees. In addition to explaining the nature and status of these suits, it provides background information to judge advocates in the field concerning the government's position that retiree medical benefits have always been subject to limitations imposed by statute and regulation.

Background

25. 42 U.S.C.A. § 9607(f)(1), (2). *See* 40 C.F.R. § 300.615 (containing information on NRD trustees).

26. 43 C.F.R. §§ 11.23(b), (e)(1)-(5) (1996).

27. *Id.* § 11.23(b).

28. *See* 43 C.F.R. §§ 11.30-11.84 (containing guidance on assessments).

29. 43 C.F.R. §§ 11.25(e), 11.22(b), 11.23(e)(3).

30. 43 C.F.R. § 11.23(e)(5). *See* In Re Acushnet River and New Bedford Harbor, 712 F. Supp. 1010, 1035 (D. Mass. 1989).

31. *See, e.g.*, Nick Adde, *A Broken Promise? No Free Health Care*, Army Times, Aug. 24, 1998, at 7.

The military services have traditionally provided "free" medical services to active duty members in order to maintain the physical health of the force in peacetime and to treat casualties in time of war.[32] Military retirees and their family members, however, historically have enjoyed much more limited medical benefits. Before the Dependent's Medical Care Act was enacted in 1956,[33] there was no statutory authority to provide any sort of medical treatment to retirees. During that time regulations enacted by the individual services generally authorized local commanders to admit and treat retirees and their families, so long as treatment could be extended without adversely affecting the primary mission of treating the active force.[34]

Retirees, who relied upon alleged promises of free medical care for life in deciding to pursue military careers[35] have various complaints: resource constraints have reduced the numbers of retirees treated at military medical facilities; some military medical facilities that previously treated military retirees have closed incident to base realignment and closure; implementation of TRICARE (under which retirees must pay an annual premium in order to enjoy healthcare benefits comparable to active duty family members); and, the Medicare program (the primary vehicle by which military retirees and their family members receive healthcare upon reaching age sixty-five). While many retirees have clear expectations of "free" medical care, it is also clear that these expectations have never had any basis in law, regulation, or the express terms of any enlistment contracts.

The Lawsuits

The Army has lead litigation responsibility for a number of suits that have been brought by military retirees. The following is a brief summary of these cases.

In *Coalition of Retired Military Veterans v. United States*,[36] the plaintiffs are all members of a nonprofit military retirees group. They allege that the government violated the Fifth Amendment's Due Process Clause by depriving them of free medical care for life, which they were promised when they decided to pursue their military careers. The court granted the government's motion to dismiss. The court held that the lawsuit challenged nonreviewable military decisions involving the allocation of healthcare resources and, alternatively, that plaintiffs had no constitutionally protected property or contractual interest. The plaintiffs have appealed that decision to the U.S. Court of Appeals for the Federal Circuit.

In *Schism v. United States*,[37] the plaintiffs filed a class action suit alleging that the government breached their enlistment contracts, violated Fifth Amendment's Due Process and Equal Protection Clauses, and engaged in impermissible age discrimination by "revoking or limiting access to military hospitals, in-patient and out-patient care, and medicine to [plaintiffs and other military retirees]." On 11 June 1997, the court granted the Army's motion to dismiss for lack of jurisdiction with respect to plaintiffs' Federal Tort Claims Act and age discrimination claims.[38] The court denied the motion with respect to the Fifth Amendment Due Process and Little Tucker Act claims as to plaintiffs who elected to pursue military careers prior to 1956 (the effective date of the statute providing the retirees can receive medical care at military facilities on a "space available" basis).[39] On 31 August 1998, the court granted the government's motion for summary judgment on the plaintiffs' remaining claims, finding that they have no legal entitlement to "free" medical care.[40] The plaintiffs will likely appeal.

In *McGinley v. United States*,[41] the plaintiffs are seeking to certify a class action and limit their recovery to $10,000 per plaintiff. They are also seeking injunctive relief to stop Medicare B deductions from their retirement pay. The two named

32. *See generally* Department of Defense, Office of the Secretary of Defense, Military Compensation Background Papers 661-68 (5th ed. 1996) [hereinafter Military Compensation Background Papers]. For most of the nation's history, even active duty personnel did not enjoy the broad right to medical care they have in recent decades. In the past, service members were generally only entitled to medical treatment while "on duty." *See* Morrow v. United States, 65 Ct. Cl. 35 (1928) (holding that a naval officer is not entitled to reimbursement of medical expenses incurred during period of leave, even though leave was canceled upon his admission to a civilian hospital and no military facilities were available; the applicable statute authorized reimbursement only for medical expenses incurred while "on duty;" mere cancellation of leave was not sufficient to restore the officer to duty).

33. 10 U.S.C.A. §§ 1071-1098 (West 1998).

