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The Preemption Debate: What Is the Scope of the Miller Act Remedial Scheme?

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Introduction

If a contractor in a private construction project defaults on a payment to a supplier of labor, services, or materials, the supplier generally can secure a mechanic's lien[1] against the improved property under state law. A mechanic's lien allows an unpaid supplier of services, labor, or material to secure priority in receiving payment under a private construction contract.[2] Because a lien cannot attach to government property, this remedy is not available to a supplier in a construction contract with the United States.[3] Consequently, Congress enacted the Miller Act[4] in 1935 to provide suppliers under government contracts with a remedy that is comparable to a mechanic's lien.[5]

Under the Miller Act,[6] before any contract for the construction, repair, or alteration of any public work is awarded to a contractor, the contractor must give the United States a payment bond with a surety or sureties. This payment bond protects suppliers of services, labor, or materials under the contract.[7] Furthermore, every person who has furnished labor or material to a prime contractor under a government construction contract can sue on the payment bond for the amount that is due. This remedy is available if the supplier has not been fully paid within ninety days after he completed performance under the contract.[8]

The Miller Act also protects suppliers who have a direct contractual relationship with a subcontractor under a government contract, but have no contractual relationship with the prime contractor. The Miller Act gives these suppliers a right to sue on the payment bond.[9] A claimant who sues under a Miller Act payment bond must bring suit within one year after the last day that he performed his obligations under the contract. In addition, he must bring suit in the name of the United States and in the federal district court where the contract "was to be performed and executed."[10]

In recent years, many federal courts have debated the meaning and purpose of the Miller Act.[11] Specifically, courts are split on whether the Miller Act preempts a subcontractor or supplier from bringing suit under state law against a surety or other party involved in a government construction contract.[12] In ana-

1. *Blacks Law Dictionary* defines a mechanic's lien as:

> [A] claim or lien created by state statutes for the purpose of securing priority of payment of the price or value of work performed and materials furnished in erecting, improving, or repairing a building or other structure. A mechanic's lien attaches to the land as well as the buildings and improvements erected thereon.

BLACKS LAW DICTIONARY 981 (6th ed. 1990).

2. *Id.*

3. *See* Illinois Surety Co. v. John Davis Co., 244 U.S. 376, 380 (1917).

4. 40 U.S.C.A. § 270(a)-(d)(1)(West 1998).

5. *See* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co. Inc., 417 U.S. 116, 122 (1974).

6. The Miller Act's requirements only apply to a government construction contract if that contract involves an amount greater than $100,000. 40 U. S.C.A. § 270d-1. Service secretaries and the Secretary of Transportation may waive Miller Act requirements. *Id.* § 270e.

7. *Id*. § 270(a). The contractor must also furnish a performance bond to the United States that is used to protect the United States from losing money in the event the contractor breaches its duties under the contract. *Id*. This article, however, focuses on the payment bond required of the contractor for the protection of suppliers under the contract.

8. *Id.* § 270(b)(a).

9. A claimant who is not in privity with the prime contractor must give the prime contractor notice of a claim within 90 days from the date on which the claimant last performed under the contract. *Id*. § 270(b)(a). To give sufficient notice under the Miller Act a person must state, with substantial accuracy, the amount claimed and the subcontractor with whom he had a contractual relationship. *Id.*

10. *Id.* § 270(b)(a).

11. *See infra* notes 32-96 and accompanying text.

lyzing whether the Miller Act preempts state law, courts must begin by presuming that Congress did not intend to preempt state law.[13] Courts must then examine the congressional intent behind the Miller Act.[14] Courts that have taken these steps have uniformly held that the Miller Act does not preempt state law remedies against a surety or other parties involved in a government construction contract.[15] Conversely, the two courts that have held that the Miller Act preempts state law have both mistakenly interpreted the Supreme Court's holding in *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*[16] as requiring a presumption that the Miller Act was intended to preempt state law. Both courts also neglected to review the congressional intent underlying the Miller Act.[17]

This article reviews the congressional intent underlying the Miller Act in its historical context. It examines the Miller Act preemption debate among the federal courts. This article argues that the courts holding that the Miller Act does not preempt state law have properly applied the Supreme Court's preemption case law. Finally, this article discusses the impact of the Supreme Court's developing case law on the Miller Act preemption debate.

The Purpose of the Miller Act

In 1894, Congress enacted the Heard Act.[18] This statute required any person who entered into a formal contract with the United States for the construction of any public building or public work to execute a single bond obligating that person to promptly pay all persons who supplied labor and materials under the contract. United States Supreme Court case law and the legislative history of the Heard Act indicate that Congress enacted the statute to protect subcontractors and materialmen who supplied labor and materials for the construction of public works by giving them the federal equivalent of a state mechanic's lien.[19]

Despite the statute's protective purpose, Congress found that the Heard Act did not adequately protect the supplier of labor and material in a government construction contract.[20] Three provisions in the Heard Act allowed sureties to delay and often default in making payments under a bond to a subcontractor. First, the United States had priority over all subcontractors in a claim against the contractor's bond under the Heard Act.[21] Second, the Heard Act expressly limited a surety's liability to the amount of a bond that the surety posted:

> If the recovery on the bond should be inadequate to pay the amounts found due to all said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the surety's liability, to wit, the penalty named in the bond less any amount which said surety may have had to pay to the United States by reason of execution of said bond, and upon so

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12. This issue usually arises where a subcontractor sues a surety in tort for a surety's bad faith denial of payments due under a payment bond. *See infra* notes 33-97 and accompanying text.

13. *See* Maryland v. Louisiana, 451 U.S. 725 (1981) (holding that consideration of whether a state provision is preempted by federal law under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law).

14. *See* Ingersoll Rand Co. v. McClendon, 498 U.S. 133, 137-138 (1990) ("[T]he question of whether a certain state action is pre-empted by federal law is one of congressional intent").

15. *See infra* notes 32-69 and accompanying text.

16. 417 U.S. 116 (1974). The courts that have found that the Miller Act preempts state law remedies against a surety have all relied on *F.D. Rich Co.* The issue of whether the Miller Act preempts a separate, state statutory or common-law cause of action against a surety, however, was neither at issue before nor addressed by the Supreme Court in that case. *See id.*; *see also infra* notes 105-120 and accompanying text.

17. *See infra* notes 83-96 and accompanying text.

18. 40 U.S.C. § 270 (repealed 1935).

19. *See* United States v. Ansonia Brass & Copper Co., 218 U.S. 452, 471 (1910) (reasoning that Congress enacted the Heard Act because mechanics and materialmen under government contracts could not obtain liens against public property); H.R. REP. NO. 53-97, at 1 (1893) ("There is no law in existence for the protection of mechanics and materialmen in this class of cases, as it is contrary to allow mechanic's or materialmen's liens on public buildings or public works, and in many cases person or persons entering into contracts with the United States . . . are without remedy.").

20. *See* H.R. REP. NO. 74-1263, at 1 (1935) ("This proposed legislation supersedes the Heard Act, which it repeals, dealing with bonds of contractors on public works. After considerable complaint with regard to the working of the Heard Act had come to the Committee on the Judiciary, *particularly from subcontractors who have experienced in many cases what seems to be undue delay, with resultant hardships, in the collection of monas due them by suits on bonds under the procedure prescribed by the Heard Act*.") (emphasis added); *see* also S. REP. NO. 74-1289, at 1 (1935).

21. *See* 40 U.S.C. § 270 (repealed 1935) ("If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of the said claim and demands, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners.")

doing, *the surety will be relieved from further liability.*[22]

Third, the Heard Act often forced a contractor to delay bringing suit on a bond because it did not permit a plaintiff to bring suit until six months after completion of a contract and only permitted such a suit if the United States had not made a claim under the bond.[23]

In 1935, Congress repealed the Heard Act[24] and enacted the Miller Act in its place. In establishing the Miller Act, Congress sought to strengthen the remedies available to a supplier in a government contract. The Judiciary Committees of both the House and the Senate made this intent evident by declaring: "The major purpose of [the Miller Act] seems to be to afford greater protection to subcontractors, laborers, and materialmen."[25]

In enacting the Miller Act, Congress essentially recodified the Heard Act with some minor alterations.[26] Two fundamental differences between the Heard Act and the Miller Act show that, in drafting the Miller Act, Congress intended to increase a supplier's remedial power against a surety.[27]

First, the Miller Act expedited a supplier's ability to bring suit against a surety on a payment bond. Under the Heard Act, a supplier was required to wait six months after the completion of a contract before it could bring suit against a surety. Conversely, under the Miller Act, a claimant can bring suit against a surety ninety days after he performs his last obligation under a contract.[28]

Second, the Miller Act expanded the scope of recovery that was granted to a subcontractor against a surety. Under the Heard Act, if a surety paid the amount specified in its bond to a court, even where the bond was inadequate to repay all creditors, he was "relieved from further liability."[29] Conversely, the Miller Act omits the language that caps a surety's liability and potentially limits a claimant to a pro rata recovery of money owed to him. In place of this language, the Miller Act provides a claimant with a cause of action to recover "sums justly due him."[30]

In summary, the legislative history surrounding the Heard Act suggests that Congress initially created the Heard Act to give suppliers under government contracts protection by providing them with an alternative remedy to a state mechanic's lien. The legislative history of the Miller Act reveals that the Heard Act was not a strong enough statute to protect subcontractors from strategic behavior on the part of sureties that were paying money due on contractor's bonds.[31] Consequently, Congress enacted the Miller Act to grant a subcontractor under a government contract remedial powers against a surety that had not been previously available.

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22. *See* 40 U.S.C. § 270 (repealed 1935) (emphasis added).

23. *See id.* If the United States brought suit on the bond within six months after the end of the contract, a creditor could intervene in the suit and have its rights on the bond adjudicated; however, the creditor's rights were subject to the priority of the United States' claim on the bond. *See id.*; *see also* H.R. REP. No. 74-1263, at 2 (1935).

> If, however, no suit is brought on the bond by the United States, the claimants must wait until 6 months after the completion of the final settlement of the contract before they may initiate suit. . . . This may mean a delay of years before the subcontractors, materialmen, and laborers are even permitted to bring suits the bond, and months more of delay occur before judgment is entered. Under such circumstances, it appears that claimants frequently find themselves under the necessity of choosing whether they will wait years for their money or accept compromises which, if they do not involve greater loss, at least destroy the profitableness of the contract. Those in financial stringency, of course, do not have a choice but the latter alternative.

Id.

Under the Heard Act the plaintiff was required to bring suit on the bond in the name of the United States in a federal district court where the contract was to be executed and performed. 40 U.S.C. § 270 (repealed 1935).

24. *See* 40 U.S.C. § 270 (repealed 1935).

25. *See* H.R. REP. NO. 74-1263, at 1 (1935); S. REP. NO. 74-1289, at 1 (1935).

26. *Compare* 40 U.S.C. § 270 (repealed 1935), *with* 40 U.S.C.A. § 270 (a)-(d) (West 1998).

27. The Miller Act increased a supplier's protection in relation to the government by requiring a contractor to furnish two separate bonds: a performance bond for the protection of the United States, and a payment bond for the protection of suppliers of material and labor. Consequently, under the Miller Act, a plaintiff's suit on a payment bond is no longer limited by claims that the United States makes on the same bond. *See* 40 U.S.C.A. § 270(a)-(b).

28. *Compare* 40 U.S.C. § 270 (repealed 1935), *with* 40 U.S.C.A. § 270 (b).

29. 40 U.S.C. § 270 (repealed 1935). In such cases the creditors were paid pro rata on the bond. *Id.*

30. *Compare* 40 U.S.C. § 270 (repealed 1935), *with* 40 U.S.C.A. § 270 (b).

31. *See supra* note 23.

The Circuit Debate: Does the Miller Act Preempt a Subcontractor's or Supplier's State Law Remedies Against Other Parties Involved in a Miller Act Project?

Courts Holding that the Miller Act does not Preempt State Law Remedies

Two circuit courts have held that the Miller Act does not preempt state law actions by a supplier against other parties involved in a federal construction project. In *K-W Industries v. National Surety Corp.*,[32] National Surety failed to pay a contractor the amount that was due on a Miller Act payment bond.[33] After suing National Surety in a federal district court for the amount due under the bond, the contractor sued National Surety in a Montana state court for bad faith under the state's unfair insurance practices statute.[34] The Ninth Circuit rejected National Surety's claim that the Miller Act preempted state law liability against a surety for conduct relating to the performance of its obligations arising out of the Miller Act bond.[35] The court noted that the legislative history of the Miller Act did not suggest that Congress intended to protect sureties from liability for torts committed in connection with the payment of claims under Miller Act bonds.[36] The court reasoned that the Miller Act's purpose would be advanced if sureties were deterred by state law from bad faith practices in the payment of Miller Act bonds.[37] Accordingly, the court concluded that the Miller Act, like the mechanic's lien that it replaced, is not an exclusive remedy for a supplier on a government project. Rather, it constitutes a remedy that is separate and independent from a supplier's personal remedies.[38]

Similarly, in *United States ex rel. Sunworks Division of Sun Collector Corp. v. Insurance Co. of North America*,[39] a supplier to a subcontractor brought a common law action for unjust enrichment against the general contractor on a Miller Act contract after the subcontractor neglected to pay the supplier for its services.[40] The Tenth Circuit held that the Miller Act did not preempt the supplier's claim for unjust enrichment.[41] The court concluded that the Miller Act was not the supplier's exclusive remedy.[42] The court noted that the purpose of the Miller Act was to provide suppliers under government contracts with an alternative remedy to a mechanic's lien.[43] Consequently, the court concluded that the Miller Act, like the mechanic's lien provided for by state statute, created a statutory remedy that supplemented other statutory and common law remedies.[44]

At least four district courts have held that state actions against a Miller Act surety are not preempted by the Miller Act. In *Goldman Services Mechanical Contracting v. Citizens Bank and Trust Co.*,[45] a subcontractor on a federal construction project filed a negligence claim against Citizens Bank and Trust Company after Citizens signed a certificate of sufficiency allowing an individual with insufficient funds and assets to qualify as a surety on a Miller Act payment bond. The court held that the Miller Act did not preempt the subcontractor's tort claim against Citizens.[46] The court noted that the purpose of the Miller Act is to protect suppliers under federal projects by giving them an alternative remedy to a mechanic's lien.[47] The

32. 855 F.2d 640 (9th Cir. 1988).

33. *Id.* at 641.

34. *Id.*

35. *Id.* at 642.

36. *Id.* at 643.

37. *Id.*

38. *Id.* (citing United States *ex rel*. Sunworks Div. of Sun Collector Corp. v. Insurance Co. of N. Am. 695 F.2d 455, 458 (10th Cir. 1982)). The court reasoned that for purposes of deciding whether or not the Miller Act preempts a contractor's common law claims, there was no reason to distinguish between remedies that a supplier might have against an owner, contractor or subcontractor as opposed to a surety. *Id.*

39. 695 F.2d 455 (10th Cir. 1982).

40. *Id.* at 456.

41. *Id.* at 457.

42. *Id.*

43. *Id.* at 457-58.

44. *Id.* at 458.

45. 812 F. Supp. 738 (W.D. Ky. 1992), *aff'd*, 9 F.3d 107 (6th Cir. 1993).

46. *Id.* at 741.

court reasoned that the Miller Act, like the mechanic's lien, is not an exclusive remedy.[48] The court concluded that the Miller Act's purpose would be undermined if the subcontractor's claim against Citizens was preempted.[49]

In *Alvarez v. Insurance Co. of North America*,[50] a Miller Act surety only paid the subcontractor, Nueva Castilla, a pro rata share of the amount that was due under a Miller Act bond. Nueva sued the surety for bad faith under a California insurance statute that, by its express terms, covered sureties.[51] The court held that the Miller Act did not preempt Nueva's claim.[52] The court began its analysis by noting that it would not lightly infer that Congress intended to preempt state law. The court also recognized that the legislative history of the Miller Act demonstrated that the statute was enacted to "protect subcontractors who had previously had difficulty collecting payment on public works."[53]

The court rejected the surety's argument that Treasury regulations, which allowed the Secretary of the Treasury to revoke a surety's certificate of authority if it failed to make prompt payments to suppliers, evidenced Congress' intent to have delinquent Miller Act sureties regulated by federal law rather than state law.[54] The court noted that Congress did not state that it intended to preempt state law in the Treasury regulations. The court also noted that the regulations applicable to Miller Act sureties specifically incorporate state law.[55] Accordingly, the court concluded that the Treasury regulations evidenced a congressional desire to use state regulation in the enforcement of the Miller Act.[56] Additionally, the court dismissed the surety's argument that the California good-faith insurance statute conflicted with the purpose of the Miller Act.[57] The court reasoned that the California statute did not require any conduct that is prohibited by or inconsistent with the Miller Act.[58] Rather, the court concluded that the California statute strengthened the Miller Act, because it provided sureties with an additional reason to promptly pay claims that are made against bonds.[59]

Similarly, in *C&F Construction Co. v. International Fidelity Insurance Co.*,[60] C&F, a subcontractor in a federal construction project, sued the surety under the project. In the suit, C&F alleged that the surety's failure to make payments that were due under a payment bond was tortious, malicious, and an act of bad faith. The court held that the Miller Act did not preempt C&F's tort claim.[61] The court reasoned that the legislative history of the Miller Act provided "no plausible basis" for a preemption claim.[62]

In *United States ex rel. Ehmcke Sheet Metal Works v. Wausau Insurance Co.*,[63] Ehmcke Sheet Metal Works a subcontractor on a federal construction contract, brought suit against a surety for breach of the covenant of good faith and fair dealing under California law. The court held that the Miller Act did not preempt Ehmcke's state law claim against the surety.[64] The court reasoned that the Miller Act simply creates the federal equivalent of a mechanic's lien and does not displace a supplier's other remedies in a federal construction project.[65]

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47. *Id.*

48. *Id.*

49. *Id.*

50. 667 F. Supp. 689 (N.D. Cal. 1987).

51. *Id.* at 690-92.

52. *Id.* at 697.

53. *Id.* at 693.

54. *Id.* at 694-95 (citing 31 C.F.R. § 223.18(a) (1998)).

55. For example, the regulations require a Miller Act surety to be licensed in the state where the bond is to be executed. *Id.* (citing 31 C.F.R. § 223).

