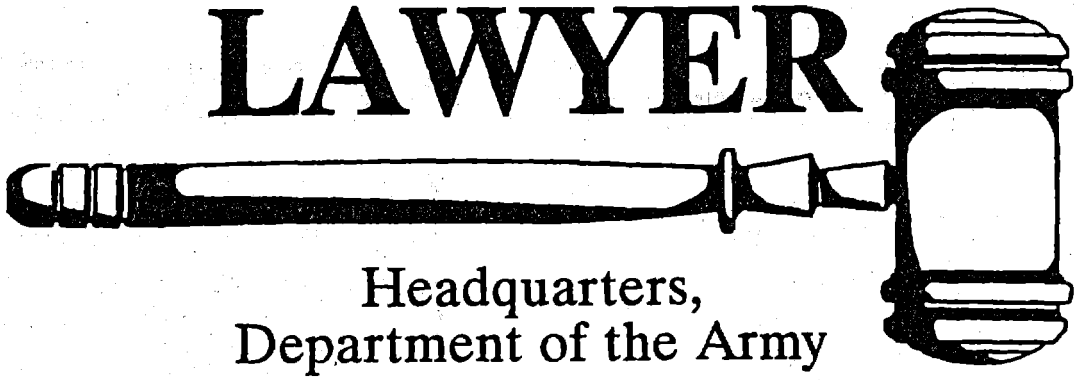
THE ARMY LAWYER



Headquarters,
Department of the Army

Department of the Army Pamphlet 27-50-259
June 1994

Table of Contents

The Army Lawyer (ISSN 0364-1287)

Editor
Captain John B. Jones, Jr.

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index,* and the *Index to U.S. Government Periodicals.*

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, telephone (202) 783-3238.

Address changes: Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as ARMY LAW., [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

Avoiding Anti-Deficiency Act Violations on Fixed-Price Incentive Contracts (the Hunt for Red Ink)

Colonel James W. McBride
Staff Judge Advocate, Space and Missile Systems Center
Los Angeles Air Force Base, California

Introduction

The potential for violating the Anti-Deficiency Act[1] (ADA) increased significantly on 5 November 1990 when section 1405 of the National Defense Authorization Act for fiscal year (FY) 1991 became effective.[2] That law eliminated merged surplus authority and required phasing out merged surplus (M) accounts by 30 September 1993.[3] Previously, two years after an appropriation expired, unexpended balances were merged with balances from other prior year accounts (appropriated for the same general purpose) in the M account (if the funds were obligated) or in the merged surplus authority (if the funds were unobligated).[4] Unexpended funds could remain in these accounts indefinitely without any FY identity and be used to pay for contract overruns or inscope contract changes identified with these prior year accounts. Therefore, an overobligation of the original appropriation was not a violation of the ADA if sufficient balances were available in the M account, or could be restored to the M account from merged surplus authority balances.[5] This safety valve is gone, now that M accounts and the merged surplus authority no longer exist.

By eliminating these accounts, Congress has played havoc with the government's fiscal management of large programs. First, by the time many contracts are closed out, unexpended funds which were obligated to pay for performance have been canceled.[6] Second, most large systems contracts do not require the contractor to segregate costs by contract line item number (CLIN), by FY, or by type of work performed.[7] Third, several different and irreconcilable government computer data bases exist to account for available funds, obliga-

---

[1] 31 U.S.C. § 1341 (1988).

[2] Pub. L. 101-510, 104 Stat. 1676 (codified as amended at 31 U.S.C. §§ 1551-1557) (1990).

[3] 3. "[C]oncern over the large amounts that had accumulated in the merged surplus accounts that permitted changes to exceed the amounts originally available for programs led to the 1990 amendments eliminating the merged surplus accounts." B-245856.2-O.M., Feb. 7, 1992 (unpub.).

[4] 31 U.S.C. §§ 1551-1557 (1988).

[5] *See* pt. XI to OMB Circular A-34 (Aug. 1985); OMB Bulletin 91-07 (17 Jan. 1991).