34. Military Compensation Background Papers, *supra* note 32, at 609-10.

35. One court has specifically noted that it "does not doubt that recruiters made specific promises to certain recruits who relied upon those promises." Coalition of Retired Military Veterans v. United States, No. 2:96-3822-23 (D. S.C. Dec. 10, 1997).

36. *Id.*

37. 972 F. Supp. 1398 (M.D. Fla. 1998).

38. *Id.* at 1407.

39. *Id.* at 1406.

40. *Schism*, No. 3:96-349 (N.D. Fla. Aug. 31, 1998) (order granting motion for summary judgment).

plaintiffs in the suit entered the service prior to 1956 and served continuously until retirement. The case is presently pending a decision on the government's motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted.

Feathers v. United States[42] is the fourth lawsuit filed by military retirees who claim they were induced to pursue military careers, in part, by promises of free health care for life. The plaintiffs in this case are pursuing a class action on behalf of all military retirees over sixty-five years of age who are having deductions made from their social security payments for Medicare benefits. The complaint was filed on 1 July 1998, and the government will soon file a motion to dismiss or a motion for summary judgment.

Conclusion

To date, no court has ruled that military retirees are entitled to the extensive, no-cost, medical care sought by plaintiffs in the above actions. Although many retirees firmly believe they are entitled to such benefits, there has never been a basis in law or regulation for any claim that military retirees are entitled to "free medical care for life." Lieutenant Colonel Elling, Major Broyles.

Federal Circuit: Disagreement with Supervisor is Not a Whistleblower Disclosure

In responding to a charge of whistleblower retaliation, whether in court or in the administrative arena, it is often necessary to determine whether the disclosures allegedly made by the complainant are the type that the Whistleblower Protection Act[43] was designed to shelter. In a recent case, *Willis v. Department of Agriculture*,[44] the Court of Appeals for the Federal Circuit held that criticisms made by an employee to the supervisors who are the subject of his complaints do not constitute protected disclosures under the Act.

Mr. Willis was a district conservationist with the United States Department of Agriculture (USDA). Among his duties was a requirement to inspect farms to insure that they conformed to conservation plans endorsed by the USDA.[45] In 1992, Willis surveyed seventy-seven farms and determined that sixteen were not in compliance with the conservation plan. A number of the farms appealed and Willis' decisions on all but one of the appealing farms were overturned. Later, Willis' supervisor counseled him in writing for various reasons including the poor quality reviews of his office.[46] Willis replied in a letter addressing each of his supervisor's comments. Willis later retired rather than face an involuntary transfer.

After he retired, Willis wrote a letter to the Center for Resource Conservation alleging that his supervisors had improperly reversed his determinations pertaining to compliance with farm conservation plans.[47] Later, Willis wrote a letter to the Director of the Office of Personnel Management alleging that improper personnel actions based on the reversal of his compliance determinations had forced his retirement. Willis then wrote to the Office of Special Counsel (OSC) requesting an investigation of the allegedly improper personnel actions that were taken against him. Dissatisfied with OSC, Willis filed an individual right of action (IRA) appeal with the Merit Systems Protection Board (MSPB) alleging that adverse personnel actions had been taken against him in retaliation for disclosures he made with regard to the conservation compliance decisions that he had made which had been reversed.[48] Willis maintained that his disclosures were protected by the Whistleblower Protection Act. An MSPB Administrative Judge dismissed Willis' whistleblower claim and that decision was affirmed by the full Board.[49]

Before the Federal Circuit, Willis conceded that the letters he wrote after his retirement were not covered by the Whistleblower Protection Act. He contended, however, that the complaints that he made to his supervisors about the reversal of his conservation compliance determinations were protected disclosures.[50]

41. No. 97-1140 (M.D. Fla. Aug. 31, 1998) (order granting motion for summary judgment).

42. No. 98-451 (E.D. Ark. filed July 1, 1998).

43. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 U.S.C.A.).

44. 141 F.3d 1139 (Fed. Cir. 1998).

45. *Id.* at 1140.

46. *Id.* at 1141.

47. *Id.*

48. *Id.* at 1142.

49. *Id.* at 1141.

50. *Id.* at 1141.

To succeed in a claim of retaliation for whistleblowing, an employee must show that a protected disclosure was made and that it was a contributing factor in an adverse personnel action.[51] The employee must prove that the adverse personnel action resulted from a prohibited personnel practice specified in 5 U.S.C.A. § 2302(b)(8). In *Willis*, the Federal Circuit noted that the Whistleblower Protection Act's aim was to encourage federal employees to reveal wrongdoing to officials who have the ability to rectify the situation without fear of reprisal. "Discussion and even disagreement with supervisors over job-related activities is a normal part of most occupations. It is entirely ordinary for an employee to fairly and reasonably disagree with a supervisor who overturns the employee's decision."[52] Willis simply complained to his supervisors about reversing his compliance determinations. While he was employed, Willis did not take any steps to communicate with any higher officials in a position to remedy improper activity.[53]

In determining whether alleged whistleblowing by a federal employee is protected, simple complaints or criticisms to the employee's own supervisors about job-related issues will not be considered protected disclosures under the Whistleblower Protection Act. In order to be protected, disclosures must ordinarily be made to a higher authority under circumstances that would cause that person to believe that he is at risk for some disciplinary or adverse action as a result of the disclosures. Major Wilson.