56. *See id*.

57. *Id.* at 696-97.

58. *Id.* at 697.

59. *Id.*

60. No. 97-1709-LFO (D. D.C. Oct. 21, 1997).

61. *Id.* at 2 n.1.

62. *Id.* (citing H.R. REP. NO. 74-1263 (1935); S. REP. NO. 74-1238 (1935)); *see supra* notes 18-30 and accompanying text.

63. 755 F. Supp. 906 (E.D. Cal. 1991).

Despite its holding on federal preemption, however, the court concluded that California law barred Ehmcke's suit because Ehmcke was not in privity with the surety that it sued.[66] The court reasoned that allowing such suits would result in an increase in the number of suits and claims for punitive damages.[67] This, in turn, would increase the cost of surety bonds. The court concluded that the increased surety bond cost would be passed on by sureties to prime contractors, and then by prime contractors to the United States.[68] Accordingly, the court concluded that California law would bar Ehmcke's suit to minimize the insurance costs to the United States.[69]

Courts Holding that the Miller Act does Preempt State Law Remedies

Courts that hold that the Miller Act preempts a state action against a surety or other party on a federal construction project have uniformly relied on the Supreme Court's holding in *F.D. Rich Co.*[70] In that case, F.D. Rich, a prime contractor for a California housing project posted a payment bond with its surety. F.D. Rich then entered into a contract with a subcontractor in which the subcontractor agreed to supply and install plywood panels under the project.[71] The subcontractor entered into a contract with Industrial Lumber Company to supply the plywood needed for the California project.[72] When F.D. Rich needed plywood for one of its other contracts, it diverted one of Industrial's California shipments to a project in South Carolina.[73]

After the subcontractor on the project defaulted in paying Industrial for the plywood it supplied to both the California and South Carolina projects, Industrial brought a claim against F.D. Rich and its surety in the Eastern District of California.[74] The Ninth Circuit affirmed the district court's judgment that venue was proper and both F.D. Rich and its surety were jointly and severally liable for the amount of unpaid shipments to the California project plus eight percent interest.[75] The Ninth Circuit further held that recovery under the Miller Act entitled Industrial to attorney's fees, and the surety on F.D. Rich's California project was not liable for amounts owed to Industrial for shipments that were diverted from the California project to South Carolina.[76]

The Supreme Court affirmed the Ninth Circuit's judgment, except the Supreme Court held that attorney's fees were not recoverable under a Miller Act cause of action.[77] The Court denied Industrial's argument that "sums justly due" under a Miller Act cause of action include attorney's fees.[78] The Court reasoned that, absent evidence of congressional intent to do so, it would not expand the scope of the Miller Act to incorporate the state law policy of awarding attorneys fees in public works cases.[79] Additionally, the Court suggested in dicta that a uniform rule of national application would benefit the reasonable expectations of claimants who bring suit under the Miller Act.[80]

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64. *Id.* at 909.

65. *Id.*

66. *Id.* at 913; *see* United States *ex rel*. Caps v. Fidelity and Deposit Co., 875 F. Supp. 803, 810-11 (M.D. Ala. 1995) (holding that the Miller Act does not bar a claim against a surety for bad faith insurance practices yet refusing to exercise pendant jurisdiction over the suit because it involved novel questions of state law that were properly resolved by a state tribunal).

67. *Ehmcke Sheet Metal Works*, 755 F. Supp. at 911.

68. *Id.*

69. *Id.* The court's analysis of the bad faith claim does not, in effect, preempt state law claims under the Miller Act because the court suggested that Ehmcke could bring a state cause of action against the prime contractor for fraud. *Id.* at 914.

70. 417 U.S. 116 (1974).

71. *Id.* at 118.

72. *Id.*

73. *Id.* at 119.

74. *Id.* at 120.

75. *Id.* at 121 n.5. It is imperative to note that the Miller Act does not provide for prejudgment interest on sums due. Industrial's claim for interest arises from its contract with its subcontractor that interest would be calculated at eight percent per annum from the date payment was due. *See* Brief for Respondent at 17-18, F.D. Rich Co. v. United States *ex rel*. Indus. Lumber Co., 427 U.S. 116 (1974) (No. 72-1382).

76. *F.D. Rich Co*., 417 U.S. at 121 n.5.

77. *Id.* at 121.

78. *See id.* at 127-29; Respondent's Brief at 18-22, *F.D. Rich Co*. (No. 72-1382).

The Court further ruled that venue was proper in the Eastern District of California under the Miller Act, because the majority of the contract was performed and executed in California.[81] Additionally, the Court neglected to review the appeals court's award of prejudgment interest to Industrial.[82]

Relying on *F.D. Rich Co.*, two federal district courts have held that the Miller Act preempts a subcontractor from bringing a claim grounded in state law against a Miller Act surety or against other parties involved in a federal construction project. In *United States ex rel. Pensacola Construction Co. v. Saint Paul Fire & Marine Insurance Co.*,[83] Pensacola Construction, a subcontractor on a Miller Act project, sued the general contractor and its surety on a Miller Act bond. They brought a separate state cause of action for attorney's fees and penalties.[84] The court held that the Miller Act preempted Pensacola's state claims.[85] The court reasoned that by requiring Miller Act suits to be brought in the federal district court where the contract was to be performed, Congress intended "to shield sureties from a multiplicity of suits, which could lead to liability in excess of the payment bond."[86] Additionally, the court noted that the Supreme Court's decision in *F.D. Rich Co.* defined the preemptive scope of the Miller Act.[87] The court concluded, therefore, that *F.D. Rich Co.* mandated a uniform rule of preemption on claims that relate to Miller Act bonds.[88]

Similarly, in *Tacon Mechanical Contractors, Inc. v. Aetna Casualty & Surety Co.*,[89] Tacon Mechanical Contractors, a subcontractor on a federal construction project, brought suit against a contractor's surety alleging that the surety's delay in making payments under a payment bond violated state tort laws.[90] The court held that the Miller Act preempted Tacon's tort claims.[91] The court noted that Tacon was required to show that the Miller Act did not preempt its claim.[92] Without citing authority, the court suggested that the Miller Act was enacted to keep government costs defined and predictable by limiting the impact that "local risk-increasing rules" could have on Miller Act contractors.[93] Accordingly, the court expanded upon the dicta in *F.D. Rich Co.* and concluded that remedies which arise out of a claim on a Miller Act bond should be nationally uniform.[94]

Additionally, the court provided two other rationales for preempting Tacon's claims. First, the court reasoned that Congress created a mandatory federal venue provision in the Miller Act to protect sureties from multiple suits in state courts that could lead to liability in excess of the payment bond.[95] Second, the

79. *F.D. Rich Co.*, 417 U.S. at 127.

80. *Id.*

81. *Id.* at 124-25.

82. *See generally id.* at 116-33.

83. 710 F. Supp. 638 (W.D. La. 1989).

84. *Id.* at 639.

85. *Id.*

86. *Id.* at 640 (citing United States *ex rel*. Aurora Painting, Inc. v. Fireman's Fund Ins. Co., 832 F.2d 1150, 1152 (9th Cir. 1987); United States Fidelity & Guaranty Co. v. Hendry Corp. 391 F.2d 13, 25 (5th Cir. 1968)). In *Aurora Painting* the court denied a surety's claim that the exclusive jurisdiction provided for under the Miller Act precluded it from being bound by a state court judgment regarding the liability of its insured, the prime contractor. *See Aurora Painting*, 832 F.2d at 1152-53. The court reasoned that the full faith and credit statute, 28 U.S.C § 1738, required it to give preclusive effect to the state court's judgment on the prime contractor's liability. *Id.* at 1152. The court reasoned that the purpose of the Miller Act's venue provision was not to displace all state law claims arising out of a Miller Act contract, but rather, was to provide a single forum in order to avoid conflicting judgments in various different courts. *Id.*

87. *Pensacola*, 710 F. Supp. at 640.

88. *Id.*

89. 860 F. Supp. 385 (S.D. Tex. 1994), *aff'd*, 65 F.3d 4865 (5th Cir. 1995) (affirming the district court on independent and adequate state grounds without addressing the preemption issue).

90. *Id.* at 386.

91. *Id.* at 387.

92. *Id.*

93. *Id.*

94. *Id.* The dicta in *F.D. Rich Co*. suggested only that *the federal remedy provided for under the Miller Act* should be nationally uniform. *See F.D. Rich Co.*, 417 U.S. at 127.

court concluded that because Congress gave the Secretary of the Treasury the power to revoke a delinquent surety's certificate of authority, it intended for sureties to be regulated administratively rather than by state causes of action.[96]

Case Law Analysis: Which Courts Have Properly Applied Preemption Doctrine in the Miller Act Debate?

The Supremacy Clause of the United States Constitution proscribes any state law that is contrary to federal law.[97] The Tenth Amendment, however, provides that the states retain all governmental power that is not explicitly reserved to the federal government by the Constitution.[98] Thus, Congress' power to preempt state law is limited, at least to some degree, by state sovereignty.[99] In the past twenty years, the Supreme Court has attempted to delineate a coherent set of rules for determining when, and to what degree, a federal statute will preempt state law.[100]

Though the Court recites a variety of preemption tests throughout its case law,[101] the Court has consistently applied two principles in preemption review.[102] First, the Court has consistently held that the fundamental question in determining whether a federal statute preempts state law is whether there was congressional intent to preempt.[103] Second, the Court has uniformly presumed, when reviewing congressional intent, that federal statutes do not supersede state law unless Congress has clearly expressed this intent.[104]

The courts that have held that the Miller Act does not preempt state law against a surety or against other parties in a federal construction project have properly applied the standards set forth above by the Supreme Court. These courts began their preemption analysis by examining the congressional intent behind the Miller Act.[105] In determining that Congress intended to afford subcontractors greater protection by enacting the Miller Act, the courts in *C&F Construction*[106] and *Alvarez*[107]

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95. *Tacon Mechanical Contractors*, 860 F. Supp. at 387; *Pensacola*, 710 F. Supp. at 640 (citing United States *ex rel*. Aurora Painting, Inc. v. Fireman's Fund Ins. Co., 832 F.2d 1150, 1152 (9th Cir. 1987); United States Fidelity & Guaranty Co. v. Hendry Corp., 391 F.2d 13, 25 (5th Cir. 1968)).

96. *Tacon Mechanical Contractors*, 860 F. Supp. at 388.

97. U.S. CONST. art. VI, cl. 2.

98. U.S. CONST. amend. X.

99. Early Supreme Court preemption doctrine is based on principles of statutory interpretation. The Court primarily examined whether or not Congress intended to preempt state law. *See infra* notes 102-105 and accompanying text. However, recent Supreme Court cases have relied on principles of federalism to limit federal preemption of state law, despite congressional intent. *See infra* notes 140-153 and accompanying text.

100. *See infra* notes 102-105 and accompanying text.

101. The Supreme Court has outlined three ways in which Congress can preempt state law. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983). First, Congress may preempt state law by stating its desire to do so in express terms. *Id*. at 203. Second, in the absence of express congressional intent to preempt state law, Congress may still impliedly preempt state law by creating a scheme of regulation that is so pervasive that the court can infer that Congress left no room for the states to supplement federal law. *Id.* at 204. Third, even in the absence of pervasive federal regulation, state law may be impliedly preempted if it conflicts with federal law or if state law creates an obstacle to "the full accomplishment and execution of the full purposes and objectives of Congress." *Id.*

Significantly, the second and third ways in which Congress can preempt state law are often confused and used interchangeably by the courts. Palmer v. Liggett Corp. 825 F.2d 620, 624 (1st Cir. 1987) (noting that the distinction between the different types of implied preemption do not delineate any real differences); Missouri Pac. R.R. v. Railroad Comm'n, 833 F.2d 570, 573 (5th Cir. 1987) ("These guides are easier to state than to apply . . . ."); *see* Paul Wolfson, *Preemption and Federalism: The Missing Link*, HASTINGS CONST. L.Q. 69 (1988) (arguing that the Court's obstacle preemption analysis is functionally indistinguishable from the its excess federal regulation preemption analysis and noting that the Court, nonetheless, treats the two rules as separate for preemption).

102. *See infra* notes 104-105 and accompanying text.

103. *See* Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 369 (1986) ("The critical question in any preemption analysis is always whether Congress intended the federal regulation to supersede state law."); *see also* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95 (1983) ("In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue.").

104. *See* Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230 (1947); *see also* Maryland v. Louisiana, 451 U.S. 724 (1981).

105. *See* K-W Indus. v. National Sur. Corp., 855 F.2d 640 (9th Cir. 1988); Goldman Servs. Mechanical Contracting v. Citizens Bank and Trust Co., 812 F. Supp. 738 (W.D. Ky. 1992); United States *ex rel.* Sunworks Division of Sun Collector Corp. v. Insurance Co. of N. Am., 695 F.2d 455 (10th Cir. 1982); United States *ex rel*. C&F Constr. Co. v. International Fidelity Ins. Co., No. 97-1709-LFO (D. D.C. 1997); United States *ex rel.* Ehmcke Sheet Metal Works v. Wausau Ins. Co., 755 F. Supp. 906 (E.D. Cal. 1991). *See also supra* notes 34-71 and accompanying text.

106. No. 97-1709-LFO, slip op. at 2-3 n.1.

107. Alvarez v. Insurance Co. of N. Am., 667 F. Supp. 689, 693 (N.D. Cal. 1987)..

cited House and Senate Judiciary Committee reports that detailed the problems that subcontractors endured in recovering from sureties under the Heard Act. Additionally, in *K-W Industries*, *Ehmcke Sheet Metal Works*, *Sun Works*, and *Goldman Services* each court acknowledged the Miller Act's protective purpose and noted that, in enacting the Miller Act, Congress intended to provide subcontractors with the federal equivalent of a state mechanic's lien.[108] Consequently, each court concluded that, like the state mechanic's lien, the Miller Act was not intended to be an exclusive remedy for subcontractors.[109] Each court examined the congressional intent behind the Miller Act and found that there was no evidence that Congress intended to preempt a subcontractor's state law cause of action. Consequently, these courts maintained the presumption that Congress did not intend to preempt state law in passing the Miller Act.[110]

Conversely, the courts in *United States ex. rel. Pensacola Construction Co. v. Saint Paul Fire and Marine Insurance Co.*[111] and *Tacon Mechanical Contractors v. Aetna Casualty & Surety Co.*[112] found that the Miller Act preempted state law remedies. These courts mistakenly relied on the Supreme Court's holding in *F.D. Rich Co.* to reach this conclusion. There are two reasons why *F.D. Rich Co.* does not control the issue of preemption. First, *F.D. Rich Co.* did not involve a state law cause of action.[113] Rather, F.D. Rich urged the Court to incorporate a state policy regarding attorney's fees into the Miller Act (a *federal* cause of action). In its brief to the Court, F.D. Rich argued:

> But the fact that Congress did not detail in the Miller Act the components of the remedy or the elements to be included in "sums justly due," does not preclude the federal courts from doing so, in line with the express purpose of the Act, nor prevent the federal courts from referring to state law to determine the appropriate elements of Miller Act recovery in a particular state . . . attorney's fees as part of the claim [of] a Miller Act case must represent part of the federal statutory right created by Congress. The claim does not originate in either the common law or the statute of any particular state. When making its determination of sums justly due under federal law, the federal courts should appropriately look to the purpose of the Miller Act.[114]

Accordingly, the Court in *F.D. Rich Co.* never addressed the issue of preemption.

Second, the *F.D. Rich Co.* Court affirmed the appeals court's award of prejudgment interest for the supplier under the contract.[115] The supplier in *F.D. Rich Co.* contracted with a subcontractor that, in the event of default, the supplier would be entitled to prejudgment interest. The parties agreed to this provision even though the Miller Act does not provide for prejudgment interest in its remedial scheme.[116] Therefore, the Court permitted state contract law regarding prejudgment interest to supplement the scope of the Miller Act remedy. Consequently, the Court's holding concerning prejudgment interest implicitly acknowledges that the Miller Act is not an exclusive remedy and that it will incorporate some state law in determining "sums justly due" under the Miller Act.

Relying on *F.D. Rich Co.* to define the Miller Act's " preemptive" scope caused the courts in *Pensacola Construction Co.* and *Tacon Mechanical Contractors* to overlook the congressional intent underlying the Miller Act. Both courts constructed a congressional intent for the Miller Act that supported the *F.D. Rich Co.* Court's "preemptive" holding.[117] For example, without citing any authority, the *Tacon Mechanical Con-*

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108. *See K-W Indus.*, 855 F.2d at 643; *Ehmcke Sheet Metal* Works, 755 F. Supp. at 909; *Sun Works*, 695 F.2d at 457-58; *Goldman Servs.*, 812 F. Supp. at 741. *See also supra* notes 34-71 and accompanying text.

109. *Id.*

110. *See*, *K-W Indus.*, 855 F.2d at 643 ("National [the surety] has pointed to nothing in the Miller Act or its legislative history to suggest that Congress intended the Act to protect sureties from liability for torts . . . that they may commit in connection with the payment of bonds executed pu rsuant to the act."); *See also C&F Constr. Co.*, No. 97-1709-LFO, slip op. at 2-3 n.1 (noting that the legislative history of the Miller Act provides no plausible basis for a preemption claim).

111. 710 F. Supp. 638, 640 (W.D. La. 1989).

112. 860 F. Supp. 385, 387 (S.D. Tex. 1994), *aff'd*, 65 F.3d 4865 (5th Cir. 1995).

113. *See generally* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co. Inc., 417 U.S. 116 (1974).

114. Respondent's Brief at 19-21, *F.D. Rich Co.* (No. 72-1382).

115. *F.D. Rich Co.*, 417 U.S. at 120, 120 n.5.

116. *Id.* at 120 n.5.