[6] Now all funds remain in an expired account for five years after their period of availability expires. At the end of five years, unexpended balances (both obligated and unobligated) are canceled. However, an obligation associated with the canceled year requirement may be paid (without violating the ADA) from unexpired (currently available) appropriations made for the same general purpose (such as, Air Force 3020 missile procurement funds) subject to the lesser of (1) the unexpended balance of the original (canceled) appropriation or (2) one percent of the unexpired appropriation. If these limitations are exceeded, agencies must defer payment and seek reappropriation of canceled balances. (Such refusal to pay for completed work may breach the contract. That an appropriation is exhausted does not constitute a defense to a suit for breach of contract. Ferris v. United States, 27 Ct. Cl. 542 (1892)). The one percent limitation is based on the total amount of currently available funds of each type (such as, 3020). *Id.* A separate one percent limitation exists for expired funds. *See infra* note 98. All Air Force uses of current year funds must be cumulated at the Secretary of the Air Force/Financial Management (SAF/FM) to avoid exceeding this limitation.

[7] A new clause has been proposed which may be designed to address this problem. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP 1-103, 252.242-7006, internal controls [hereinafter DFARS]. It requires contractors to agree to maintain accounting controls sufficient to:

(1) Ensure compliance with applicable laws and regulation;

(2) Provide reasonable assurance that—

(i) The accounting system and cost data are accurate and reliable; and

(ii) Substantial risk of contract misallocations, mischarges, or government overpayments will not occur.

However, these are general standards. For example, the clause does not specifically require the contractor to collect costs and bill progress payments by appropriation. The Administrative Contracting Officer (ACO) must determine whether the contractor's accounting system is ineffective for government costing or payment purposes and request the contractor to furnish a corrective action plan. 58 Fed. Reg. 49,958 (1993) (*DFARS* proposal). If the ACO imposes a requirement for a more detailed (and expensive) accounting system after contract award, the contractor will likely claim constructive change, unless such requirement was spelled out in the solicitation prior to contract award. The American Bar Association Section of Public Contract Law has criticized the guidance as imprecise and requiring "highly judgmental" determinations likely to lead to disputes. *ABA Section Voices Continuing Concerns over Contractor Accounting Controls Proposal,* 35 THE GOV'T CONTRACTOR, ¶ 657 (1993).

tions, and disbursements, making it extremely difficult to accurately ascertain the fiscal status of many large contracts.[8] Fourth, the Department of Defense Inspector General (DOD/IG) has recognized the elimination of M accounts and merged surplus authority as a new opportunity for "search and destroy" missions against acquisition personnel.[9] Therefore, changes must be made in drafting contract terms and administering contracts to account for this new reality.

Fixed-Price Incentive (FPI) contracts, more than any other contract type, create the potential for violating the ADA. Department of Defense guidance on recording obligations for FPI contracts is, "[w]hen the contract is executed, an obligation must be recorded only for the amount of the target or billing price stated in the contract, even though the contract may contain a ceiling price in a larger amount."[10] Although such contracts comply with the law when awarded, the ADA still can be violated if inadequate funds remain available when payment is due or if upward adjustments cause the obligation to exceed available funds.[11] Because the government's liability is not fixed at the time the contract is awarded, but is subject to increase up to the ceiling price (CP), obligating funds only to the target price (TP) makes the government vulnerable to paying the amount between the TP and the CP without having sufficient available funds.[12] Further, no clause in an FPI production contract (which is required to be "fully funded")[13] requires the contractor to notify the government before incurring costs in excess of the funds obligated on the contract.[14] Thus, the government lacks both the protection of funding to its maximum liability, as well as the protection of notice provisions inherent in a limitation of cost clause,[15] a limitation of funds clause,[16] or a limitation of government's obligation (LOGO) clause.[17]

While insuring that adequate funds are available at the time of award is a necessary first step, under FPI contracts what happens as the contract is performed is especially important:

> In the case of some indefinite price contracts and similar obligations, it is difficult to determine the precise amount of the Government's liability at the time contracts are made, and it is considerably more difficult to determine the Government's ultimate legal liability under such contracts. While it is recognized that these cases present many difficulties from a control standpoint, the allottee, nevertheless, is responsible for ensuring that only valid obligations . . . are recorded against the allotment and that sufficient funds are available in the allotment to cover all increases in such obligations. . . . If the allotment [or appropriation] becomes overobligated or overexpended because of inaccurate estimates of obligations or failure to reserve sufficient funds to cover contingencies, a violation of . . . [the ADA] has occurred.[18]

To avoid this result, understanding the principles of fiscal law, maintaining accurate and timely data on the availability of funds, imposing requirements on the contractor to account for

---

[8] The Office of Management and Budget (OMB) has identified federal financial systems as an area of particular weakness within federal financial management. It considered government-wide data deficient in terms of accuracy, timeliness, internal consistency, and accessibility. After collecting data on 878 operational financial management systems, a joint OMB/Treasury team determined that data collection should be synchronized and data redundancy reduced. OMB, *Federal Financial Management Status Report and 5-Year Plan* (Aug. 1993). *See infra* note 200 and accompanying text.