Practice Pointer: Proving a Complainant/Plaintiff Is Aware of Required EEO Procedures

It is advantageous to both the installation commander and to the defense of the Army in federal discrimination cases for civilian employees to be familiar with Equal Employment Opportunity (EEO) reporting procedures.[54] Timely employee participation is critical to an effective command EEO Program. Employees can quickly resolve workplace disputes to minimize an adverse impact on morale. Conversely, if an employee does not exhaust administrative remedies, his administrative complaint or federal suit might be dismissed.[55] When facing a government motion to dismiss a judicial complaint, plaintiffs often allege a lack of notice of the required EEO procedures. A proactive preventative law practice by labor counselors is critical to ensuring both that these employees are familiar with the reporting requirements and document these requirements.

The simplest, but perhaps least effective manner[56] for labor counselors to ensure this familiarity is to spot check EEO and work area bulletin boards to ensure posting of the required information. The names of EEO counselors, their business phone numbers, work addresses, and the time limits for contacting a counselor are required to be posted.[57] Outdated or missing posters indicate that the workforce and the command may not understand the importance of the timing of this initial contact.[58] Copies of outdated posters with a record of where they were posted should be kept for at least five years to minimize the possibility that a recalcitrant plaintiff will allege that he would have filed sooner but was not informed about the process.[59]

Another way to prove that employees had notice of required EEO procedures is through the new employee inprocessing session. While many installations mention the EEO system and procedures in this session, the problem lies in documentation. Specifically, either the attendees or the contents of the orientation are not documented. Therefore, the proactive labor counselor should ensure that not only are these records kept, but also maintained for the entire period that an employee works for the installation.

Finally, perhaps the best way to document current knowledge is through the commander's reading file that contains policy letters. This file should contain a brief explanation of the EEO program and the administrative process. It should also be mandatory reading for all employees. This requirement could pay large dividends if the employees are required to initial a routing slip or sign a statement indicating that they read the information in the file. By updating the file with each new

51. 5 U.S.C.A. § 1221(e)(1).

52. *Willis*, 141 F.3d at 1142.

53. *Id.* at 1144.

54. Many lawsuits filed against the Army are subject to a dispositive motion for the employee's failure to properly exhaust required EEO procedures.

55. *See* Brown v. General Servs. Admin., 425 U.S. 820 (1976).

56. This is the least effective because in a minority of circuits proof of posting the required information will not overcome plaintiff's claim of unfamiliarity for the purposes of a motion to dismiss or for summary judgment. A plaintiff's unsubstantiated claim that he was unfamiliar with the required procedures will result in the court finding that there is a genuine issue of material fact. *See* Bragg v. Reed, F.2d 1136, 1139 (10th Cir. 1979).

57. 29 C.F.R. § 1614.102(b)(6) (1998).

58. An employee who alleges impermissible discrimination must contact an EEO counselor within 45 days of the alleged discriminatory action. 29 C.F.R. § 1614.

59. Agency carelessness in counseling can extend an employee's right to sue almost indefinitely. *See, e.g.*, Weick v. O'Keefe, 26 F.3d 467 (4th Cir. 1994) (dealing with an employee who timely contacted the EEO counselor was not required to file a formal administrative complaint within any definite time period where the counselor failed to give her notice of the final interview; the court held that filing of an administrative complaint three years after nonselection was timely).

commander, the employees will receive the latest EEO information, and the Army will have written proof to defend against those employees who claim that they are unfamiliar with the EEO administrative requirements. Major Martin.

Practice Pointer: Litigation Report Checklist for Civilian Personnel Cases

The prudent labor counselor will call his Litigation Division attorney (DSN 426-1600) immediately upon learning of a new lawsuit. Next, the labor counselor should prepare the singularly most important document for the Army's defense of a lawsuit: the litigation report. The majority of civilian personnel lawsuits are eliminated, or the issues therein significantly reduced, through a dispositive motion that is based almost entirely upon a quality litigation report prepared by the installation labor counselor. The following checklist provides a guide to assist labor counselors in preparing a winning report. Major Berg.

Litigation Report Checklist

References: AR 27-40, Para. 3-9; Individual litigation attorneys

1. Statement of Facts

Complete Statement of Facts.
– All facts pertaining to claims raised in the judicial complaint.
– All facts pertaining to potential defenses to claims in the judicial complaint.
– Dates for all complaints and responsive actions.

All Facts Supported by Documents/Statements.
–All supporting documents and statements are attached and tabbed.
– Statement of facts references all supporting tabbed evidence.