117. United States *ex rel.* Pensacola Constr. Co. v. Saint Paul Fire & Marine Ins. Co., 710 F. Supp. 638, 640 (W.D. La. 1989) ("The preemptive scope of the Miller Act was discussed in F.D. Rich Co."); *Tacon Mechanical Contractors, Inc.*, 860 F. Supp. at 387 ("[T]he remedies available in an action arising out of the bond should be nationally uniform.") (citing *F.D. Rich Co.*, 417 U.S. at 126-31)).

tractors court reasoned that the intent underlying the Miller Act was to minimize the cost of government contracting[118] by limiting the impact that local risk-increasing liability rules could have on sureties.[119] Both courts, therefore, concluded that the Miller Act was enacted to limit a surety's liability under a payment bond.[120]

The legislative discussion and the historical context surrounding the Miller Act fails to support any finding that Congress enacted the Miller Act to limit surety liability. Rather, Congress passed the Miller Act in response to the delays and hardships subcontractors endured in collecting money from sureties under the Heard Act.[121] While reviewing the Heard Act, Congress noted the need to provide a remedy that would counter a surety's ability to unreasonably delay payments, forcing a subcontractor to accept less than the amount due under a bond.[122] In passing the Miller Act, Congress granted a subcontractor the right to bring suit promptly against a delinquent surety and specifically eliminated language in the Heard Act[123] that placed a limit on surety costs under a payment bond. Accordingly, a review of the Miller Act in its historical context suggests that it was enacted neither to limit surety liability nor to minimize government costs by reducing surety liability.[124]

The courts in *Pensacola Construction Co.* and *Tacon Mechanical Contractors* manufactured congressional intent behind the Miller Act to fit the Supreme Court's "preemptive" decision in *F.D. Rich Co.* These courts misapplied the preemption doctrine at two levels. First, both courts neglected to acknowledge Congress' intent to afford subcontractors under Miller Act projects greater protection in relation to sureties. Second, both courts defied preemption doctrine by presuming that Congress intended to preempt state law in enacting the Miller Act.[125] The *Tacon Mechanical Contractors* court explicitly stated its presumption that the Miller Act preempted state law in requiring the plaintiff to prove that "the congressional enactment does not preempt state law claims."[126]

Both courts' presumption that the Miller Act preempts state law is implicitly evident in their respective analyses of the Miller Act's venue provision. The Miller Act's venue provision[127] mandates that suits to recover a payment bond be brought in the federal district court where the contract was performed and executed. Both courts argued that this venue provision evidences a congressional intent to protect sureties from multiple suits that could lead to liability in excess of the payment bond.[128] Consequently, both courts presumed that the Miller Act was intended to preempt state law actions against a

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118. *Tacon Mechanical Contractors*, 860 F. Supp. at 387 (concluding that the Miller Act created a bond to reduce government contracting costs because without the bond, a subcontractor would be left insecure, and would therefore price his risk into his bid on any government project). The Miller Act, unlike the Heard Act, did not create a bond giving government contractor security. *See* 40 U.S.C. § 270 (repealed 1935).

119. *See Tacon Mechanical Contractors*, 860 F. Supp. at 388.

> If the proliferation of state regulation had been an element of the context of the performance bond pricing, Congress might have appreciated that threat to Congress' attempt to establish an orderly and comprehensive federal scheme for protecting materialmen and sureties alike. To read the Miller Act as limiting the government's own contracting costs through solely protecting subcontractors . . . ignores that the Act regulates sureties to further the purpose of reducing costs. The Miller Act preempts the plaintiff's state law claims.

Id.

See also United States *ex rel.* Ehmeke Sheet Metal Works v. Wausau Ins. Co., 755 F. Supp. 906 (E.D. Cal. 1991) (denying a state cause of action against a surety for reasons grounded in state law).

120. *Pensacola Constr. Co.*, 710 F. Supp. at 640; *Tacon Mechanical Contractors*, 860 F. Supp. at 887-88.

121. S. REP. NO. 74-1289 (1935); H.R. REP. NO. 74-1263 (1935).

122. H.R. REP. NO. 74-1263 (1935).

123. *See supra* notes 29-31 and accompanying text.

124. Even if the Miller Act was enacted to reduce the cost of government contracting, it does not logically follow that the Act must have intended to employ preemption to limit surety liability. *Tacon Mechanical Contractors* suggested that if sureties were subject to common law liability in addition to their bonds they would have to increase their premiums thereby increasing the overall cost of government contracting. *Tacon Mechanical Contractors*, 860 F. Supp. at 868. However, the court simultaneously noted that subcontractors price the extent of their risk under a government contract into their bids. *Id.* Therefore, if subcontractors are precluded from recovering for torts committed against them in the execution of government contracts, subcontractors' bid prices for contracts will likely increase to account for added risk in proportion to the degree that surety premiums will decrease to discount for reduced risk. Accordingly, it was inaccurate for the *Tacon Mechanical Contractors* court to assume that limiting surety liability through preemption would reduce government costs in contracting.

125. In reviewing preemption issues, courts are bound to examine congressional intent and, in so examining, are bound to presume that Congress did not intend to preempt state law. *See supra* notes 104-105 and accompanying text.

126. *Tacon Mechanical Contractors, Inc.*, 860 F. Supp. at 387.

127. 40 U.S.C.A. § 270b (West 1998). The Supreme Court has held that this provision in the Miller Act is a venue provision and not a jurisdictional provision. *See F.D. Rich Co.* 417 U.S. at 125-26.

surety.[129] This presumption is flawed for two reasons. First, the Miller Act's venue provision only applies to suits to recoup monies that are due under the Miller Act. This provision does not apply to state or federal causes of action that are distinct from a Miller Act suit.[130]

Second, both courts misconstrued the manner in which the venue provision protects payment bond sureties. Both courts reasoned that Congress acted to protect sureties by making venue *federal*. Consequently, both courts concluded that the venue provision evidenced congressional intent to preempt state law claims. However, *United States ex rel. Aurora Painting, Inc. v. Fireman's Fund Insurance Co.*,[131] the case that both courts relied on for the proposition that the venue provision evidences a congressional intent to preempt state law, suggests that the Miller Act protects sureties by providing for venue in a *single* tribunal. In *Aurora Painting* the Ninth Circuit held that a surety was bound by a state court judgment regarding its principal's liability on a Miller Act contract.[132] The court reasoned that the Miller Act protects against conflicting judgments that relate to payment bonds by providing a *single* tribunal for adjudicating bond liability.[133] Therefore, to the extent the Miller Act protects payment bonds, it does so by limiting the place where a claim can be made to a *single* forum. It does not protect payment bonds by limiting state law actions.[134]

In reasoning that the *federal* nature of the Miller Act's venue provision reflected a congressional intent to preempt state law, both courts employed circular logic. Both courts reasoned that the venue provision was drafted to protect a surety from state law claims by providing for federal venue. It does not necessarily follow, however, that a suit in a mandatory federal venue shields a defendant from a state cause of action. That conclusion overlooks the pendent jurisdiction[135] of the federal courts.[136] Both courts assumed from the beginning that the Miller Act's mandatory federal venue provision reflected a congressional intent to shield sureties from pendent state claims in federal court. Both courts' analyses of the venue provision assumed the conclusions that they reached.

Conclusion and the Future of Miller Act Preemption

Neither side of the Miller Act preemption debate reviewed the issue of preemption in light of the Supreme Court's evolving case law on preemption.[137] As the Miller Act preemption debate unfolds, federal courts should take note that the Supreme Court has applied an especially strong presumption against federal preemption in the area of state tort law.[138] A new prong in the preemption analysis is emerging in cases where the preemption of the common law is at issue. Once the Court identifies a congressional intent to preempt *some* state law, it further requires Congress to make evident which part of the state law is displaced and which part is not.[139]

The distinction between the preemption of the common law and the preemption of other state law began in the early 1980's when the Rehnquist Court began to afford state common law

128. United States *ex rel.* Pensacola Constr. Co. v. Saint Paul Fire & Marine Ins. Co., 710 F. Supp. 638, 640 (W.D. La. 1989); *Tacon Mechanical Contractors*, 860 F. Supp. at 387-88.

129. *Pensacola Constr. Co.*, 710 F. Supp. at 640; *Tacon Mechanical Contractors, Inc.*, 860 F. Supp. at 387-88.

130. 40 U.S.C.A. § 270(b) (West 1998).

131. 832 F.2d 1150, 1153 (9th Cir. 1987)

132. *Id.* at 1152-53.

133. *Id.*

134. The venue provisions' *singular* nature protects the payment bond, its federal nature adds nothing to its protection. For example, if Congress had the power to provide for venue in a *single* state instead of a single federal court, the surety would benefit from the same level of protection. Unless one assumes, that in making venue federal, Congress intended to preempt state law.

135. Pendent jurisdiction is a principle applied in federal courts whereby a federal court may exercise jurisdiction over a non-federal claim for which no independent jurisdictional ground exists between the same parties who are properly before the court on a federal claim where both claims arise from a common nucleus of operative facts. BLACK'S LAW DICTIONARY 1134 (6th ed. 1990).

136. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 109 (1984) ("If a state claim is properly within the pendent jurisdiction of the federal court, it should not be ground for objection that the venue would not be proper if that claim were sued on alone . . . .").

137. The majority of the Miller Act preemption cases involve the issue of whether or not the Miller Act preempts a common law remedy against a surety. *See supra* notes 40-50, 90-97 and accompanying text.

138. *See, e.g.*, Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180 (1978) (discussing trespass actions); Farmer v. United Bhd. of Carpenters and Joiners of Am., 430 U.S. 290 (1977) (discussing intentional infliction of emotional distress); Linn v. United Plant Guard Workers of Am., 383 U.S. 53 (1966) (discussing malicious defamation); International Union, United Auto., Aircraft & Agric. Implement. Workers of Am. v. Russell, 356 U.S. 634 (1958) (discussing malicious interference).

139. *See infra* notes 141-152 and accompanying text.

remedies greater protection from preemption than state imposed regulations, such as a statutes.[140] The recent Supreme Court decision of *Medtronic, Inc. v. Lohr*[141] continued this trend. In *Medtronic*, the Court examined whether the Medical Device Amendments of 1978[142] (MDA) preempted a plaintiff's state negligence actions against the manufacturer of an allegedly defective pacemaker.[143] The MDA provided for considerable federal regulation of the safety of medical devices,[144] and further contained a provision expressing Congress' intent to preempt any state requirements that differed from or added to the MDA.[145] The Court found that the MDA did not preempt the plaintiff's tort claims.[146] The Court conceded that the MDA's language evidenced a congressional intent to preempt some state law; however, the Court nonetheless attempted to identify " the domain" of state law that Congress aimed to preempt.[147] In doing so, the Court reasoned that Congress did not intend to preempt common law causes of actions because this power is traditionally left with the states.[148] The Court further reasoned that a federal statute or regulation would only preempt a general state common law remedy where the federal government specifies the state duties that are in conflict with specific federal interests.[149] The Court found that the general language of the MDA did not evidence a clear congressional intent to displace all state tort law.[150] Accordingly, the Court concluded that a state damages action merely provided manufacturers regulated by the MDA with another reason to comply with the MDA.[151]

It is too early to know what effect the *Medtronic* decision will have on the preemption of common law torts, in particular torts arising out of the execution of a Miller Act bond. The opinion, however, does suggest that, despite congressional intent to preempt *some* state law, the Court will not necessarily find that a general common law cause of action is preempted by a federal statute. Rather, Congress must *specifically* state which causes of action are preempted by federal law and which *specific* federal interests are undermined by the preempted state causes of action.[152] Given the Miller Act's somewhat brief legislative history and the minimal number of regulations that apply to the Miller Act,[153] it seems doubtful that the Miller Act and its regulatory enforcement scheme manifest sufficiently specific congressional intent to preempt all state tort law.

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140. *See* English v. General Elec. Co., 496 U.S. 72, 78-90 (1990). In *English*, an employee at a nuclear power facility operated by General Electric (GE) was discharged for making complaints about alleged GE safety violations. The employees claim to the Secretary of Labor alleged that GE dismissed her in violation of a federal whistleblower statute. An administrative law judge dismissed her claim as untimely. *Id.* at 75. Following the administrative dismissal, the employee filed a claim against GE for intentional infliction of emotional distress. *Id.* at 76-77. Despite that Congress has preempted the nuclear safety field, the Court held that the employee's emotional distress claim was not preempted because Congress did not express a clear and manifest intent to preempt *all* state tort laws. *Id.* at 83. The Court noted that while a state statute or regulation can directly require a party to change behavior that is the subject of federal regulation, a common-law tort action, at most, can only indirectly affect behavior. *Id.* at 84-86. The Court concluded that the only *direct* effect tort law has on behavior is that it forces a party to a suit to pay a judgement. *See id.*

141. 518 U.S. 470 (1996).

142. 21 U.S.C.A. § 360c(a) (West 1998).

143. *Medtronic, Inc.*, 518 U.S. 470 (1996).

144. *See* 21 C.F.R. § 860.3(c)(1)-(3) (1998).

145. *See* 21 U.S.C.A. § 360c(a).

146. *Medtronic*, 518 U.S. 503.

147. *Id.* at 484.

148. *Id.* The Court further reasoned that it was required to examine the congressional purpose of the MDA in order to identify the domain of state law that the Act preempted. *Id.* at 477-81. In denying a manufacturer the benefit of a preemption defense, the Court emphasized that the MDA was enacted for consumer protection. *Id.*

149. The court emphasized that a general negligence cause of action applies to all manufacturers and is not specifically targeted at manufacturers of medical devices regulated by the MDA. *Id.* at 500.

150. *Id.*

151. *Id.*

152. *See supra* notes 42-59 and accompanying text.

153. The Treasury Regulations pertaining to the Miller act are only ten pages long. 31 C.F.R. § 223 (1998).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Family Law Note

Modification of Support Orders Applying The Uniform Interstate Family Support Act

Most child support cases that involve military members and their families will eventually become an interstate issue. The rules on jurisdiction over child support modification actions changed dramatically with the Uniform Interstate Family Support Act (UIFSA).[1] As of 1 January 1998, the UIFSA controls subject-matter jurisdiction in support cases for all United States jurisdictions.[2] After forty-seven years of operating under the Uniform Reciprocal Enforcement of Support Act (URESA),[3] the UIFSA presents new challenges to family law practitioners. Because the military is a mobile society, understanding the jurisdictional rules for modifying support orders is essential.

Gentzel v. Williams,[4] a recent Kansas case, illustrates not only the UIFSA's modification rules but also its interaction with the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).[5] Valerie and Keith Gentzel were divorced in Arizona in August 1994.[6] An Arizona court ordered Keith to pay $640 per month in child support.[7] Shortly after the divorce, Valerie and the children moved to Texas, and Keith moved to Kansas.[8] In accordance with the UIFSA, Valerie registered the Arizona decree with the Kansas IV-D agency[9] for enforcement.[10] Keith received notice of an income withholding order to enforce the Arizona decree and arrears. He then requested the Kansas court to modify the Arizona support order using the Kansas child support guidelines.[11] The Kansas trial court, finding it had continuing exclusive jurisdiction (CEJ),[12] modified the Arizona order to $237 per month.[13] The IV-D agency appealed this ruling on Valerie's behalf.

Continuing exclusive jurisdiction is an important status in modification issues under the UIFSA.[14] The CEJ is definitional (a state either fits the definition or it does not). The Kansas trial court applied the definition improperly by reasoning that simple residence by one of the parties is sufficient to convey CEJ status. While the trial court was correct in finding that Arizona lost CEJ status when all the parties left Arizona, neither Texas nor Kansas gained CEJ status. When there is no state with CEJ, the petitioner must file for modification in the respondent's

1. 2 U.L.A. 229 (amended 1996).

2. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [hereinafter Welfare Reform Act] required states to adopt the UIFSA by 1 January 1998. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

3. 9B U.L.A. 567 (amended 1968). The URESA was extensively revised in 1968 and called the Revised Uniform Reciprocal Enforcement of Support Act (RURESA). All 50 states eventually adopted some version of the URESA. When enacting the UIFSA, some states repealed their URESA statutes, others replaced their URESA statutes with the UIFSA.

4. 965 P.2d 855 (Kan. Ct. App. 1998)

5. 28 U.S.C.A. § 1738B (West 1998).

6. *Gentzel*, 965 P.2d at 856.

7. *Id.*

8. *Id.*

9. A IV-D agency refers to a child support enforcement agency established under section IV-D of the Social Security Act. 42 U.S.C.A. §§ 651-650 (West 1998).

10. *Gentzel*, 965 P.2d at 856.

11. *Id.*

12. Continuing exclusive jurisdiction is a term of art under section 205 of the UIFSA. It is a status afforded to a state that issued a support order and remained the residence of the obligor, the individual obligee, or the child for whose benefit the support order was issued. UNIF. INTERSTATE FAMILY SUPPORT ACT § 205, 2 U.L.A. 229 (amended 1996).

13. *Gentzel*, 965 P.2d at 857.

14. Only the state that issued the controlling order of support and maintains CEJ can modify the order. Under the UIFSA, the Arizona court order in *Gentzel* was controlling because it was the first and only order regarding support issued by any court. In older support cases, there are often multiple orders covering the same child(ren). Section 207 of the UIFSA sets out rules to determine which of the existing orders will control prospective support. If the state that issued the controlling order also has CEJ status, it is the only state that can modify the order.

state of residence.[15] Therefore, in this case, Keith must seek modification in Texas, where Valerie resides. Texas law controls whether a modification is allowed, and Texas child support guidelines control how much support is owed.[16] After properly applying the UIFSA, the Kansas Court of Appeals reversed the trial court's modification for lack of subject-matter jurisdiction.[17]

The Kansas Court of Appeals also analyzed this case under the FFCCSOA. Applying the FFCCSOA, the court reached the same conclusion.[18] The FFCCSOA was passed by Congress in 1994. The structure and intent of the FFCCSOA is similar to the UIFSA.[19]

Legal assistance attorneys must understand the UIFSA rules. The UIFSA sets out subject-matter jurisdiction to establish, enforce, and modify support obligations. Determining which state has jurisdiction to act in support cases is a basic requirement of adequate advice. Legal assistance attorneys can call the National Conference of Commissioners on Uniform State Laws (NCCUL) (312) 915-0195 to request a copy of the UIFSA.[20] Major Fenton.

Consumer Law Note

Litigation is Not a "Legitimate Business Need" Under the Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA)[21] governs the collection and release of credit information by credit reporting agencies. It seeks to balance the legitimate needs of businesses for this information with the consumer's interest in maintaining privacy.[22] Under the FCRA, credit-reporting agencies may release credit reports only in limited circumstances.[23] One of these situations is when the person requesting the report "otherwise has a legitimate business need for the information . . . ."[24] The exact contours of this permissible purpose for releasing credit reports were the subject of some debate prior to 1996.[25] In that year, Congress more specifically defined when credit-reporting agencies could release consumer reports for the business need purpose.[26] A recent decision by the Eighth Circuit, however, reminds practitioners that the exception was never as broad as some might have believed.