2. Setoff or Counterclaim

Discuss any prior settlements or settlement offers.
Discuss any possible counterclaim, i.e. fraud.

3. Responses to Pleadings

Prepare a Draft Answer to the Judicial Complaint.
–Respond to each and every fact asserted.
– Deny what is false.
– Admit what is true.
– If neither, deny as presented and aver or explain our position.
– Explains tangential facts not contained in litigation report.
– Factual supplement to the litigation report.

4. Memorandum of Law

Prepare Brief Statement of the Legal Issues and Potential Defenses.
– Format not important.
– View it as a lawyer to lawyer memo highlighting the legal issues.
– Do not worry about legal citations.
– Do not let this requirement delay the litigation report.

5. Potential Witness Information

Complete List of Potential Witnesses.
– Work address and phone number.
– Home address and phone number if available (for emergency use).
– Brief statement of witness relevance and to what they can attest.

6. Exhibits

Copy of all relevant documents attached and tabbed.
Index/List of tabs and exhibits included.

7. Distribution

Two Copies to the Litigation Attorney.
One Copy to the Assistant U.S. Attorney who is assigned to the Case.
Computer Disk of Litigation Report included.
– WordPerfect format preferred. (DOJ format)
– MS Word format acceptable.
– Include copy of any MSPB or EEOC briefs available.
– Label disk.

Claims Report

United States Army Claims Service

Personnel Claims Note

The Military-Industry Memorandum of Understanding on Salvage

Some claims offices do not understand all of the implications of the Memorandum of Understanding (MOU) on Salvage[1] between the military services and the carrier industry. The MOU on Salvage indicates, "In instances where the carrier chooses to exercise salvage rights, the carrier will take possession of salvage items, at the service member's residence, or other location acceptable to the member and carrier, not later than thirty days after the receipt of the government's claim against the carrier."[2] This means that the carrier has thirty days after receipt of the demand on the carrier[3] to request the item. This may be a significant amount of time after delivery or settlement of the claim, since the government has up to six years to submit a demand.[4] Some claims offices are informing the claimants that the time for the carrier to exercise salvage rights has expired and that the carrier is not entitled to the property. This is wrong.

If the claimant refuses to cooperate with a carrier that is exercising its salvage rights, the carrier may request help from the claims office. At that time, claims personnel should contact the claimant and remind him that because full payment of the depreciated price was made the items must be made available for salvage. If the claimant wishes to keep the item, the claimant must reimburse the government twenty-five percent for the depreciated amount of each item.

Claims personnel should carefully scrutinize a carrier's allegations that a claimant has not been cooperative in the salvage process. The carrier should produce examples of its efforts to contact the member and the member's refusal to cooperate. At this point it is extremely important that the claims office investigate why the member refused to cooperate, to determine if there are sufficient grounds to relieve the carrier of liability. If the claims office determines that the member simply refused to cooperate, it should provide the carrier with a twenty-five percent salvage credit for each item involved and deduct this amount from the member's previous payment.

There are many more implications in the MOU that claims personnel should examine. The MOU is available in the new *Department of the Army Pamphlet 27-162*, which is dated 1 April 1998.[5] Ms. Schultz.

Claims Management Note

The Judge Advocate General's Excellence in Claims Award

The U.S. Army Claims Service has established new criteria for the 1998 Judge Advocate General's Excellence in Claims Award. The criteria are listed below. The criteria were also published on the Claims Forum of the LAAWS Bulletin Board System (BBS) on 24 July 1998 (BBS message number 1121252). Claims offices that are responsible for processing personnel or tort claims are encouraged to submit an application for the award.

The award will cover claims operations during Fiscal Year 1998 (1 October 1997 through 30 September 1998). The applications must arrive at the U.S. Army Claims Service no later than 1300, 13 January 1999. The awards will be announced in the spring of 1999. The January deadline was selected to avoid conflicts with the deadline for applications for the Legal Assistance Award.

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1. *See* U.S. DEP'T OF ARMY, PAM 27-162, CLAIMS PROCEDURES, fig. 11-6 (1 Apr. 1998) [hereinafter DA PAM 27-162] (containing the memorandum of understanding that became effective 1 April 1987 for all claims that are delivered after that date).

2. *Id.*

3. U. S. Dep't of Defense, DD Form 1843, Demand on Carrier/Contractor (Dec. 1988).

4. 28 U.S.C.A. § 2415 (West 1998).

5. DA PAM 27-162, supra note 1, at 401-03.

All claims offices are eligible to apply for this award. Branch offices (claims processing offices) may either apply for the award separately or may be included in an application that is submitted by a higher headquarters claims office. All offices will be judged using the same criteria. Offices will not be divided into categories such as small, medium, and large. However, both the size and the mission of an office will be considered when evaluating the applications (for example, a one-person office will not be expected to publish as many articles as a ten-person office). If a claims office only completes tort claims or only completes personnel claims, it can still apply for the award. The individual who is submitting the application should indicate which portions are not applicable to the office. The office will then be judged only on the basis of the work that it does. Lieutenant Colonel Masterton.

THE JUDGE ADVOCATE GENERAL'S EXCELLENCE IN CLAIMS AWARD

APPLICATION FORM FOR FISCAL YEAR 1998

A. Claims Office Information.

1. Name of the claims office nominated (as listed in DA Pam 27-162):

2. List all claims personnel, including reservists, by rank or grade, name, position, length of experience in claims, length of time in current job, and hours devoted weekly to claims.[6]

Grade/Name	Position	Experience	Time in job	Hours devoted
Personnel Claims				
Recovery				
Torts				
Affirmative Claims				

3. List all personnel who have attended a claims training course in the past 12 months including, but not limited to, training by USARCS on-site at either the European or PACOM claims training courses.

Grade/Name	Training	Date(s)

6. List personnel separately for personnel claims, recovery, torts, and affirmative claims. A person may be listed more than once if that person works in more than one category.

4. List sources your office uses to obtain information on torts and affirmative claims and how frequently the sources are utilized or visited (e.g., medical treatment facility (MTF), safety office, MP blotter, news media); include the number for the average week.

5. Is your claims office located so as to serve the public and does it have adequate visitor accommodations?
Yes No. If not, why not?

6. Are both personnel and tort claims logged in daily on the day of receipt?
Yes No. If not, why not?

7. Does someone in your claims office log on to the LAAWS BBS claims forum at least twice a week to check for updates?
Yes No. If not, why not?

8. Does your office use the new personnel claims computer program in accordance with the user's manual and submit timely monthly reports?
Yes No. If not, why not?

B. Torts.

1. Did your office earn a "green" rating on all tort claims measurements under the most recent Installation Status Report criteria?
Yes No. If not, in which areas was your office "yellow" or "red" and why?

2. Does your office systematically implement proactive steps to reduce your installation's potential liability regarding potentially compensable events?
Yes. If yes, give one example. No.

3. Area Claims Office (ACO) - Attach copy of claims directive for your geographic area of responsibility for all posts and activities such as DOD, NG, Recruiting, ROTC, Depots, etc. Claims Processing Office (CPO) - Attach copy of description of method of functioning with your ACO.

4. Attach copy of your claims reporting form for serious incidents (SI). List the number of SI reported to USARCS Area Action Officer in the past 12 months.

5. Are unit claims officers appointed pursuant to AR 27-20 in your area?
Yes. If yes, append a list of these officers. No. If not, why not?

6. Do you have a budget for TDY, expert witnesses, phone?

Yes. No. If not, why not?

7. Do you have a camera? Accident measuring device?
Yes. If yes, how many times have they been used in the past 12 months? No. If not, why not?

8. Regarding tort claims within USARCS' jurisdiction, is a mirror copy furnished upon receipt with weekly updates thereafter?
Yes No. If not, why not?

9. Do you furnish a copy of NAFI claims to AAFES or RIMP and medical malpractice claims to the MTF, MEDCOM, and AFIP?
Yes No. If not, why not?

10. Do you record in the claims file a list of all documents furnished to the claimant, USARCS, experts or others?
Yes No. If not, why not?

11. When a new claim is not properly completed (for example, no proper signature, no sum certain, inadequate description to permit investigation) is the claimant or representative immediately informed by phone or other expeditious means and is the claimant provided with written notice thereof ?
Yes No. If not, why not? If so, how many times was this done in the past 12 months?

12. Are independent-contractor tortfeasors identified and notice given to claimants within 30 days of receipt of a claim?
Yes No. If not, why not?

13. Is a master file established on all multi-claims incidents and retained until all claims are resolved?
Yes No. If not, why not?

14. Do all transmittals or correspondence contain the claim number?
Yes No. If not, why not?

15. Have you been in contact with your USARCS AAO in the past month?
Yes No. If not, why not?

16. Do you conduct on- and off-post investigations with police, claimants and witnesses present?
Yes If yes, how many in past 12 months? No. If not, why not?

17. How many negotiations have you conducted in the past 12 months? How many of those negotiations were conducted face-to-face?

18. Are pro se claimants informed of all elements of damage and an MFR made concerning the negotiation?
Yes No. If not, why not?

19. Does the SJA personally approve all denials and final offers including denial of an appeal or reconsideration?
Yes No. If not, why not?

20. How many reconsideration requests or appeals have been granted in the past 12 months?

21. Attach a copy of a claims memorandum of opinion.

C. Affirmative Claims.

1. Have report of injury questionnaires been reviewed and updated in last 12 months?
Yes No. If not, why not?

2. Does the office have an affirmative claims checklist for routine actions which has been updated in last 12 months?
Yes No. If not, why not?

3. Has at least one article been published in the last 12 months discussing the benefits of the affirmative claims program?
Yes If so list date, title, author and publication. No. If not, why not?