In 1996, Laura McKinnon, an attorney, represented several women suing Dr. Johnny Bakker, a dentist, for improperly touching them during dental treatment.[27] During litigation, Ms.

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15. UNIF. INTERSTATE FAMILY SUPPORT ACT § 611, 9 U.L.A. 229 (amended 1996).

16. *Id.*

17. *Gentzel*, 965 P.2d 861.

18. *Id.* at 860.

19. The FFCCSOA served as a stop-gap measure after the National Conference of Commissioners on Uniform State Laws (NCCUL) adopted the UIFSA and before all states enacted the UIFSA because the FFCCSOA set out the same rules. Additionally, the FFCCSOA is a federal statute. Therefore, federal preemption requires that all states, after the enactment of the FFCCSOA, treat interstate cases under its rules. The Welfare Reform Act included technical amendments to the FFCCSOA to ensure it mirrored the UIFSA's provisions.

20. The NCCUL will provide anyone with a copy of the UIFSA and the comments to the UIFSA. The comments are extremely helpful in explaining the UIFSA provision and the differences between the old URESA practice and the new UIFSA practice. *See* John J. Sampson, *Uniform Interstate Family Support Act (1996)*, 32 FAM. L.Q. 385 (1998) (discussing the UIFSA).

21. 15 U.S.C.A. §§ 1681–1681u (West 1998).

22. *Id. See* NAT'L CONSUMER LAW CENTER, FAIR CREDIT REPORTING ACT § 1.3.1 (3d ed. 1994 & Supp. 1997) [hereinafter NCLC REPORTING].

23. 15 U.S.C.A. § 1681b. Generally, these purposes are for credit, insurance, employment, licensing, or other legitimate business transactions.

24. *Id.* § 1681b(a)(3)(F).

25. *See generally* NCLC REPORTING, *supra* note 22 §§ 2.3.5.9, 4.2.8.

26. Consumer Credit Reporting Reform Act of 1996, 104 Pub. L. 208, 110 Stat. 3009 (to be codified at 15 U.S.C.A. § 1681). These changes took effect on 30 September 1997. *See* Consumer Law Note, *Fair Credit Reporting Act Changes Take Effect in September*, ARMY LAW., Aug. 1997, at 19.

The changes to the "legitimate business need" purpose allow consumer reporting agencies to release consumer report only when the user "otherwise has a legitimate business need for the information . . . in connection with a business transaction that is initiated by the consumer; or to review an account to determine whether the consumer continues to meet the terms of the account." 15 U.S.C.A. § 1681b(a)(3)(F). Even under this new provision, businesses are working to determine the limits of their access to credit reports. *See* Consumer Law Note, *Federal Trade Commission Staff Issues Informal Interpretation of FCRA Changes*, ARMY LAW., June 1998, at 9.

27. Bakker v. McKinnon, 152 F.3d 1007, 1009 (8th Cir. 1998). The court in *Bakker* decided the case under the pre-1996 act because the credit report access at issue occurred before the effective date of the changes.

McKinnon collected a variety of information about Dr. Bakker and his family. This information included the credit reports of Dr. Bakker and his two adult daughters.[28] Ms. McKinnon's rationale for collecting the information seemed logical for an attorney in the midst of litigation. "[S]he obtained the credit reports about Dr. Bakker and his daughters in order to determine whether he was judgment proof and whether he was transferring his assets to his daughters."[29] The Bakkers sued Ms. McKinnon for violating the FCRA.[30] The district court found for the Bakkers and awarded them damages and attorney's fees. Ms. McKinnon appealed the finding.[31]

At the Eighth Circuit, Ms. McKinnon asserted two errors by the district court. First, she claimed that she obtained the credit reports for "a commercial or professional purpose"; therefore, the FCRA did not govern the transaction.[32] In the alternative, she argued that even if the FCRA applied, she had a "legitimate business need" for the information.[33]

In deciding Ms. McKinnon's first claim, the Eighth Circuit focused on the purpose for collecting the information, not her intended use. It held that "regardless of appellant's intended use of the credit reports, these reports are consumer reports within the meaning of the FCRA because the information contained therein was collected for a consumer purpose."[34] The court reasoned, "whether a credit report is a consumer report . . . is governed by the purpose for which the information was originally collected in whole or in part by the consumer reporting agency."[35] This interpretation of the FCRA makes sense.[36] The statute is designed to protect consumers, not the users of the credit information. The protections should not depend on the status of the user, but on the status of the person about whom the user wants credit information.

The court's resolution of the appellant's second claim is more important. There is some logic to considering litigation a "business need" under the FCRA. In this case, Ms. McKinnon "testified that she obtained the credit report on Dr. Bakker seeking information about his ability to satisfy a judgment if the parties settled the underlying litigation."[37] She then "obtained a second credit report on Dr. Bakker and his two daughters . . . to see if Dr. Bakker was transferring assets to his daughters [in order to make himself judgment proof]."[38] On their face, these arguments seem compelling. Congress, however, did not pass the statute to aid litigation. Thus, courts and commentators have not viewed litigation as a permissible purpose to issue a consumer report.[39] The Eighth Circuit agreed with this view of the statute holding:

> [An] appellant cannot be said to have a legitimate business need within the meaning of the Act unless and until she can prove or establish that she and appellees were involved in a *business* transaction involving a consumer. In order to be entitled to the business need exception found in § 1681b(3)(E), the business transaction must relate to 'a consumer relationship between the party requesting the report and the subject of the report' regarding credit, insurance eligibility, employment, or licensing.[40]

This case is important to legal assistance practitioners for two reasons. First, for consumer clients, this case demonstrates the trend to limit access to credit reports. Legal assistance attorneys can use this case (and the logic behind it) to protect clients involved in litigation from "fishing expeditions" by the opposing counsel. Second, legal assistance attorneys also see clients on issues like separation agreements where a credit report on

28. *Id.*

29. *Id.* at 1010.

30. *Id.* at 1009.

31. *Id.*

32. *Id.* at 1010-11.

33. *Id.* at 1011.

34. *Id.* at 1012.

35. *Id.*

36. *See* NCLC Reporting, *supra* note 22, § 2.3.4.

37. *Bakker*, 152 F.3d at 1011.

38. *Id.*

39. *See* NCLC Reporting, *supra* note 22, § 4.3.3.

40. *Bakker*, 152 F.3d at 1012 (citing Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1149 (3d Cir. 1986)).

the client's spouse may seem relevant. Legal assistance attorneys must realize that they do not have a "permissible purpose" to obtain consumer reports in these contexts. Major Lescault.

Criminal Law Note

The Hemp Product Defense

Introduction

On 23 December 1997, at Dover Air Force Base, Delaware, Air Force Master Sergeant Spencer Gaines was acquitted of marijuana use.[41] His defense? He asserted that he tested positive for metabolized tetrahydrocannibinol (THC), the psychoactive ingredient in marijuana,[42] because he had ingested two legal and commercially available health products, (Hemp Liquid Gold and Hemp 1000 capsules).[43] A weight lifter with twenty-two years of Air Force service, Gaines stated that he used the hemp products to provide him needed fatty acids not otherwise found in his diet.[44]

A variety of urinalysis defenses have developed since the military launched its urinalysis-testing program. Some, such as innocent ingestion (for example, pouring cocaine in one's drink or one's urine) are often used.[45] Others, such as passive inhalation (unwittingly inhaling marijuana fumes) are highly dubious.[46] This note focuses on the newest of these defenses (the assertion that a legal hemp oil or hemp food product caused a service member to test positive on a urinalysis test). It provides a brief overview of hemp and hemp products, the effects these products can have on a urinalysis test for metabolized THC, the methodology the Armed Forces Institute of Pathology (AFIP) has developed for testing hemp products, and a brief review of long-range steps being considered to resolve the problem. A companion note, in *The Art of Trial Advocacy* section of this issue, focuses on courtroom strategies for both defense and government counsel litigating a hemp food product defense.[47]

What are Hemp and Hemp-Based Products?

Hemp, botanically referred to as *Cannabis sativa* L, is a plant whose flowering tops and leaves are marijuana.[48] The hemp plant itself, apart from the tops and leaves, however, is non-psychoactive, and was originally cultivated for use in making ropes, fabrics, and paper products.[49] Early in this century, alarmed at the apparent rise in marijuana use, Congress enacted the Marijuana Tax Act of 1937, which heavily taxed the already declining hemp industry.[50] While World War II caused a brief resurgence,[51] the hemp industry had all but vanished from the United States by the late 1950s.[52] Following the ratification of the United Nations Single Convention on Narcotic Drugs in 1961[53] that listed marijuana as a Schedule I narcotic, and the Comprehensive Drug Abuse Prevention and Control Act of 1970,[54] hemp production for any purpose in this country was effectively outlawed.[55]

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41. Memorandum from COL William K. Atlee, Jr., Director, U.S. Air Force Judiciary, Air Force Legal Service Agency, to The Judge Advocate General, U.S. Air Force, subject: Urinalysis Testing Problem–Hemp Seed Products (6 Jan. 1998) (on file with author) [hereinafter Air Force Memo].

42. *Id*. When a person ingests marijuana, some of its psychoactive ingredient, called Delta - 9 THC, converts into a non-toxic compound (metabolite) called Delta - 9 tetrahydrocannabinol-9-carboxylic acid (THC). Until hemp-based products appeared on the market, this could metabolite only be found when the human body metabolizes marijuana. *See* R. FOLTZ, ADVANCES IN ANALYTICAL TOXICOLOGY 125, 130 (R. Baselt ed. 1984) (discussing the analysis of cannabinoids in physiological Specimens by GC/MS testing). The Department of Defense tests for the presence of 9 carboxylic THC in service members' urine.

43. Air Force Memo, *supra* note 41.

44. John Pulley, *AF Acquittal Prompts Review of Drug Testing*, ARMY TIMES, Jan. 26, 1998, at 6.

45. *See* David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 17.

46. *Id*. at 16.

47. *See* The Art of Trial Advocacy, *Tips in Hemp Product Cases*, ARMY LAW., Dec. 1998, at 30.

48. *See* Susan David Dwyer, Note, *The Hemp Controversy: Can Industrial Hemp Save Kentucky?*, 86 KY. L.J. 1144 (1997-98). *See also* Thomas J. Ballanco, Comment, *The Colorado Hemp Production Act of 1995: Farms and Forests Without Marijuana*, 66 U. COLO. L. REV. 1166 (1995).

49. Dwyer, *supra* note 48, at 1156-57.

50. *Id.* at 1159.

51. Due to the shortage of rope production, the government launched a "Hemp for Victory" campaign encouraging American farmers to grow hemp. Between 1942 and 1945, American farmers grew over 400,000 acres of hemp. Ballanco, *supra* note 48, at 1171.

52. Dwyer, *supra* note 48, at 1163.

53. Mar. 16, 1961, 18 U.S.T. 1408, 520 U.N.T.S. 204.

54. Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1236, 1292 (codified at 21 U.S.C.A. § 802 (West 1998)).

While modern materials and other synthetics have replaced the need for hemp in rope and fabric production, since the mid-1970s there has been a growing movement in America to promote the use of the hemp plant in a variety of ways.[56] Some states have looked at the feasibility of legalized hemp production, especially as a means to substitute for the shrinking tobacco markets.[57] At the same time, there has been a proliferation of hemp products: hemp clothing and shoes, hemp wines and beers, hemp skin care products, and hemp oil and food products, all sold and advertised widely on the internet and in such periodicals as *Hempworld* and *Hemptimes*.[58] Most of these products are imported from countries such as Canada, France, Germany, and Switzerland, which allow hemp growth as long as the THC concentration in the plants does not exceed maximum allowable limits.[59]

Hemp Oil and Hemp Food Products and Urinalysis Testing for THC

Studies performed on hemp oil and hemp food products indicate that ingestion can trigger a THC positive urinalysis result. For example, the October 1997 issue of the *Journal of Analytical Toxiciology* published two separate studies regarding THC-positive urinalysis results from consumption of hemp seed foods or hemp oil products.[60] In the hemp seed food test, subjects consumed commercially available snack bars and cookies. While no subject had any psychoactive reaction to the food products, THC positive results above Department of Defense (DOD) cutoff levels were reported.[61] In the hemp oil product test, subjects consumed a hemp oil product—Hemp Liquid Gold™ and subsequent urinalysis tests also indicated THC-positive results above DOD cutoff levels for some subjects.[62]

The Methodology of Hemp Product Testing at the Armed Forces Institute of Pathology (AFIP)

Because of the scientific possibility that a hemp product can trigger a THC-positive result, the Department of Defense Drug Detection Quality Assurance Laboratory (DDQA), Division of Forensic Toxicology, AFIP will test a hemp-based product to determine whether it contains THC at levels that could register positive results on a urinalysis test.[63] The AFIP has tested twenty-seven products, and to date, only hemp oil products have caused positive test results.[64]

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55. Dwyer, *supra* note 48, at 1164-65. Marijuana as an illegal controlled substance is specifically defined in 21 U.S.C.A. § 802(15) as:

> [A]ll parts of the plant *Cannabis sativa* L. whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C.A. § 802(15) (West 1998).

56. Jack Herer, the so-called "father of the modern hemp movement" began his "crusade" to promote the uses of the hemp plant for a variety of reasons in the mid-1970s. Herer asserts that the hemp plant has gigantic potential, not simply for marijuana, but as a biomass energy crop (used to balance the carbon dioxide level in the atmosphere), as a fuel-producing crop, and as an alternative to timber for paper production. *See* JACK HERER, THE EMPEROR WEARS NO CLOTHES 43-50 (10th ed. 1995).

57. *See* Dwyer, *supra* note 48; Ballanco, *supra* note 48.

58. The Fall 1998 issue of *Hempworld* lists 72 stores in the United States and Canada exclusively or primarily dedicated to selling hemp products. *Retail Map, North American Hemp Stores*, HEMPWORLD, Fall 1998, at 50-51.

59. Letter from LCDR Kenneth A. Cole, Armed Forces Institute of Pathology, to MAJ Walter Hudson (Nov. 19, 1998) (on file with author) [hereinafter Cole Letter]. Hemp seeds that have been sterilized can also be exported to the United States. *Id*.

60. Anthony Costantino et al., *Hemp Oil Ingestion Causes Positive Urine Tests for Delta -9 Tetrahydrcannabinol Carboxylic Acid*, 21 J. OF ANALYTICAL TOXICIOLOGY 482 (1997) (discussing hemp oil products causing THC positive urinalysis results); Neil Fortner et al., *Marijuana-Positive Urine Test Results From Consumption of Hemp Seeds in Food Products*, 21 J. OF ANALYTICAL TOXICOLOGY 476 (1997) (discussing hemp seeds in food products causing THC-positive urinalysis results).

61. Specifically, commercially available snack bars (Seedy Sweeties snack bars) and cookies were given to 10 volunteers. The volunteers gave urine samples over the next 24 hours that were tested using the gas chromotography/mass spectroscopy (GC/MS) test (the same "gold standard" test the DOD performs on service members' urine). Specimens from individuals who ate just one hemp seed bar showed little reactivity and only one specimen screened positive at a 20-ng/ml level (the DOD GC/MS cutoff is 15-ng/ml). Five specimens from individuals who ate two hemp seed bars screened positive at a 20-ng/ml cutoff level. The authors concluded: "[A] positive test result depends on the amount of hemp seeds consumed, the form in which they are ingested, and the testing cutoff value applied. Naturally the metabolism of the individual and the time of collection of the specimen after ingestion also affect the probability of testing positive." Fortner et al., *supra* note 58, at 476-80.

62. Seven volunteers consumed 15 milliliters of Hemp Liquid Gold™. Urine samples were taken before ingestion and at 8, 24, and 48-hour intervals after the dosage. A total of 18 postingestion samples were taken, 14 of the samples screened above the 20 ng/ml cutoff, seven above the 50 ng/ml cutoff, and two screened above the 100 ng/ml cutoff using the GC/MS test. Costantino, et al., *supra* note 60, at 482.

Specimens that are submitted to the DDQA laboratory should be sent under a chain of custody along with a memorandum requesting testing for THC and a point of contact to receive the test results.[65] If the requester wants an opinion regarding the likelihood of the product inducing a positive test result, he must provide the following information: (1) the accused's/suspect's weight, (2) the amount of the product allegedly ingested, (3) how frequently the product was ingested (for example, twice weekly, weekly), (4) the duration of product ingestion (for example, one week, one month), and (5) the time elapsed between the last ingestion of the product and the urinalysis test.[66]

The product is tested using the gas chromatography/mass spectroscopy (GC/MS) testing procedure (the so-called "gold standard" test also performed at DOD urinalysis laboratories).[67] Unlike the urinalysis testing, however, the DDQA laboratory tests for the presence of the THC itself, not its metabolized version.[68] The method of testing the products is forensically valid, and there have been no successful defense-based attacks on the DDQA laboratory's drug testing procedures.[69] The DDQA laboratory will issue a memorandum after testing indicating the microgram level of THC in the product. In addition, if the appropriate data from the suspect/accused has been submitted,[70] the memorandum will offer an opinion as to whether the ingestion of the hemp-based product at the stated levels is consistent with the urinary THC metabolite concentration.[71]

Long Range Strategies

The military services have proposed long-range strategies to deal with the hemp oil defense. The services are concerned that the defense could impair the military's ability to test soldiers for marijuana use. One Air Force proposal recommends that the services obtain samples of products nationwide and systematically test them to establish which products test positive and at what levels.[72] The same proposal suggests the possibility of a "no-use" order banning hemp oil products either service-wide or at the local/installation level.[73]

The AFIP has tested several products, as have the Drug Enforcement Administration (DEA), the Department of Health and Human Services, and private companies.[74] At this time, however, the Department of the Army is reluctant to issue a total ban on hemp oil and hemp food products.[75] This reluctance is partially based upon interagency actions between the Department of Justice and DEA. These agencies are currently considering whether to propose that Congress ban hemp oil/hemp food products or pressure manufacturers to remove these products.[76] As a result of these agencies' actions, some specu-

63. Telephone Interview with LCDR Kenneth A. Cole, Department of Defense, Defense Drug Detection Quality Assurance Laboratory, Armed Forces Institute of Pathology (Nov. 13, 1998) [hereinafter Cole Interview]. Lieutenant Commander Cole is the primary tester of the hemp oil products. He can be contacted at (301) 319-0048/0100/email address: cole@afip.osd.mil. Lieutenant Commander Cole has emphasized that, early contact with him is essential, if you are preparing or rebutting a hemp product defense.

64. Cole Letter, *supra* note 59. Lieutenant Commander Cole previously tested several hemp oils and hemp food products. Some of the food products include Hempen Ale, a German soft drink called HEMP, and an unnamed German beer of which the only indicator it is a hemp product is a hemp leaf on the label. None of these beverages produced a positive urinalysis result for THC. The Drug Enforcement Administration and the Department of Health and Human Services also tested a variety of products, including: hemp cookies, hemp coffees, lip balm, hemp seed burgers, hemp cheese, and hemp bread. None of these products has been used in a hemp defense. *Id.*

65. Memorandum from LCDR Kenneth A. Cole to MAJ Walter Hudson (undated) (on file with author).

66. *Id*.

67. *See* Fitzkee, *supra* note 45, at 13-15 (containing an analysis of the DOD GC/MS testing).

68. Cole Letter, *supra* note 59. Oils submitted to the DOD DDQA laboratory are extracted and deuterated, THC is added to the specimen as an internal standard. The method of adding deuterated THC is also used with the measurement of the THC metabolite at the drug testing laboratories. The deuterated THC, however, has different mass spectrometric characteristics. The two THCs, therefore, cannot be "confused." *Id*.

69. *Id*.

70. *See supra* note 65 and accompanying text.

71. Redacted Memorandum from LCDR Kenneth A. Cole to CPT David Bizar, Trial Defense Service, 4th Infantry Division, Fort Hood, subject: Results of Testing of Spectrum Essentials Hemp Seed Oil Products (19 Nov. 1998) (on file with author).

72. Air Force Memo, *supra* note 41

73. *Id*.

74. Cole Letter, *supra* note 57. According to Lieutenant Commander Cole, because of the failure of several hemp product manufacturers to have accurate lot numbers on their products, it is difficult to get an accurate count of how many products on the market have already been tested. Cole Interview, *supra* note 63.

75. Letter from LTC William M. Mayes, Office of The Judge Advocate General, Criminal Law Division to MAJ Walter Hudson (5 Oct. 1998) (on file with author).

late that by spring 1999, nearly all hemp oil and hemp food product manufacturers will have eliminated THC concentrations entirely from their products.[77] Until the products are banned or altered, the hemp oil defense will continue to be used in courts-martial and other adverse actions. A companion note in this issue's *The Art of Trial Advocacy* contains some suggestions for both sides in either using or rebutting this defense. Major Hudson.

Reserve Component Practice Note

Do Officer Reservists Separated for Serious Misconduct with Twenty "Good" Years Still Get Their Reserve Retirement?[78]

Congress passed the Reserve Officer Personnel Management Act (ROPMA) in 1994.[79] The ROPMA, however, did not change the basic rules of reserve component retirement pay eligibility for reserve officers. The rules are that an officer reservist, upon being notified by his service secretary, is entitled to retirement pay if he: (1) completes twenty or more years of "qualifying service,"[80] (2) performs his last eight years of military service in a reserve component status, and (3) reaches age sixty.[81] The service secretary notification is commonly known as the "twenty-year letter." Unlike a private pension contract, reserve military retirement pay is not a "vested" or contractual right, but a statutory entitlement.[82]

What happens if a reserve officer (commissioned or warrant) is involuntarily discharged for misconduct after receiving his "twenty-year letter"?[83] Does the award of a general or other than honorable discharge adversely impact upon his retirement pay eligibility? The answer is no. Only when a reservist is convicted of a capital offense under the Uniform Code of Military Justice, or receives a court-martial sentence that includes a dismissal, bad conduct discharge, or dishonorable discharge, is he denied reserve retirement pay.[84] If an enlisted soldier receives an other than honorable discharge from an involuntary separation board, he is reduced automatically to the pay grade of Private E-1, which has a detrimental effect on his retirement income.[85]

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76. *Id.*

77. Cole Interview, *supra* note 63. One unresolved question is whether the THC found in the hemp products comes from contaminants or is within the seed itself. Some studies suggest the former, which would mean better methods to clean the seeds might prove effective. Electronic Information Paper from COL Brian X. Bush, Office of the Judge Advocate General, Criminal Law Division, subject: Impact of Hemp Oil Products on the Military Drug Testing Program (19 Feb. 1998) (on file with author).

78. Major John K. Harms, USAR, 94th Regional Support Command, helped research this topic.

79. Pub. L. No. 103-337, 108 Stat. 2957 (1994) (codified in scattered sections of 10 U.S.C.A., 32 U.S.C.A.). The ROPMA refers to involuntary officer separation boards as "boards of inquiry" (BOI). *Army Regulation (AR) 135-175* governs reserve component officer separation actions. U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS (22 Feb. 1994). *Army Regulation 135-178* governs involuntary separation boards of enlisted soldiers. U.S. DEP'T OF ARMY, REG. 135-178, SEPARATION OF ENLISTED PERSONNEL (1 Sept. 1994) [hereinafter AR 135-178]. This article addresses only non-Active Guard Reserve (AGR) Reserve officer members ("drilling" or "M-day" reservists).

80. "Qualifying service" consists of reserve service that meets the requirements of *AR 140-185.* U.S. DEP'T OF ARMY, REG. 140-185, TRAINING AND RETIREMENT POINT CREDITS AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS (15 Sept. 1979). Reserve members must earn at least 50 retirement points a year by attending drill, military education, active duty tours, or any combination thereof, in order to have a "qualifying year" for reserve retirement purposes. *Id.*

81. 10 U.S.C.A. § 12731 (West 1998).

82. Godley v. United States, 441 F.2d 1175, 1178-79 (1971).

83. The notification letter is sent by order of the service secretary. It indicates that the reserve member has twenty years of service and enough retirement points to qualify for reserve component retirement pay. This is commonly referred to as a "twenty year letter." *See* 10 U.S.C.A. § 1223; U.S. DEP'T OF ARMY, REG. 135-180, QUALIFYING SERVICE FOR RETIRED PAY NON-REGULAR SERVICE, para. 2-3 (22 Aug. 1974) [hereinafter AR 135-180].

At least one case has held that a reservist who completed twenty qualifying years of service, but who was under the age of sixty, was subject to "defeasance"[86] for breach of good conduct while awaiting reserve retirement payments.[87] Current legislation and regulation, however, presume that most reservists who reach retirement eligibility, and are facing involuntary separation for serious misconduct, should be given the option to retire in lieu of facing involuntary separation.[88]

Does this mean a reserve officer who committed serious misconduct (but is not court-martialed), but has his "twenty-year letter," may retire without any adverse impact on his reserve retirement? The answer is yes, if the command takes the officer to a separation board and he does not receive an other than honorable discharge.[89]

The only administrative option available to the reserve commander is to request that the Personnel Actions and Services Directorate (PASD) at Army Reserve Personnel Command (AR-PERSCOM) review the retiring reservist's personnel records and forward them to the Army Grade Determination Review Board (AGDRB). The AGDRB will then determine the officer's proper retirement grade.[90] The AGDRB may reduce the officer's final grade for retirement pay purposes if it finds "there is information in the officer's service record to indicate clearly that the highest grade was not served satisfactorily."[91] This information might consist of separation board findings of misconduct, a general officer memorandum of reprimand for misconduct filed in the officer's Official Military Personnel File (OMPF), or a referred officer evaluation report (OER) for misconduct/relief for cause.

Army Regulation 15-80[92] establishes the AGDRB and empowers it to review cases referred by Active, Guard, and Reserve components.[93] In enlisted cases, the AGDRB makes a final grade determination on behalf of the Secretary of the Army.[94] In officer cases, the AGDRB makes a recommendation to the Deputy Assistant Secretary of the Army (Army Review

84. 10 U.S.C.A. § 12740. The statute entitled "Eligibility: denial upon certain punitive discharges or dismissals," states:

> A person who--
> (1) is convicted of an offense under the Uniform Code of Military Justice (chapter 47 of this title) and whose sentence includes death; or
> (2) is separated pursuant to a sentence of a court-martial with a dishonorable discharge, a bad conduct discharge, or (in the case of an officer) a dismissal, is not eligible for retired pay under this chapter.

Id.

The legislative history of this section sheds no light on whether the secretary may deny "nonregular" reserve retirement to a soldier who has a "twenty year letter," but has been subjected to a board of inquiry or involuntary separation board, has been found guilty of serious misconduct and recommended to receive a general discharge, or other than honorable discharge. *See* H.R. CONF. REP. NO. 104-450, at 808 (1996), *reprinted in* 1996 U.S.C.C.A.N. 334.

85. If the separation board approval authority approves a discharge recommendation for an other than honorable discharge (OTH), the soldier's pay grade is immediately reduced to Private (E-1). U.S. DEP'T OF ARMY, REG. 140-158, ENLISTED PERSONNEL CLASSIFICATION, PROMOTION, AND REDUCTION, para. 7-12a (1 Oct. 1994); NAT'L GUARD REG., 600-200, para. 6-44c; AR 135-178, *supra* note 79, para. 2-20. A grade reduction has a major impact upon the reserve retirement income received by a soldier discharged with an OTH discharge. Less than 15% of the United States Army Reserve Command (USARC) enlisted drug boards conducted for the period 1993-1996 resulted in an approved recommendation for an OTH. Similar small percentages of OTH discharges are found for Army National Guard drug boards for the same period. Most (64%) USARC separation boards for the period 1993-1996 resulted in either an honorable or general discharge when a soldier is not retained. Reserve officers are not subject to the OTH grade reduction provision.

86. "Defeasance" means "a rendering null or void." WEBSTER'S NEW COLLEGIATE DICTIONARY 296 (1976 ed.)

87. Ex Parte Burson, 615 S.W.2d 192, 196 (Tex. 1981). No regulation discusses whether serious misconduct, other that disposed of under the UCMJ, bars a reservist from retirement pay.

88. *See* 10 U.S.C.A. § 14905 (West 1998) (dealing with reserve officers facing an involuntary BOI). Qualified officers, pending a BOI for misconduct, may request the service secretary to approve voluntary retirement or transfer to the retired reserve. The provision further provides that if an officer is removed from active reserve status as the result of a BOI, he may retire in the eligible grade under normal retirement provisions. *Id. See also* U.S. DEP'T OF DEFENSE, INSTR. 1332.40, SEPARATION PROCEDURES FOR REGULAR AND RESERVE OFFICERS, para. 6, encl. 3 (16 Sept. 1997) (discussing procedures for non-probationary officers).

89. AR 135-178, *supra* note 77, para. 2-20 and accompanying text.

90. AR 135-180, *supra* note 81, para. 2-11c. Reserve commands need to notify AR-PERSCOM PASD of those retiring officers whose misconduct would warrant referral to the AGDRB. Questions on the reserve retirement screening process may be answered by calling PASD at 1-800-318-5298, or referring to their web site, <www.army.mil/usar/ar-perscom>. In the author's opinion, AR-PERSCOM should consider screening retirement packets for indications of serious misconduct in the soldier's retirement grade, at least where such misconduct is documented in the officer's OMPF.

91. *Id.* Statutory authority for such a retirement grade reduction can be found at 10 U.S.C.A. § 1374(b).

92. U.S. DEP'T OF ARMY, REG. 15-80, ARMY GRADE DETERMINATION REVIEW BOARD (28 Oct. 1986) [hereinafter AR 15-80].

93. AR 15-80, *supra* note 90, para. 5.

94. *Id*. para. 6a.

Boards) for a final determination in alleged unsatisfactory service cases.[95]

Generally, service in a grade is presumed satisfactory for reserve component officers except when "[t]here is sufficient unfavorable information to establish that the officer's service in the grade in question was not satisfactory."[96] The regulation further states:

> One specific act of misconduct may form the basis for a determination that the over-all service in that grade was not satisfactory, regardless of the period of time served in the grade. However, service retirement in lieu of or as the result of elimination action will not, by itself, preclude retirement in the highest grade.[97]

Individuals are not entitled to appear before the AGDRB.[98] The AGDRB may consider any documentary evidence relevant to the grade determination regardless of whether it is part of the officer's OMPF.[99] When the information is not part of the officer's OMPF, the AGDRB will advise the officer of the information and give him a reasonable period for comment or rebuttal.[100] According to AGDRB legal advisors, very few reserve component cases have been referred to the AGDRB.[101] Generally, the AGDRB has not found that a single documented incident of drug or alcohol abuse constitutes unsatisfactory service in the officer's final grade.[102] Despite this limited impact in the past, Reserve and National Guard commanders and their legal advisors should still consider referring serious misconduct by officers to the AGDRB. Commanders should point out any aggravating factors that would justify a board determination of unsatisfactory service in the officer's current grade.[103] Lieutenant Colonel Conrad.

International and Operational Law Note

Antipersonnel Land Mines Law and Policy

Introduction

The global movement to ban all antipersonnel land mines (APL) has focused attention on the use of these mines by United States forces.[104] Judge advocates must be aware of the following policies and laws when advising commanders on the use of APL.

United States Policy on the Use of Anti-Personnel Land Mines

On 16 May 1996, the President announced that United States forces may no longer employ non-self-destructing APL, except for training purposes and on the Korean Peninsula to defend against an armed attack across the de-militarized zone.[105] These APL do not self-destruct, self-neutralize, or have a deactivating capability.[106] This policy applies in international armed conflict and Operations Other Than War. The law that applies in international armed conflict, however, is not as restrictive as this policy.

Protocol II of the 1980 Conventional Weapons Convention

The 1980 United Nations Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons

95. *Id.* para. 6b. The AGDRB can only retain or upgrade a reserve enlisted soldier's retirement rank. *Id.*

96. *Id*. para. 7c.

97. *Id.*

98. *Id*. para. 11.

99. *Id.*

100. *Id.*

101. Telephone Interview with Colonel Joel Miller, Legal Advisor, Military Review Boards Agency (28 Aug. 1998). The Military Review Boards Agency, which includes the AGDRB, is establishing a World Wide Web Site at <http://arba.army.pentagon.mil>.

102. *Id.* The author finds this trend disturbing. If a single incident of illegal drug use can result in an OTH for a reserve component officer, it seems there is a sufficient basis for the AGDRB to find the officer's service in his final grade unsatisfactory. While a per se rule either way would not be fair to officers, cases where aggravating factors are presented should be considered by the AGDRB.

103. Examples of aggravating factors are: conviction of a civilian felony offense; awareness of the reserve component policy on use of illegal drugs or regulations prohibiting the serious misconduct, previous counseling about the misconduct, use of illegal drugs with enlisted soldiers; or the officer had distributed or used illegal drugs while on active reserve (drill) status.

104. An antipersonnel land mine (APL) is a mine primarily designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure, or kill one or more persons. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *amended* May 3, 1996, art. 2, U.S. TREATY DOC. NO. 105-1, at 37, 35 I.L.M. 1206 [hereinafter Amended Protocol II]

(UNCCW)[107] limits the use of certain weapons that may cause unnecessary suffering or have indiscriminate effects.

Protocol II of the convention covers land mines (including APL), booby traps, and "other devices" such as command detonated mines.[108] The United States is a party to the UNCCW and ratified Protocol II to the convention.[109] The Protocol prohibits the use of land mines against civilians,[110] either directly or though indiscriminate placement.[111] The Protocol also requires that forces take all feasible precautions to protect civilians from the effects of land mines.[112] Articles 4 and 5 restrict placement of mines and booby traps in populated areas. Under Article 4, non-remotely delivered mines, booby traps, and other devices cannot be used in towns or cities, or other populated areas where combat between ground forces is not taking place or is not imminent. Article 4 creates limited exceptions, however, if the devices are placed in the vicinity of a military objective under the control of an "adverse party" (combatant) or measures are in place to protect civilians from their effects (for example, posting of signs, sentries). Under Article 5 forces may only use remotely delivered mines[113] against military objectives. In addition, they may be used only if their location can be accurately recorded or if they are self-neutralizing.[114] Article 6 prohibits the use of booby traps on ten categories of objects including the dead, wounded, children's toys, medical supplies, and religious objects. Protocol II of the UNCCW addresses land mines generally; the United States is now considering ratifying the amended Protocol II that will further regulate the use of APL.

Amended Protocol II

On 3 May 1996, the Review Conference of the State Parties to the UNCCW proposed amendments to Protocol II.[115] The United States participated in this conference and the President transmitted the ratification package on the amended Protocol II to the Senate on 7 January 1997.[116] The Senate is currently con-

105. President William Jefferson Clinton, Statement at the White House (16 May 1996) (*available at* LEXIS, News Library, ARCNWS File); The White House, Office of the Press Secretary, Fact Sheet, subject: U.S. Announces Anti-Personnel Landmine Policy (May 16, 1996), *available at* <http://www.pub.whitehouse.gov/uri-res/I2R?:pdi://oma.eop.gov.us/1996/5/16/7.text.1>; U.S. DEP'T OF ARMY, FIELD MANUAL 20-32, MINE/COUNTERMINE OPERATIONS xvii (29 May 1998); *see generally* Presidential Decision Directive 48 (on file with Chairman Joint Chiefs of Staff Legal Counsel). On 17 January 1997, the United States imposed a unilateral APL stockpile cap and banned the export and transfer of all APL. The United States also initiated action to pursue negotiations on a worldwide treaty banning the use, production, stockpiling and transfer of APL in the United Nations Conference on disarmament. This policy was codified by Presidential Decision Directive 54 (on file with Chairman Joint Chiefs of Staff Legal Counsel). Information Paper, LTC John Spinelli, Policy Analyst, Department of the Army Deputy Chief of Staff Operations and Plans (DCSOPS), DAMO-SSP, subject: Anti-Personnel Landmine (APL) Studies and Initiatives (L-1-00) (16 Nov. 1998) (copy on file with the author). *See infra* text accompanying notes 135-40 (discussing U.S. policy initiatives).