4. Are open files reviewed and updated once every 30 days?
Yes No. If not, why not?

5. Does the office have relevant workers' compensation forms on hand?
Yes No. If not, why not?

6. Does the office have a procedure for tracking the statute of limitations on open files?
Yes No. If not, why not?

7. Has the office unintentionally allowed the statute of limitations to run on any cases within the last 12 months?

Yes If so, why? No.

8. Have claims personnel coordinated with the local DPW at least quarterly to obtain information on potential affirmative claims for real property damage?
Yes No. If not, why not?

9. Have claims personnel coordinated with the local DOL at least quarterly in order to obtain information on potential affirmative claims for damaged personal property?
Yes No. If not, why not?

D. Personnel Claims.

1. Did your office earn a "green" rating on all personnel claims measurements under the most recent Installation Status Report criteria?
Yes No. If no, in which areas was your office "yellow" or "red" and why?

2. State the number of articles your office has published on personnel claims in the last 12 months. List date, title, author and publication. If none, explain why.

3. Does your office have a current task oriented SOP (in compliance with the guidance issued at the annual claims training conference) which has been updated in the last 12 months?
Yes No. If not, why not?

4. Do office personnel visit the local transportation office (where soldiers go for outbound counseling) quarterly?
Yes No. If not, why not?

5. Are personnel cross-trained so individual absences do not impede office operations?
Yes No. If not, why not?

6. Have instructions to claimants been reviewed and updated in the last 12 months?
Yes No. If not, why not?

7. Are claimants seen both by appointment and on a walk-in basis?
Yes No. If not, why not?

8. Is the office closed for some portion of the week for administrative duties?
Yes No. If not, why not?

9. Does the office have meaningful customer satisfaction surveys (in compliance with the examples provided in the annual claims training course)?
Yes No. If not, why not?

10. Are payments transmitted to DFAS daily?
Yes No. If not, why not?
11. Are reconsiderations resolved or forwarded within 30 days?
Yes No. If not, why not?

12. Are 95% of personnel claims adjudicated within 30 days?
Yes No. If not, why not?

13. Do more than 1% but less than 5% of claimants request reconsideration?
Yes No. If not, what are the reasons?

14. Are less than 10% of adjudicated claims held pending funding?
Yes No. If more than this are held pending funding, explain why.

E. Recovery.

1. Do adjudicators calculate recovery at the same time a claim is adjudicated?
Yes No. If not, why not?

2. Does the office have one person who has the specific responsibility for tracking recoveries?
Yes No. If not, why not?

3. Does a claims judge advocate or attorney review at least 20% of recovery demands each month prior to settlement with the third party?
Yes No. If not, why not?

4. Are 95% of local recovery demands dispatched within 7 days of payment of the claim?
Yes No. If not, why not?

5. Are 95% of centralized demands sent out after 30 days but not more than 45 days after payment of the claim?
Yes No. If not, why not?

6. Do all files forwarded for reconsideration have demand packets enclosed?
Yes No. If not, why not?

7. Are all third party payments received after the claim file has been forwarded to USARCS returned to the third party?
Yes No. If not, why not?

8. Does the office have a written procedure for controlling recovery checks (securing and depositing them)?
Yes No. If not, why not?

9. Does the office have a safe or locked container for holding checks and are all checks placed in this container upon receipt pending deposit or return?
Yes No. If not, why not?

10. Are all checks deposited or returned within 30 days?
Yes No. If not, why not?

11. Does the office coordinate at least quarterly on offset requests with the contracting activity that administers DPM contracts in the office's area of responsibility?
Yes No. If not, why not?

F. Disaster Claims

1. Does your office have a disaster claims plan?
Yes No. If not, why not?

2. If your office has a disaster claims plan, has your office coordinated with the drafter of the installation disaster plan during the past year?
Yes No. If not, why not?

3. Did your office conduct at least one disaster claims exercise or training session within the past year?
Yes No. If not, why not?

G. Indicia of Excellence

1. Using bullets, indicate a maximum of five strengths of your claims program in fiscal year 1998.

2. Using bullets, list a maximum of three new claims initiatives begun by your claims office during fiscal year 1998.

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 foleyms@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 inquires 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.

IMA Positions in Criminal Law Department, TJAGSA

The Judge Advocate General's School, U.S. Army, Criminal Law Department, has two positions open now for Individual Mobilization Augmentees. The positions are specified as follows:

two major (O-4) positions to conduct trial advocacy training during the two-week criminal law advocacy course, held twice annually; trial experience required.

Each application packet must include the following materials:

Personal data: Full 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. Also, include any continuing legal education primarily devoted to advocacy training.

Civilian experience: Resume of legal experience.

Statement of purpose: A concise statement (one or two paragraphs) of why you are particularly qualified to train young judge advocates in trial advocacy.