106. "Self-destruction mechanism means an incorporated or externally attached automatically-functioning mechanism that secures the destruction of the munitions into which it is incorporated or attached." Amended Protocol II, *supra* note 104, art. 2, para. 10. "Self-neutralization mechanism means an incorporated automatically-functioning mechanism that renders inoperable the munitions into which it is incorporated." *Id*. art. 2, para. 11. "Self-deactivating means automatically rendering munitions inoperable by the irreversible exhaustion of a component, for example, a battery that is essential for the operation of the munitions." *Id*. art. 2, para. 12. An example is the claymore, which is not a mine if it is in command-detonated mode.

107. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, U.S. TREATY DOC. NO, 103-25, at 6, 1342 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter UNCCW].

108. Protocol On Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 Oct. 1980, 19 I.L.M. 1529 [hereinafter Protocol II]. "Mine means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle . . . ." *Id*. art. 2, para. 1. "Booby-trap means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches and apparently harmless object or performs an apparently safe act." *Id*. art. 2, para. 2. "Other devices means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time." *Id*. art. 2, para. 3.

109. A state is considered a party to the UNCCW if it has ratified two or more of the Protocols at the time it deposits its instrument of ratification. The United States ratified Protocols I and II. The United States ratified the UNCCW on 24 March 1995, with a reservation to article 7, paragraph 4. That article applies the UNCCW in wars of self-determination as described in article 1, paragraph 4 of Protocol I Additional to the Geneva Conventions of 1949. Geneva Protocol I expands the definition of international armed conflict to include so called wars against "colonial domination," "alien occupation," and "racist regimes." Protocol I Additional to the Geneva Convention of 1949, Dec. 12, 1977, 16 I.L.M. 1391. The United States objects to the expansion of the scope of international armed conflict under the UNCCW. The United States believes this expansion politicizes the law of war by injecting a political cause consideration.

110. Protocol II, *supra* note 108, art. 3, para. 2.

111. *Id.* art. 3, para. 3.

112. *Id.* art. 3, para. 4.

113. "Remotely delivered mine means any mine delivered by artillery, mortar or similar means or dropped by aircraft." *Id.* art. 2(1).

114. A self-neutralizing mechanism can be a self-actuating or remotely controlled mechanism that renders the mine harmless or destroys the mine when the mines no longer serve a military purpose. *Id*. art. 5(1)(b).

115. Amended Protocol II, *supra* note 104.

sidering whether to give its advice and consent on ratification. The amendments expand the scope of the original Protocol to include internal armed conflicts.[117] They require that all *remotely delivered* APL be equipped with self-destruct devices and backup self-deactivation features.[118] Furthermore, the amendments require that all *remotely delivered* mines other than APL have the same features "to the extent feasible."[119] The self-destructing and self-deactivating features must comply with specifications in the technical annex to the amendments.[120] The amendments require that all *non-remotely delivered* APL be self-destructing or self-neutralizing unless they are employed within controlled, marked, and monitored minefields that are protected by fencing or other means to keep out civilians.[121] These areas must also be cleared before they are abandoned.[122] These restrictions, however, do not apply to claymore weapons if they are: (1) employed in a non-command detonated (tripwire) mode for a maximum period of seventy-two hours, (2) located in the immediate proximity of the military unit that emplaced them, and (3) the area is monitored by military personnel to ensure civilians stay out of the area.[123]

If a claymore weapon is employed in a tripwire mode that does not comply with these restrictions, it will be regarded as an APL and must meet the restrictions for an APL. The Amended Protocol II also requires that all APL be detectable using available technology.[124] All APL must contain the equivalent of eight grams of iron to ensure detectability.[125] The amendments require that the party laying mines preclude their irresponsible or indiscriminate use.[126] At the end of hostilities, the party must immediately clear, remove, destroy, or maintain the mines in a marked and monitored area.[127] The amendments provide for means to enforce compliance.[128] The ability of United States forces to lawfully use APL recently faced a challenge by domestic legislation that would have rendered these laws essentially irrelevant for most of 1999.

APL Moratorium

Section 580 of the Foreign Operations Authorization Act of 1996[129] would have established a moratorium on the use of anti-personnel land mines for one year beginning 12 February 1999, "except along internationally recognized borders or in demilitarized zones with a perimeter marked area that is monitored by military personnel and protected by means to exclude civilians."[130] The moratorium would not have applied to command detonated claymore mines. Section 1236 of the Fiscal Year (FY) 1999 Department of Defense Authorization Act[131] repealed Section 580 of the 1996 Act.

Ottawa Convention

Judge advocates should be aware of another international APL agreement (the Ottawa Convention). The Convention on the Prohibition of the Use, Stockpiling, Production, and Trans-

116. Message from the President of the United States Transmitting Protocols to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: The Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II); the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III or the Incendiary Weapons Protocol); and the Protocol IV on Blinding Laser Weapons (Protocol IV), Jan. 7, 1997, U.S. TREATY DOC. NO. 105-1 (1997).

117. The Protocol applies to situations referred to in Article 3 common to the Geneva Conventions of 1949. *Id.* art 1(2).

118. Amended Protocol II, *supra* note 104, art. 6, para. 2.

119. *Id.* art. 6, para. 3.

120. *Id.* technical annex, para. 3.

121. *Id.* art. 5, para. 2(a).

122. *Id.* art. 5, para. 2(b).

123. *Id.* art. 5, para. 6.

124. *Id.* art. 4.

125. *Id.* technical annex, para. 2.

126. *Id.* art. 14.

127. *Id.* art. 10.

128. *Id.* art. 14.

129. Pub. L. No. 104-107, 110 Stat. 751 (1996).

130. *Id.*

131. H.R. CONF. REP. NO. 105-736, at 246 (1998).

fer of Anti-Personnel Mines and on Their Destruction[132] (hereinafter Ottawa Convention) was signed on 2 and 3 December 1997 by 123 nations. As of December 1998, 131 nations have signed the convention and fifty-seven nations have ratified it. The convention will enter into force on 1 March 1999. The United States is not a party to the convention. Parties to the convention pledge never to use APL. In addition, the parties agree never to develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly APL. Finally, the parties agree not to assist, encourage, or induce, in any way, anyone to engage in prohibited activity to a state party under the convention. Each state party must destroy or ensure the destruction of all stockpiled APL it owns or possesses, or that are under its jurisdiction or control. This must be done as soon as possible but not later than four years after a country enters the convention into force. Though the United States did not sign the Ottawa Convention, we must consider interoperability issues related to our allies that have ratified the treaty.[133] Though the United States is not a party to the treaty, the President has announced several initiatives with regard to APL that are related to the treaty.

United States Initiatives

On 17 September 1997, the President explained why the United States did not sign the Ottawa Convention and announced the steps that the United States would take to "advance our efforts to rid the world of land mines."[134] The President directed the DOD to develop alternatives to APL for use outside of Korea by the year 2003, with the goal of fielding them in Korea by 2006.[135] The President appointed a former Chairman of the Joint Chiefs of Staff as an advisor on land mines,[136] and the President pledged to increase demining programs.[137] He also stated: "[W]e will redouble our efforts to establish serious negotiations for a global antipersonnel land mine ban in the Conference on Disarmament in Geneva."[138] Key aspects of the President's announcement have been codified in Presidential Decision Directive 64 (PDD 64).[139] This document addresses general guidance on APL policy,[140] a schedule for developing APL alternatives,[141] the development of future barrier systems as alternatives to mine systems,[142] humanitarian demining programs,[143] a global APL ban,[144] and cooperation among allies.[145]

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132. Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Ant-Personnel Mines and on Their Destruction, *opened for signature* Sept. 8, 1997, 36 I.L.M. 1507.

133. Of the 16 NATO members, only the United States and Turkey have not signed the Ottawa Convention. Belgium, Canada, Denmark, France, Germany, Italy, Norway, and the United Kingdom had ratified the Ottawa Convention. As of 20 December 1998, Greece, Iceland, Luxemburg, Netherlands, Portugal, and Spain have signed, but not ratified the Convention. Department of the Army (HQDA), Joint Chief's of Staff, DOD and the Department of State (DOS) are currently working on interoperability issues with a number of NATO allies. Judge advocates at field commands should consult the HQDA points of contact (listed at the end of this note) for current information pertinent to their command.

134. President William Jefferson Clinton, Remarks on Land Mines at the White House (Sept. 17, 1997), *available at* <http://www.whitehouse.gov/WH/New/html/19970917-8619.html>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Information Paper, LTC John Spinelli, Policy Analyst, Department of the Army Deputy Chief of Staff Operations and Plans, DAMO-SSP, subject: PDD-64: Anti-Personnel Landmines (APL): Expanding Upon and Strengthening U.S. APL Policy (U) (8 July 1998) (copy on file with author).

140. *Id.* Presidential Decision Directive 64 ensures that as the United States pursues its humanitarian goals, it will take necessary steps to protect the lives of American military personnel and civilians they may be sent to defend. The DOD will ensure that the design and employment features of APL alternatives provide equivalent military effectiveness and safety, while minimizing the risks to non-combatants. The DOD will also ensure that APL alternatives do not create other humanitarian problems. *Id.*

141. *Id.* The DOD will develop APL alternatives to end use of all APL outside Korea, including those that self-destruct, by the year 2003. The DOD will develop a new mixed system that provides an alternative to employing two munitions (Area Denial Artillery Munitions and Remote Anti-Armor Mine) and preserves an important anti-tank mine capability. The United States will assess the viability of other APL alternatives being explored pursuant to this PDD, as well as other relevant factors, before deciding (in FY 2001) to proceed with production. The DOD will aggressively pursue the objective of having alternatives to APL ready for Korea by 2006, including those that self-destruct. This date is an objective, rather than a deadline, because viable alternatives have not yet been identified, the risks of the program are significant, and the costs to build and deploy alternatives cannot be fully assessed at this time. *Id.*

142. *Id.* As the DOD explores alternatives to APL, it will retain mixed anti-tank mine systems as part of the current and planned inventory of anti-tank munitions. However, as alternatives to existing APL are developed, the DOD will actively investigate the use of such alternatives in place of the "anti-personnel" (AP) component in mixed munitions. The DOD will also actively explore other technologies and concepts that could result in new approaches to barrier systems that could replace the entire mixed munitions. These alternatives would also be advantageous militarily, cost effective, safe, and eliminate the need for mines entirely. No established deadline exists by which alternatives for the AP component in mixed munitions, or the entire mixed system, must be identified and fielded. Presently, an operationally viable concept has not been identified and there is no guarantee this search will be successful.

Conclusion

The international process underway to outlaw all APL is primarily concerned with the indiscriminate effect irresponsible use has on civilian populations. United States armed forces primarily employ APL to protect our defensive positions and to prevent deactivation of our anti-tank mines. United States doctrine fully complies with Protocol II and the Amended Protocol II of the UNCCW. Except on the Korean Peninsula, the United States employs highly reliable APL that self-destruct within hours or days of their employment and contain a backup self-deactivation feature. Many non-governmental organizations and some United States allies objected to APL use as indiscriminate because of their potential for misuse; therefore, they have supported the Ottawa process. In the face of the continuing efforts to ban all APL and the scrutiny surrounding the use of any APL, judge advocates must be prepared to clearly articulate U.S. policy and applicable law. Lieutenant Colonel Barfield

Points of Contact

Questions regarding APL issues should be directed to HQDA DAMO-SSD (LTC Spinelli, (703) 695-5162 or DSN 225-9162), or OTJAG (Mr. Parks, (703) 588-0132 or DSN 425-0132).

Operational Law Seminar Evolves, Adds Sommerfeld Lecture

Beginning with the 31st Operational Law (OPLAW) Seminar, which will occur from 1 - 12 March 1999, the International and Operational law Department will modify both the content and the organization of the course. The modified schedule retains the thematic consistency of a fictional scenario that raises legal issues for discussion. However, the revised course schedule focuses more on preparing students for the issues they will encounter during operations. More significantly, the revisions will help students develop functional legal skills rather than mere intellectual appreciation of the legal issues associated with military operations. Finally, the course will inaugurate the Sommerfeld Lecture series.

The first week of the two-week course will build on the student's understanding of the Law of War. Students attending the Operational Law Seminar should have attended the Law of War Workshop. The first day of the new course will emphasize the nexus between Law of War issues and the practice of operational law. The remainder of the first week is devoted to teaching students the functional skills they need to practice operational law. Classes will emphasize the lawyer's role in the staff process, ROE development, and fiscal law rules. The first week also includes a series of discrete classes centered on substantive legal areas. For example, some of the first week classes include The Law of Common Spaces, Intelligence Law, High Profile Investigations, and Reserve Component Mobilization Issues. The first week concludes with each student preparing a Legal Annex to the Joint Task Force Operational Order OPORD) for the fictional Operation Balkan Storm.

The most noticeable changes will take place during the second week of the course. Students will wear battle dress uniforms throughout the week. Each morning, the class will receive a staff briefing from the International and Operational Law "staff." The students will break down into small groups and prepare a briefing on one or two legal issues within each one of the functional legal systems. The seven functional legal systems are: Law of War (Methods and Means), Law of War (Non-combatants), Rules of Engagement, Staff Integration and Coordination, Contracts and Fiscal Law, International Law and Agreements, Administrative Law and Foreign Claims, and Discipline, Legal Assistance, and Personal Claims.

Each day of week two will present students with legal issues that arise from one phase of military operations. Monday will highlight issues from the Predeployment and Mobilization Phase. Tuesday through Thursday will respectively focus on Counterinsurgency, Combat Operations, and Post Conflict Stability and Support Operations. Students will have about three hours to research their assigned issues and prepare a briefing for the commander. Students will brief their solutions to ADI faculty that are in the role of "commander" every afternoon. The goal is to help students integrate their legal knowledge and research ability with the skill needed to stand up and brief the issues to a discerning commander.

Aside from the schedule modifications, the new OPLAW Seminar will initiate the Sommerfeld Lecture on Thursday evening of Week two. Mr. Alan E. Sommerfeld made a generous gift of $11,000 to the Alumni Association of The Judge Advocate General's School. Named in his honor, the Sommerfeld Operational Law Lecture series will bring superb speakers

143. *Id.* The DOD executes the United States' humanitarian demining research and technology development program. In consultation with relevant agencies (including the DOS Special Representative for Global Humanitarian Demining) DOD will continue to ensure its research and development program supports the broader goals of U.S. humanitarian demining programs and the objectives established in the United States' "Demining 2010 Initiative." *Id.*

144. *Id.* While more than 120 nations have signed the Ottawa Convention, for reasons that were explained on 17 September 1997, the United States has not signed. The United States, however, will sign the Ottawa Convention by 2006 if it has identified and fielded suitable alternatives to APL and mixed anti-tank systems. The United States will continue work on a global ban in the Conference on Disarmament. *Id.*

145. *Id.* The United States will continue to work with NATO allies to ensure Ottawa Convention signing, ratification, and adherence does not undercut the alliance's ability to carry out other treaty responsibilities. The United States will also work with other allies to ensure its ability to execute its responsibilities under other regional security agreements is not adversely affected. *Id.*

to address the students after dinner the night before students depart at noon the next day. The Sommerfeld Lecture will spotlight experts in the field of Space and Missile Defense or Information Operations. The Center for law and Military Operations and the International and Operational Law Department will seek the best available speaker to speak on the issues specified by Mr. Sommerfeld. The Sommerfeld Lecture Series also has the discretion to select other outstanding speakers on topics deemed highly relevant to current operational law issues and emerging doctrine.

Mr. Sommerfeld's gift will add an unprecedented dimension to the Operational Law Seminar that will contribute to the goals for the two-week course. In conjunction with the course, the Operational Law Seminar will provide judge advocates with legal knowledge and the practical skills to apply that knowledge. The new course will therefore enhance the competence and confidence that judge advocates bring to the modern practice of operational law. Lieutenant Colonel Barfield.

Note from the Field

Modification of Military Retired Pay as Spousal Support in Indiana

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The Indiana Court of Appeals recently clarified when an award of military retired pay under the Uniformed Services Former Spouse's Protection Act (USFSPA)[1] is subject to later modification based upon changes in the circumstances of the divorced parties. While Indiana courts cannot modify an award of military retired pay that is characterized as a *division of marital property*,[2] an award that is characterized as *spousal maintenance* may be modified.[3] In *Thomas v. Abel*,[4] the Indiana Court of Appeals clarified when modifications may be made due to changes in circumstances. The court concluded that if a settlement agreement awards military retired pay as spousal maintenance, the trial court may not subsequently modify the maintenance agreement upon the petition of one party and over the opposition of the other.[5]

The USFSPA permits state divorce courts to divide military retired pay within a divorce decree provision for child support, the division of marital property, or the payment of alimony.[6] The Social Security Act defines "alimony" as the "legal obligation of an individual to provide support and maintenance of the spouse (or former spouse) of the individual."[7]

In *Thomas*, the Court of Appeals of Indiana considered whether and when a divorce decree that divided the military retired pay of a National Guard officer could be modified due to a change in circumstances. The decree in *Thomas* awarded the officer's spouse one-third of his retired pay as spousal maintenance.[8]

The parties were married in 1957 and divorced in 1981. At the time of the divorce, the husband was vested with the right to receive retired pay for non-regular service in the armed forces.[9] Therefore, he would not receive monthly-retired pay until he reached age sixty. The decree incorporated a separation agreement with separate articles that addressed property disposition, child support, and spousal maintenance.

Under the spousal maintenance article, the husband agreed to pay one-third of his monthly military retired pay as spousal support after he reached age sixty. He also agreed to execute any documents that were necessary to authorize the Army to pay this amount directly to his former spouse.[10] In addition, the agreement stated: "This Agreement shall be irrevocably binding on both parties . . . ."[11]

The husband turned sixty in December 1993. In January 1994, he began receiving retired military pay monthly. Contrary to his agreement, he neither paid the spousal support nor filed the necessary assignment with the Defense Finance and Accounting Service (DFAS) for direct payment to his former wife. Failing to obtain his cooperation, his former wife applied to the DFAS for payment. The DFAS rewarded her persistence in August 1994 when she began receiving checks, although they were less than the amount provided for in the divorce decree. She filed a contempt citation against her former husband for his failure to abide by the divorce decree. He responded by filing a petition to terminate or to modify the agreement based upon "a change of circumstances so substan-

1. 10 U.S.C.A. § 1408 (West 1998).

2. Myers v. Myers, 560 N.E.2d 39, 44 (Ind. Ct. App. 1990).

3. *Id*. at 42.

4. 688 N.E.2d 197 (Ind. Ct. App. 1997).

5. *Id.* at 201 (citing Voigt v. Voigt, 670 N.E.2d 1271 (Ind. Ct. App. 1996)).

6. *See* 42 U.S.C.A. § 659(i)(3) (West 1998) (defining alimony).

7. *Id.*

8. *Thomas*, 688 N.E.2d at 199.

9. "Retired pay for non-regular service" is the present retirement program for members of the reserve components. *See* 10 U.S.C.A. § 12731 (West 1998).

10. *Thomas*, 688 N.E.2d at 199.

11. *Id*.

tial and continuing as to render the payment of one-third of his retirement pension to be unreasonable."[12] A master commissioner held hearings on the matter. The trial court later approved the master commissioner's recommendation and terminated the maintenance order.[13]

The Indiana Court of Appeals reversed the trial court's order terminating spousal maintenance. The court reasoned that the spousal maintenance order was not based upon a finding of the spouse's incapacity, but was rather the product of an agreement of the parties. The court stated that parties to a divorce may enter into "*such settlement agreements as in a spirit of amicability and conciliation they wish.*"[14]

Indiana law provides that divorce decree provisions for spousal maintenance that are ordered due to a spouse's physical or mental incapacity may be modified or revoked upon a showing of "changed circumstances so substantial and continuing as to make its terms unreasonable."[15] In *Thomas,* the respondent attempted to bring the terms of his settlement agreement for spousal maintenance within the statute that permits subsequent modifications. In his decree, however, the spousal maintenance provision was not a court-imposed order based upon a finding of spousal incapacity. The Indiana Court of Appeals rejected his attempt and held that while a trial court may award post-divorce spousal maintenance only under the narrow circumstances outlined in the dissolution statute, the parties are not so limited in drafting settlement agreements.[16] The court reasoned that the husband and wife freely and voluntarily entered into the settlement agreement that included the maintenance provision.[17] Accordingly, the trial court lacked the authority to modify the settlement agreement and terminate the husband's maintenance obligation.[18]

Thomas provides a valuable guide to counsel who are drafting or reviewing a proposed settlement agreement that will be merged into an Indiana divorce decree. The first decision is whether to characterize the division of a military pension as a division of marital property or as spousal maintenance. If it is characterized as spousal maintenance, the provision should be clearly identified as either court-imposed due to spousal incapacity or a negotiated settlement agreement of the parties. The agreement should state whether and under what circumstances the provision is subject to future modifications or a termination of the maintenance obligation.

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12. *Id*. *Thomas v. Abel* does not specify what factors the husband alleged as constituting a substantial change in circumstances.

13. *Id*.

14. *Id*. at 201 (citing Voigt v. Voigt, 670 N.E.2d 1271, 1277 (Ind. Ct. App. 1996)).

15. IND. CODE ANN. § 31-15-7-3 (West 1998). An order of spousal maintenance found in an Indiana dissolution decree may be modified or revoked. Modifications of spousal support may be made only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable. *Id.*

16. *Thomas*, 688 N.E.2d at 201 (citing *Voigt*, 670 N.E.2d at 1277).

17. *Id.*

18. *Id.*

The Art of Trial Advocacy

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

Tips in Hemp Product Cases

The hemp product (specifically hemp oil) defense has been used successfully by the defense in recent cases.[1] It is not, however, a guaranteed "winner" for the defense. As in any case, to use or rebut it successfully, both sides need to be thoroughly prepared before they go to court. Both sides also need to be ready to react to developments during trial. This note looks at four areas that have particular relevance for a hemp product defense: (1) notice of the defense, (2) whether to put the accused on the stand, (3) the government's rebuttal strategy, and (4) the need for a clarifying instruction on whether the consumed item is a "controlled substance."

Notice

Rule for Courts-Martial (R.C.M.) 701(b)(2) requires the defense to notify the government of an innocent ingestion defense prior to trial on the merits.[2] This must include the place or places where the ingestion took place as well as the circumstances under which it took place, and the names and addresses of witnesses on whom the defense is going to rely on to establish the defense.[3] The rule, however, does not require a specific time when this information needs to be disclosed; it simply requires that the defense disclose the information "before the beginning of trial on the merits."[4]

Notice or the absence of notice can impact either side in hemp product cases. Often, the defense may be "locked in" to a hemp product defense because of an accused's prior statements. In these cases, the government should expect a hemp product defense and, even without specific notice, it should interview witnesses who allegedly saw the accused obtain or use the product. The government should also have the product tested.[5] On the defense side, if the accused has not "locked in" the trial strategy with prior statements or acts, counsel should be wary of tipping their hand too soon regarding the defense they intend to use. Defense counsel often reveal their strategy in urinalysis cases by requesting the government to pay for the defense expert. A way to avoid this is to have the accused pay for an expert, thus, avoiding this potentially de facto notification of the defense strategy.

If the defense does not reveal its hemp product strategy until (as the rules permit) just prior to the trial on the merits, the government may well have to seek a continuance. Obviously, if the government has had no opportunity to examine the defense's hemp oil case, it may be unprepared to rebut it at trial. Taking the necessary steps, such as testing the hemp product for THC, could likely take weeks and may slow down the docket. In this situation, the government may face a skeptical or impatient military judge. The best solution for the government is to anticipate the hemp product defense, even if not formally notified of it, and be ready to proceed as best as possible, in case a continuance is not granted.

Should the Accused Testify?

Whether the accused takes the stand may be the most important decision the defense makes. The accused may have made previous incriminating statements, or there may be independent evidence linking him to marijuana use. To plausibly explain his defense, the defense may feel compelled to put the accused on the stand. A recent case demonstrates that the accused does not always need to take the stand to be successful.

In that case, a Marine Corps lance corporal successfully raised a hemp oil defense after testing positive on a random urinalysis.[6] The defense was able to admit into evidence valuable information about the accused's alleged consumption of hemp oil products without having the accused testify.[7] Rather, a defense witness (a high school friend of the accused's wife who was staying at their home) testified that she had seen the

1. *See, e.g.*, John Pulley, *AF Acquittal Prompts Review of Drug Testing*, ARMY TIMES, Jan. 26, 1998, at 6; James W. Crawley, *Military's Drug-Test Program Shaken: Marine Cleared; Says He Used Diet Product*, SAN DIEGO UNION-TRIB. Apr. 4, 1998, at 1.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(b)(2) (1995) [hereinafter MCM].

3. *Id.* Technically, a hemp product defense is not an "innocent ingestion" defense at all, since the accused is not saying he innocently ingested a controlled substance. Rather, he is saying that he (innocently or not) consumed a *legal* substance. The policy behind the disclosure of both defenses is the same—allowing the government enough time to respond to the defense, thus, saving the time and expense of a continuance.

4. *Id.* There may be local rules that require earlier notice.

5. Memorandum from Trial Counsel Assistance Program (TCAP) to MAJ Walter Hudson, subject: Hemp Oil Cases (undated) (on file with author). The TCAP recommends that trial counsel contact TCAP as soon as possible after a hemp product defense arises.

6. Crawley, *supra* note 1.

7. E-mail message from Capt. David P. Berry, Judge Advocate Military Justice, Headquarters, U.S. Marine Corps to Maj. Brian T. Palmer, Judge Advocate Military Justice, Headquarters, U.S. Marine Corps forwarded to LTC William M. Mayes (Apr. 10, 1998) (on file with author).

accused using hemp seed oil.[8] The defense also had a physiologist testify as an expert about hemp seed oil products being high in "Omega 3 fatty acids." The physiologist also testified about the accused's diet, based upon conversations he had had with the accused.[9] This was very effective for the defense. Not only did the accused not have to testify, but an expert gave additional credibility to the defense by explaining the accused's use of the product.

The successful use of this testimony in the case described above should cause the defense to consider whether putting the accused on the stand would be the best option. If the government has no (or very little) evidence to rebut the hemp product defense, and the defense has extensive evidence to establish it, exposing the client to cross-examination seems very risky. It may be an unnecessary risk, especially if the defense is up against a seasoned and well-prepared prosecutor.

Government Rebuttal

Before deciding how to proceed with its case, to include its rebuttal case, the government will have to gather all of the facts. The government will need to get very precise information, as in any typical innocent ingestion defense. It will need to find out how much of the product the accused consumed, when and where he consumed the product, who observed him consume it, and (not to be forgotten) *why* the accused consumed the product.[10] The government should not forget, however, that a key part of rebuttal strategy (surprise) is lost in dealing with a hemp product defense, because R.C.M. 701(a)(3)(B) requires defense notification.[11]

Who are potential rebuttal witnesses for the government? If possible, the government should have an expert who can rebut the hemp product defense by testifying that the product could not produce THC in sufficient levels to register a positive THC result. The expert should also testify that there is a disparity between the THC level in the product and the urine, or some other such anomaly. The government may want to have a second type of drug test that would indicate that the accused is being untruthful. For example, if the accused said he used the hemp oil product only once, or very infrequently, a hair test could establish more frequent and longer term use.[12]

The Need for an Instruction on Whether the Metabolite is the Result of a Controlled Substance

The hemp product defense is different than the innocent ingestion defense in a fundamental way. An innocent ingestion defense deals with the mental status of the accused (he did not *know* the substance he consumed was a controlled substance). When he asserts the hemp product defense, he asserts that he consumed a *legal* product. The issue is not the accused's knowledge, but the actual nature of the substance (part of the first element of Article 112(a), Uniform Code of Military Justice).[13]

In light of a hemp product defense, the fact-finder must determine whether the metabolite in the accused's urine was the result (at least in part) of marijuana use. If it was the result of a legal hemp product, the remaining elements of Article 112(a) may be irrelevant.[14] If the fact-finder is convinced that the metabolite in the urine is a legal hemp product, the accused's knowledge makes no difference. Even, for example, if he believed that the product he was using *was* marijuana, if it was a legal hemp product, he has committed no crime.

Defense counsel must make sure the panel understands this point and should make it clear by offering an instruction that states that (1) the hemp product the accused alleges to have used is legal, and (2) that the panel must determine whether the metabolite found in the urine was the result of a controlled substance and not a legal product.[15] The defense should request an instruction that only if the panel determines that the metabolite was the result (at least in part) of a controlled substance can it properly go on to determine whether the use was wrongful.

These are just a few points that may prove useful when presenting or rebutting a hemp product defense. The hemp product defense is currently the "defense of the month" in urinalysis cases. Therefore, at least for the immediate future, both sides must understand the defense, and how to use it or counter it effectively at trial. Major Hudson.

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8. *Id.* Furthermore, the accused had allegedly taken the product as a body building supplement, and he looked "like Arnold Schwarzenegger at the counsel table." *Id.*

9. *Id.*

10. David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 17.

11. MCM, *supra* note 2, R.C.M. 701(a)(3)(B).

12. *See* Samuel J. Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10 (discussing hair analysis).

13. The two parts of the first element of use are: (1) use by the accused and (2) of a controlled substance. UCMJ art. 112(a) (1995).

14. The government must ensure that the fact-finder understands that simply establishing that the accused used legal hemp products does not necessarily mean he did not also smoke marijuana (he may have consumed both). He may have used legal hemp products deliberately to mask his marijuana use.

15. *The Military Judge's Benchbook* instruction for wrongful use of a controlled substance contains no instruction defining a "controlled substance." U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK, para. 3-37-2 (30 Sept. 1996).

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general and bad-conduct (BCD) special courts-martial whose records of trials were received by the Army Judiciary during the fourth quarter Fiscal Year (FY) 1998 are shown below.

General Courts-Martial

	1Q, FY 98	2Q, FY 98	3Q, FY 98	4Q, FY 98	FY 98
Records received by Clerk of Court	182	185	183	164	179
Days from charges or restraint to sentence	67	68	64	69	67
Days from sentence to action	87	96	98	106	97
Days from action to dispatch	19	17	8	10	14
Days en route to Clerk of Court	11	10	9	11	10

BCD Special Courts-Martial

	1Q, FY 98	2Q, FY 98	3Q, FY 98	4A, FY 98	FY 98
Records received by Clerk of Court	34	37	28	51	38
Days from charges or restraint to sentence	42	41	47	49	45
Days from sentence to action	58	86	97	90	83
Days from action to dispatch	11	16	8	4	10
Days en route to Clerk of Court	9	9	11	9	10

Courts-Martial and Nonjudicial Punishment Rates

Fourth Quarter, FY 98

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.35 (1.39)	0.34 (1.37)	0.60 (2.40	0.22 (0.86)	0.49 (1.96)
BCDSPCM	0.14 (0.58)	0.15 (0.61)	0.21 (0.83)	0.06 (0.26)	0.00 (0.00)
SPCM	0.00 (0.02)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.29 (1.40)	0.35 (1.40)	0.15 (0.60)	0.09 (0.34)	0.00 (0.00)
NJP	23.15 (92.62)	24.28 (97.12)	23.10 (92.39)	22.75 (91.00)	23.07 (92.28)

Based on an average strength of 477,967.
Figures in parenthesis are the annualized rates per thousand.

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. Volume 5, number 11 and Volume 6, number 12 are reproduced in part below.

United States District Court For the District of Columbia Dismisses Geronimo Suit for Lack of Standing

The United States District Court for the District of Columbia dismissed a suit[1] brought by a *pro se* individual and an organization seeking to compel the government to repatriate the remains of Geronimo, an Apache leader who is buried at Fort Sill, Oklahoma. The plaintiffs also demanded that Geronimo be given full military honors and that his prisoner-of-war status be removed. The court concluded that the plaintiffs lacked standing to maintain this suit.[2]

The plaintiffs based their claim on the Native American Graves Protection and Repatriation Act (NAGPRA).[3] The NAGPRA was enacted to protect Native American burial sites and to ensure removal of human remains on federal, Native American, and Native Hawaiian lands. The act requires federal agencies to return human remains upon request from a lineal descendant or a Native American tribe.[4]

The court found that the plaintiffs did not fall into the class given repatriation rights under the NAGPRA. The individual plaintiff did not allege that he was a descendant of Geronimo, and the organization plaintiff was not a Native American tribe. The court concluded that the plaintiffs could not claim injury even if the Army was violating the NAGPRA by harboring Geronimo's remains at Fort Sill.[5]

The court considered a provision of the NAGPRA that gives district courts jurisdiction over "any action brought by any person alleging a violation of this chapter."[6] Although this provision seems to grant standing to the plaintiffs, they must also satisfy constitutional standing requirements for an injury-in-fact necessary to establish an Article III "case or controversy."[7] The court relied on the decision in *Lujan v. Defenders of Wildlife*,[8] in which the Supreme Court reviewed a similarly broad grant of jurisdiction in the Endangered Species Act.[9] In *Lujan*, the Supreme Court held that although Congress could grant broad substantive rights to plaintiffs, it could not disregard the requirement that "the party seeking review must himself have suffered an injury."[10]

The district court found that the plaintiffs had only the "generalized interest of all citizens" in seeing that the Army complies with the NAGPRA. Because they had suffered no injury, the plaintiffs did not have standing and the court accordingly dismissed their suit. Lieutenant Colonel Howlett.

Distinguishing Your Underground Storage Tanks (USTs) from Your Aboveground Storage Tanks (ASTs)

To most reasonable people, the terms "underground storage tank" (UST) and "aboveground storage tank" (AST) seem separate and distinct. For the most part, they are right. Underground storage tanks are regulated under the Solid Waste Disposal Act.[11] Aboveground storage tanks are regulated under the Clean Water Act (CWA).[12] The definitions are also distinct. A UST is a tank (including connected underground piping) with a volume that is ten percent or more beneath the ground's surface and used to contain "regulated substances."[13] Regulations governing USTs are found at 40 C.F.R. § 280.[14] In contrast, an

1. *Idrogo*, 18 F. Supp. 2d 25 (D. D.C. 1998).
2. *Id.* at 26.
3. Pub. L. No. 101-877, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C.A §§ 3001-3013 (West 1998)).
4. 25 U.S.C.A. § 3005(a).
5. *Idrogo*, 18 F. Supp. 2d at 28.
6. 25 U.S.C.A. § 3013.
7. U.S. CONST. art. III.
8. 504 U.S. 555 (1992).
9. 16 U.S.C.A. §§ 1531-1534 (West 1998).
10. *Lujan*, 504 U.S. at 578 (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).
11. 42 U.S.C.A §§ 6901-6992 (West 1998).
12. 33 U.S.C.A. §§ 1251-1387 (West 1998). This is also known as the Federal Water Pollution Control Act.

AST is basically a storage tank that is not buried and is regulated under 40 C.F.R. § 112.[15] Both USTs and ASTs that store hazardous wastes are regulated under 40 C.F.R. §§ 264, 265.[16]

Aboveground storage tanks are sometimes regulated by the UST program and vice versa. For example, a tank system could appear completely above ground, yet, have an extensive underground piping system. If ten percent or more of the combined volume of tank and pipe are underground, the apparent AST can be considered a UST. Also, the AST program regulates certain USTs. For example, a tank that has a buried storage capacity of more than 42,000 gallons of oil is regulated under 40 C.F.R. § 112.[17]

The distinctions between USTs and ASTs are significant when state regulators attempt to deal with ASTs through their UST program. Because of the limited waiver of federal sovereign immunity under the UST statute,[18] state laws that attempt to regulate tanks beyond the reach of the UST statute are not merely "more stringent" but are "broader in scope." Thus, serious sovereign immunity questions are raised when regulators cite UST provisions for issues concerning Army ASTs. When ASTs are regulated under state clean water acts, the efforts of state regulators may likely be upheld. This is because the waiver of sovereign immunity, under the federal CWA,[19] extends to any requirements related to the prevention of releases into "waters of the United States"[20] The CWA waiver is, in a sense, broader than that for USTs. The CWA waiver, however, does not extend to fines or penalties—whether they are imposed by federal, state, or local regulators). In contrast, the federal Environmental Protection Agency (EPA) unilaterally asserted that its UST penalties can be paid.[21] The Department of Defense (DOD) is appealing this determination. If state regulators attempt to apply state UST rules against an Army AST, they may not have the authority to do so. Mr. Bernard Schafer (Guest Contributor/Navy).