Routing of application packet: Each packet shall be forwarded to LTC Kevin Lovejoy, Chair, Criminal Law Department, The Judge Advocate General's School, U.S. Army, 600 Massie Road, Charlottesville, VA 22903-1781.

Inquiries: For questions regarding the above positions, requirements or eligibility, contact either LTC Lovejoy (804-972-6341; lovejjk@hqda.army.mil); or MAJ Norman Allen III (804-972-6349; allennf@hqda.army.mil).

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 Tromey,.....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

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
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	BG Michael J. Marchand BG John F. DePue MAJ Geoffrey Corn MAJ Greg Coe MAJ Juan J. Rivera	MAJ John Kingrey 214th LSO 505 88th Division Rd Fort Snelling, MN 55111 (612) 713-3234
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	MG John D. Altenburg BG Richard M. O'Meara MAJ Michael Newton MAJ Jack Einwechter COL Keith Hamack	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)
9-10 Jan 99	Long Beach, CA 78th MSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres MAJ Stephanie Stephens MAJ M. B. Harney COL Keith Hamack	MAJ Christopher Kneib 5129 Vail Creek Court San Diego, CA 92130 (work) (619) 553-6045 (unit) (714) 229-7300
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	MG John D. Altenburg BG Thomas W. Eres MAJ Harrold McCracken LTC Tony Helm COL Thomas Tromey	LTC Frederick S. Feller 7023, 95th Avenue, SW Tacoma, WA 98498 (work) (360) 753-6824 (home) (253-582-6486 (fax) (360) 664-9444
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	BG Thomas J. Romig BG Richard M. O'Meara MAJ Victor Hansen LTC Karl Goetzke COL Keith Hamack	LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: Tdonne2947@aol.com

20-21 Feb	Denver, CO 87th MSO	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Joseph R. Barnes BG Thomas W. Eres MAJ Jody Hehr MAJ Michael Smidt COL Thomas N. Tromey	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	BG Michael J. Marchand BG John F. DePue 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	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Herb Ford MAJ Walter Hudson COL Thomas N. Tromey	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	BG Joseph R. Barnes BG John F. DePue 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	BG Michael J. Marchand BG Thomas W. Eres 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	BG Thomas J. Romig BG John F. DePue 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	BG Michael J. Marchand BG Thomas W. Eres 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	MG John D. Altenburg BG Thomas W. Eres 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: corrigant@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	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Moe Lescault MAJ Geoffrey Corn COL Thomas N. Tromey	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	BG Michael J. Marchand BG Richard M. O'Meara 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: browncr@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	BG Thomas J. Romig BG John f. DePue 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

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).

1999

January 1999

4-15 January	1999 JAOAC (Phase II) (5F-F55).
5-8 January	1999 USAREUR Tax CLE (5F-F28E).
11-15 January	1999 PACOM Tax CLE (5F-F28P).
11-15 January	1999 USAREUR Contract and Fiscal Law CLE (5F-F15E).
11-22 January	148th Basic Course (Phase I-Fort Lee) (5-27-C20).
20-22 January	5th RC General Officers Legal Orientation Course (5F-F3).
22 January-2 April	148th Basic Course (Phase II-TJAGSA) (5-27-C20).
25-29 January	152nd Senior Officers Legal Orientation Course (5F-F1).

February 1999

8-12 February	70th Law of War Workshop (5F-F42).
8-12 February	1999 Maxwell AFB Fiscal Law Course (5F-F13A).
8-12 February	23rd Administrative Law for Military Installations Course (5F-F24).

March 1999

1-12 March	31st Operational Law Seminar (5F-F47).
1-12 March	142nd Contract Attorneys Course (5F-F10).
15-19 March	44th Legal Assistance Course (5F-F23).
22-26 March	2d Advanced Contract Law Course (5F-F103).
22 March-2 April	11th Criminal Law Advocacy Course (5F-F34).
29 March-2 April	153rd Senior Officers Legal Orientation Course (5F-F1).

April 1999

12-16 April	1st Basics for Ethics Counselors Workshop (5F-F202).
14-16 April	1st Advanced Ethics Counselors Workshop (5F-F203).
19-22 April	1999 Reserve Component Judge Advocate Workshop (5F-F56).
26-30 April	10th Law for Legal NCOs Course (512-71D/20/30).
26-30 April	53rd Fiscal Law Course (5F-F12).

May 1999

3-7 May	54th Fiscal Law Course (5F-F12).
3-21 May	42nd Military Judge Course (5F-F33).