Circuit Court Decision on Attorney Fees

In *United States v. Chapman*,[22] the Ninth Circuit ruled that the EPA's assessment of response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) could include reasonable attorney's fees incurred in enforcement activities. In *Chapman*, Harold Chapman refused to comply with the EPA's order to remove hazardous substances that presented imminent and substantial endangerment. The court found that the EPA could recover attorney's fees because the government is not limited to the reasoning of earlier cases concerning attorney's fees in private actions.[23] The Ninth Circuit was persuaded by the Second Circuit's holding in *B.F. Goodrich v. Betkoski*.[24] In *B.F. Goodrich* the Second Circuit stated that in CERCLA cost recovery actions, the government's ability to recover attorney's fees is broader than that of private parties.[25] The Ninth Circuit noted that section 107(a)(4)(A) of the CERCLA defines the government's response costs more broadly than a parallel definition for private parties' response costs.[26] Policy considerations also supported the court's ruling. If responsible parties were charged reasonable attorney fees, they may be encouraged to perform remedial action on their own.[27] The court remanded

13. 40 C.F.R. §§ 264, 265 (1998). Hazardous substances and petroleum products under the Comprehensive Environmental Response Liability Act (CERCLA) are examples of "regulated substances."

14. *See id.* § 280.

15. *See id.*§ 112.

16. *See id.*§§ 264, 265.

17. *Id.* § 112 (providing that spill prevention plans are required for a tank that has a buried storage capacity of more than 42,000 gallons of oil).

18. 42 U.S.C.A. § 6991(1).

19. 33 U.S.C.A. §§ 1251-1387.

20. *See id.* § 1362(7) (defining "navigable waters").

21. *See* Environmental Law Division Note, *Debate Over the EPA UST Penalty Authority Continues*, ARMY LAW., Nov. 1998, at 59.

22. 146 F.3d 1166, 1175 (9th Cir. 1998).

23. *See, e.g.*, Key Tronic v. United States, 511 U.S. 809 (1994).

24. 99 F.3d 505 (2d Cir. 1996).

25. *Chapman*, 146 F.3d at 1174 (citing *B.F. Goodrich*, 99 F.3d 505).

26. 42 U.S.C.A. § 9607(a)(4)(A) (West 1998). The CERCLA section relating recovery of attorney costs among private parties is 42 U.S.C.A. § 9607(a)(4)(B).

27. *Chapman*, 146 F.3d at 1175.

the case to determine which fees were "reasonable."[28] Ms. Greco.

Heightened Scrutiny on Enforcement Matters

Practitioners should be aware that the Environmental Protection Agency (EPA) is expanding its interpretation of its authority over federal agencies. Last year, the EPA began fining federal agencies for Clean Air Act violations through its Field Citation Program. The Department of Justice (DOJ) rejected the Department of Defense's (DODs) challenge to these actions. This was the broadest interpretation of the EPA's authority ever issued by the DOJ. Recently, the EPA interpreted its authority under subtitle I of the Resource Conservation and Recovery Act (RCRA)[29] to include authority to fine federal agencies for violations of UST requirements. The legislative history of subtitle I, however, varies from the remainder of the RCRA. The DOD is conducting internal discussions with the EPA on this issue while the EPA continues to pursue UST enforcement actions. As the 22 December 1998 deadline for UST compliance approached, several installations across the DOD received voluminous requests for UST data, including requests for information developed during internal audits. These requests are often a prelude to enforcement actions. Environmental law specialists should be aware of these increasing efforts by the EPA and advise their installation environmental staffs accordingly. Colonel Rouse.

The Price of Victory

On 11 August 1998, the United States District Court for the Central District of California decided *United States v. Shell Oil Co.*[30] (hereinafter the McColl case). This case involved allocation of liability under the CERCLA between the federal government and other potentially responsible parties at the McColl Superfund site in California. The court allocated all of the cleanup costs at the site to the federal government. This decision potentially expands the scope of the government's CERCLA liability under *FMC Corp. v. United States Department of Commerce*.[31]

The McColl case involved four oil companies that contracted with the United States to produce aviation fuel during World War II.[32] The companies then contracted with Mr. Eli McColl to dispose of acid wastes that resulted from aviation fuel production. Mr. McColl accomplished this disposal by dumping the wastes on a twenty-two acre parcel of property, later known as the McColl site.[33] The EPA and the State of California brought an enforcement action under section 107 of the CERCLA to recover cleanup costs. The court had previously held that both the oil companies and the United States were liable under section 107 as arrangers.[34] The court then held a trial in February 1998 to allocate the percentage of cleanup costs to each party.[35]

The court allocated all of the costs to the federal government. In doing so, the court relied on three primary factors. First, the court found that holding the government liable for all of the cleanup costs would place the cost of a war on the United States as a whole.[36] The court noted similar reasoning in *FMC Corp.*,[37] where the Third Circuit found that placing the cost of war on society as a whole was consistent with the underlying policy of CERCLA.[38] The court stated, "it stands to reason that just as the American public stood to benefit from the successful prosecution of the war effort, so to must the American public bear the burden of a cost directly and inescapably created by the war effort, the production of [aviation fuel] waste."[39]

The second factor concerned the options available to the oil companies to dispose of the waste. The court reasoned that the decision to dump the waste on the McColl property directly related to the lack of tank cars available to the companies to transport the waste to another facility for recycling.[40] The court

28. *Id.* at 1176.

29. 42 U.S.C.A. §§ 6901-6992.

30. 113 F. Supp. 2d 1018 (C.D. Cal. 1998).

31. 29 F.3d 833 (3d Cir. 1994).

32. *Shell Oil*, 13 F. Supp. 2d at 1018, 1020.

33. *Id.* at 1023.

34. *See* United States v. Shell Oil Co., 841 F. Supp. 962 (C.D. Cal. 1993) (holding oil companies liable).

35. The total cost of the cleanup has not yet been determined, but is estimated to be between $70-$100 million.

36. *Shell Oil*, 13 F. Supp. 2d 1026.

37. *Id.* at 1027 (citing *FMC Corp.*, 29 F.3d 833, 846 (3d Cir. 1994)).

38. *Id.*

39. *Id.*

found that the War Production Board (WPB) diverted the tank cars for other uses; therefore, the oil companies had no choice but to dump the waste at the McColl Site.[41]

Finally, the court found that the government had not provided the necessary materials to the oil companies to allow them to construct regeneration plants to reprocess the acid and acid waste.[42] The court noted that two of the companies had requested that the WPB provide them with the materials required to construct these regeneration plants. Since the WPB did not grant these requests, the court again concluded that the companies had no choice but to dump the wastes at the McColl Site.[43]

The government argued at the allocation trial that the economic benefits the oil companies received from these contracts weighed in the government's favor. Not only did the companies profit from these contracts, but they also received tax benefits from their ability to accelerate the amortization of new facilities constructed during the war.[44] The court, however, did not find this reasoning persuasive. The court noted that after the war, Congress enacted two statutes, called Renegotiation Acts, designed to allow the government to demand repayment of excessive profits obtained by companies during the war. According to the court, since the oil companies were never required to repay any money to the government, their profits were not excessive. Therefore, the profits were not an equitable factor to be taken into account in the allocation process.[45]

This case potentially expands the reasoning of the *FMC Corp.* case. *FMC Corp.* determined operator *liability* under section 107 of the CERLCA based on the amount and type of control over the facility involved. The *McColl* case determined *allocation*. The issue was the application of equitable factors to determine costs between two liable parties. *FMC Corp.* does not provide guidance on allocation issues. Also, the *McColl* court ignored the independent decisions the oil companies made that led to the creation of the CERCLA site. Specifically, the companies chose to enter into contracts with Eli McColl for waste disposal. In addition, they expanded their plants and actively competed for aviation fuel contracts at the outset of the war. By not considering these factors, the court ignored an important principle underlying the CERCLA: requiring the persons responsible for pollution to pay for the damage they cause. In October, the judge denied the United States motion for a new trial. An appeal is likely. Major Romans.

40. *Id.* at 1028.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1029.

45. *Id.* at 1030.

CLAMO Report

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

The Marines Have Landed at CLAMO

On 1 October 1998, the Army's Center for Law and Military Operations (CLAMO) officially welcomed its first judge advocate member from the U.S. Marine Corps. On that day, the Marines formally assigned Major William F. Ferrell to CLAMO. The Marine representative will enhance CLAMO's role as a land component organization. The CLAMO can now assist and provide training to Army and Marine Corps judge advocates (JAs).

The Primary Mission

The Marine representative's primary mission will be to support and to assist the training of deployed Marine JAs. Because of the forward-deployed, rapid response nature of a Marine expeditionary unit (MEU), and the varying array of missions it is called on to execute, a thoroughly trained and prepared MEU JA is critical. The Marine representative's initial focus will be on how to best train and support MEU JAs.

The Marine Expeditionary Unit

A MEU is a premier crisis response force. It is a forward-deployed, self-sustained, quick response team trained and prepared to execute a wide variety of missions. A MEU is just one example of a Marine Air Ground Task Force (MAGTF)–a combined arms team consisting of air, ground, and logistics components tailored to fit a specific mission. The MAGTF concept is a hallmark of the Marine Corps. Marine forces always deploy and fight as MAGTFs. Marine Expeditionary Units that are qualified as "special operations capable" (SOC) are referred to as MEU (SOC). A MEU (SOC) is extensively trained to perform any one of thirty-one distinct missions that cover the full spectrum of military operations.

A MEU is the smallest standing MAGTF and consists of over two thousand Marines and sailors divided into a command element, a ground combat element, an air combat element, and a combat service support element. The MEU command element consists of the MEU commander and supporting staff. The command element is responsible for overall command and control of the MEU and is reinforced with specialized intelligence, reconnaissance, and communications assets. The MEU JA is part of the MEU command element. The MEU ground combat element is a battalion landing team, which consists of an infantry battalion reinforced with light armored vehicles, amphibious assault vehicles, artillery, and engineers. The MEU air combat element is a composite squadron consisting of UH-1N, AH-1W, CH-46, and CH-53 rotary wing aircraft, as well as AV-8B fixed wing aircraft. The MEU combat service support element consists of the MEU service support group, which contains the motor transport, medical, logistics, maintenance, and engineering functions for the MEU. The specific types of equipment and attachments assigned to a MEU may differ, depending on the specific missions envisioned for the MEU.

A MEU is embarked aboard an amphibious ready group consisting of three Navy amphibious ships. Typically, an amphibious ready group operates in conjunction with a carrier battle group, which provides the national command authority and supported commander in chief with a potent crisis response force. The Marine Corps has seven standing MEUs. The 22nd, 24th, and 26th MEUs deploy from the II Marine Expeditionary Force (MEF), located at Camp Lejeune, North Carolina. The 11th, 13th, and 15th MEUs deploy from I MEF, located at Camp Pendleton, California. The 31st MEU deploys from III MEF, located in Okinawa, Japan. Normally, two MEUs are deployed at any given time, with one generally centered in the Mediterranean and the other in the Western Pacific Arabian Gulf area.

Follow On Missions

Once established, the MEU JA training and support program will be the building block to establish training programs for all Marine operational law judge advocates. The Marine representative is creating a distinct after action report (AAR) format for deployed Marine judge advocates to use. The CLAMO will distribute the AAR to Marine judge advocates to capture all relevant lessons learned from exercises, routine deployments, and contingency operations. The CLAMO database will become the central repository for all these legal lessons learned.

The CLAMO's other members recently visited the National Training Center at Fort Irwin, California and the Joint Training, Analysis, and Simulation Center in Suffolk, Virginia to observe the Army's use of judge advocates as Observer/Controllers and Observer/Trainers. These highly skilled, operationally-focused judge advocates train and mentor the training unit, to include the participating judge advocates, and insert realistic legal play into the exercise as part of the operations group. The Marine representative is investigating adopting a similar approach toward the training of Marine operational law judge advocates.

Major Ferrell has also taken the lead in producing CLAMO's next publication, a Rules of Engagement (ROE) vignette "Playbook" that will deal with the full range of military operations. This book will not be a "cookbook" that provides an answer to every possible scenario. Rather, the intent will be that it serve as a training tool to assist units in conducting realistic ROE training.

Conclusion

The CLAMO welcomes the Marine representative to the Center and looks forward to the critical role that he will play in ensuring that CLAMO continues to serve as the premier resource organization for land component operational lawyers.

How Can I Contact CLAMO?

In addition to assisting operational judge advocates, CLAMO invites contributions of operational law materials from the field. Call the CLAMO at DSN 934-7115 ext. 248 or commercial (804) 972-6248. E-mail *millejw@hqda.army.mil*, *randot@hqda.army.mil*, or *ferrewh@hqda.army.mil*. Or write the Center for Law and Military Operations, The Judge Advocate General's School, 600 Massie Road, Charlottesville, Virginia, 22903-1781. Major Ferrell, United States Marine Corps.

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 Command 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
9-10 Jan 99	Long Beach, CA 78th MSO Renaissance Long Beach Hotel Long Beach, CA 90802 1-800-228-9898	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 akneib1@san.rr.com
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 feller@biia.wa.gov
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 Embassy Suites Denver Tech Center Costila Avenue 10250 Englewood, CO 80112 1-800-654-4810	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 thompsongc@in-arng,ngb.ar
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 (301) 394-0558 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 dgneiser@hrblaw.com
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	LTC 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 jtobin996@aol.com

*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

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-	148th Basic Course (Phase II-2 April 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

December

3 December ICLE	Environmental Matters Atlanta, Georgia
4 December ICLE	Employment Law Marriott Gwinnett Place Hotel Atlanta, Georgia
18 December ICLE	Labor Law Swissotel Atlanta, Georgia

1999

January

21 January ICLE	Mastering the Craft of Modern Trial Advocacy Swissotel Atlanta, Georgia
21 January ICLE	Constitutional Tort Case Seminar Swissotel Atlanta, Georgia

February

19 February ICLE	Motion Practice Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

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)

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. Article

The following information may be useful to judge advocates:

Commander Roger D. Scott, *Legal Aspects of Information Warfare: Military Disruption of Telecommunications*, 45 NAVAL L. REV. 57 (1998).

Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126 (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.

The Army Lawyer Index for 1998

Author Index

The Army Lawyer
January 1998-December 1998

-S-

Sitler, MAJ Martin H., *The Power to Prosecute: New Developments in Courts-Martial Jurisdiction*, Apr. 1998, at 1.

Sitler, MAJ Martin H., *Widening the Door: Recent Developments in Self-Incrimination*, Apr. 1998, at 93.

-W-

Wilcox, William A., Jr., *Environmental Planning on Federal Facilities*, Sept. 1998, at 16.

Wollschlaeger, MAJ Daria P., *OTJAG's China Initiatives: Past, Present, Future*, July 1998, at 55.

Wright, LTC Donna M. and LTC (Retired) Lawrence M. Cuculic, *Annual Review of Developments in Instructions—1997*, July 1998, at 39.

Subject Index

The Army Lawyer
January 1998-December 1998

-C-

CID

CID Titling Process--Founded or Unfounded, The, MAJ Patricia A. Ham, Aug. 1998, at 1.

CIVIL AUTHORITIES

CLAIMS

Operational Claims in Bosnia-Herzegovina and Croatia, June 1998, MAJ Jody M. Prescott, June 1998, at 1.

CONSTRUCTION FUNDING

Has DOD "Repaired" a Component of the Construction Funding Analysis? MAJ M. Warner Meadows, Mar. 1998, at 15.

Military Construction Funding: Variation in Cost Rules, MAJ M. Warner Meadows, Aug. 1998, at 20.

CONTRACTS (see also PROCUREMENT)

Acquisition Reform: All Sail and No Rudder, Ross W. Branstetter, Mar. 1998, at 3.

Contract Law Developments of 1997—The Year in Review, TJAGSA Contract Law Division, Jan. 1998, at 3.

Has DOD "Repaired" a Component of the Construction Funding Analysis? MAJ M. Warner Meadows, Mar. 1998, at 15.

Military Construction Funding: Variation in Cost Rules, MAJ M. Warner Meadows, Aug. 1998, at 20.

The Preemption Debate: What Is the Scope of the Miller Act Remedial Scheme?, Jack E. Kerrigan and David C. Harris, Dec. 1998, at 1.

COURTS-MARTIAL JURISDICTION

The Power to Prosecute: New Developments in Courts-Martial Jurisdiction, MAJ Martin H. Sitler, Apr. 1998, at 1.

-D-

DISCOVERY

Pyrrhic Victories and Permutations: New Developments in the Sixth Amendment, Discovery, and Mental Responsibility, MAJ Edye U. Moran, Apr. 1998, at 106. -E-

EVIDENCE

Developments in Evidence III—The Final Chapter, LTC Stephen R. Henley, May 1998, at 1.

ENVIRONMENTAL LAW

Environmental Planning on Federal Facilities, William A. Wilcox, Jr., Sept. 1998, at 16.

-I-

INSTRUCTIONS

Annual Review of Developments in Instructions: 1997, LTC Lawrence M. Cuculic & LTC Donna M. Wright, July 1998, at 39.

INTERNATIONAL LAW AND OPERATIONS

OTJAG's China Initiatives: Past, Present, Future, MAJ Daria P. Wollschlaeger, July 1998, at 55.

-J-

JURISDICTION

The Power to Prosecute: New Developments in Courts-Martial Jurisdiction, MAJ Martin H. Sitler, Apr. 1998, at 1.

-M-

MANUAL FOR COURTS-MARTIAL

Amendments to the Manual for Courts-Martial, July 1998, at 1.

MENTAL RESPONSIBILITY/MENTAL COMPETENCY

Pyrrhic Victories and Permutations: New Developments in the Sixth Amendment, Discovery, and Mental Responsibility, MAJ Edye U. Moran, Apr. 1998, at 106.

MILITARY JUSTICE

CID Titling Process--Founded or Unfounded, The, MAJ Patricia A. Ham, Aug. 1998, at 1.

-P-

-R-

Index of Practice Notes

The Army Lawyer
January 1998-December 1998

Index of Claims Notes

The Army Lawyer
January 1998-December 1998