June 1999

7-18 June	4th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
7 June- 16 July	6th JA Warrant Officer Basic Course (7A-550A0).
7-11 June	2nd National Security Crime and Intelligence Law Workshop (5F-F401).
7-11 June	154th Senior Officers Legal Orientation Course (5F-F1).
14-18 June	3rd Chief Legal NCO Course (512-71D-CLNCO).
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).
21-25 June	10th Senior Legal NCO Management Course (512-71D/40/50).
28-30 June	Professional Recruiting Training Seminar

July 1999

5-16 July	149th Basic Course (Phase I-Fort Lee) (5-27-C20).
6-9 July	30th Methods of Instruction Course (5F-F70).
12-16 July	10th Legal Administrators Course (7A-550A1).
16 July-24 September	149th Basic Course (Phase II-TJAGSA) (5-27-C20).
21-23 July	Career Services Directors Conference

August 1999

2-6 August	71st Law of War Workshop (5F-F42).
2-13 August	143rd Contract Attorneys Course (5F-F10).

9-13 August	17th Federal Litigation Course (5F-F29).
16-20 August	155th Senior Officers Legal Orientation Course (5F-F1).
16 August 1999-26 May 2000	48th Graduate Course (5-27-C22).
23-27 August	5th Military Justice Mangers Course (5F-F31).
23 August-3 September	32nd Operational Law Seminar (5F-F47).

September 1999

8-10 September	1999 USAREUR Legal Assistance CLE (5F-F23E).
13-17 September	1999 USAREUR Administrative Law CLE (5F-F24E).
13-24 September	12th Criminal Law Advocacy Course (5F-F34).

October 1999

4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
4-15 October	150th Basic Course (Phase I-Fort Lee) (5-27-C20).
15 October-22 December	150th Basic Course (Phase II-TJAGSA) (5-27-C20).
12-15 October	72nd Law of War Workshop (5F-F42).
18-22 October	45th Legal Assistance Course (5F-F23).
25-29 October	55th Fiscal Law Course (5F-F12).

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November-3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November-3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
6-10 December	1999 Government Contract Law Symposium (5F-F11).
13-15 December	3rd Tax Law for Attorneys Course (5F-F28).

2000

January 2000

4-7 January	2000 USAREUR Tax CLE (5F-F28E).
10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).
10-21 January	2000 JAOAC (Phase II) (5F-F55).
17-28 January	151st Basic Course (Phase I-Fort Lee) (5-27-C20).
18-21 January	2000 PACOM Tax CLE (5F-F28P).
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).
28 January-7 April	151st Basic Course (Phase II-TJAGSA) (5-27-C20).
31 January-4 February	158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February	73rd Law of War Workshop (5F-F42).
7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).

14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
28 February-10 March	33rd Operational Law Seminar (5F-F47).
28 February-10 March	144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).
20-24 March	3rd Contract Litigation Course (5F-F102).
20-31 March	13th Criminal Law Advocacy Course (5F-F34).
27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
8-12 May	57th Fiscal Law Course (5F-F12).

June 2000

5-9 June	3rd National Security Crime and Intelligence Law Workshop (5F-F401).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
12-16 June	4th Senior Legal NCO Course (512-71D-CLNCO).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Professional Recruiting Training Seminar

3. Civilian-Sponsored CLE Courses

1998

November

5 November ICLE	Professionalism, Ethics and Malpractice Kennesaw State University Marietta, Georgia
6 November ICLE	Bankruptcy Law Marriott Marquis Hotel Atlanta, Georgia
6-7 November ICLE	ADR Institute Swissotel Atlanta, Georgia
13 November ICLE	RICO Swissotel Atlanta, Georgia
13-14 November ICLE	Intellectual Property Law Institute Brasstown Valley Resort Young Harris, Georgia

December

3 December ICLE	Environmental Matters Atlanta, Georgia
4 December	Employment Law

ICLE	Marriott Gwinnett Place Hotel Atlanta, Georgia
18 December ICLE	Labor Law Swissotel Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

New York has implemented biennial CLE requirements for all New York attorneys that become effective 31 December 1998. These requirements differ for new attorneys, admitted after 1 October 1997, and for more senior attorneys. Reporting and certification of CLE requirments will begin with the biennial attorney registration statements filed on or after 1 January 2000. Approved CLE courses that were taken on or after 1 January 1998 may be applied toward the initial reporting cycle. There is an exemption for full-time active duty military attorneys. Presently, The Judge Advocate General's School, U.S. Army (TJAGSA) is not an approved CLE provider. Additional information can be obtained at <http://www.ucs.ljx.com>. The CLE Board also has an e-mail address for direct questions: cle@courts.state.ny.us.

For detailed information on mandatory continuing legal eduction jurisdiction and reporting dates for other states, see the September 1998 issue of *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

Legal Assistance

*AD A353921/PAA Consumer Law Guide, JA 265-98 (440 pgs).

* Indicates new publication or revised edition.

For a complete listing of the TJAGSA Materials Available through the DTIC, see the September 1998 issue of *The Army Lawyer*.

2. Regulations and Pamphlets

For detailed information, see the September 1998 issue of *The Army Lawyer*.

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

For detailed information, see the September 1998 issue of *The Army Lawyer*.

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1998 issue of *The Army Lawyer*.

5. Articles

The following information may be useful to judge advocates:

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

Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1 (1998).

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

7. 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.