[9] *See* Correll, *Blood on the Rock*, A.F. MAG., July 1993, at 2; *Evaluating the Decisions of Government Officials: Insinuations of Criminality*, 7 NASH & CIBINIC REPORT 8, para. 46 (Aug. 1993).

[10] DOD ACCOUNTING MAN. 7220.9-M, ch. 25, sec. D.2 (Oct. 1993) [hereinafter DOD ACCOUNTING MAN.].

[11] General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-15 (2d ed. Dec. 1992) [hereinafter PRINCIPLES].

[12] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.216-16, incentive price revision-firm target ("FPI clause") (1 Apr. 1984) [hereinafter FAR]. (References to the *FAR* and its supplements are located at volume 48 of the Code of Federal Regulations (CFR)).

[13] DEP'T OF AIR FORCE, AIR FORCE REG. 172-1, BUDGET, vol. 1, para. 8-2 (18 Apr. 1988).

[14] The FPI clause requires the contractor to submit a quarterly "limitation on payments" statement showing the "total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered . . . and accepted by the Government and for which final prices have not been established." FAR 52.216-16(g)(1). If such costs exceed the total amount of all invoices for such supplies, this would be a warning that the government termination liability may exceed the funds obligated by the CLINs under which those supplies were delivered.

[15] FAR 52.232-20.

[16] *Id.* 52.232-22 (including the June 1992 deviation for fixed-price research and development (R&D) contracts).

[17] DFARs 252.232-7007.

[18] DOD ACCOUNTING MAN., *supra* note 10, ch. 21, sec. E.4.f.

costs by FY and type of work performed, and carefully monitoring how the contractor's cost performance affects the government's obligation under the contract is important. Finally, if an overrun is projected, the contracting officer must take prompt action to obtain additional funds or reduce the government's obligation on the contract to the amount of available funds.

Defining a Violation—Principles of Fiscal Law

The ADA is intended to prevent expenditures or obligations in excess of available funds and to hold violators responsible if a deficiency occurs.[19] Several statutory provisions define ADA violations. An "officer or employee" of the United States may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,"[20] or available in an apportionment or administrative subdivision of funds established by regulations.[21] Knowing or willful violation of either section is a Class E felony, punishable by a fine of not more than $5000, or imprisonment of up to two years, or both.[22] Even less than a "knowing and willful" violation invites a full range of administrative discipline, including removal from office.[23] An obligation in excess of available funds is a reportable violation of the ADA, even if sufficient funds are available to cover anticipated payments (expenditures) until further funding becomes available.

To determine whether the ADA has been violated, it is necessary to define the following terms: "available," "expenditure," "obligation," "make," and "authorize,"—terms which the statute fails to define. Criminal offenses must be defined to enable ordinary people to understand what conduct is prohibited, so that prosecutors do not have the power of arbitrary enforcement.[24] Statute, regulation, or official agency policy can provide sufficient guidance[25] and Congress has specifically required each DOD component to prescribe by regulation a system of administrative control of funds that: (1) restricts obligations and expenditures from each appropriation to the amount of apportionments, reapportionments, or subdivisions of the appropriation, and (2) enables the agency to fix responsibility for an overobligation or overexpenditure.[26] Therefore, most of the definitions and much of the law relevant to the ADA are located in an agency's implementing regulations.[27]

Availability

Funds must be available in the proper account and administrative subdivision at the time a valid obligation is incurred. Availability has three distinct aspects to it:

> (1) Authority must exist to use the money in an account for the purpose of the obligation or expenditure;[28]
>
> (2) The obligation—but not the expenditure—must occur in the time limits applicable to the appropriation.[29] Appropriations are available only to fulfill a genuine or "bona fide" need of the period of availability for obligation;[30] and

---

[19] The ADA helps protect Congress's control of the purse, "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law." U.S. CONST. art. I, § 9.

[20] 31 U.S.C. § 1341(a)(1)(A) (1988) (emphasis added).

[21] *Id.* §§ 1514, 1517(a). Additionally, 31 U.S.C. § 1342 prohibits government employees from accepting voluntary services.

[22] 31 U.S.C. §§ 1350, 1519; 18 U.S.C. 3359(a)(1)(E).

[23] 31 U.S.C. § 1349(a), 1518.

[24] Kolender v. Lawson, 461 U.S. 352 (1983).

[25] United States v. Wallington, 889 F.2d 573 (5th Cir. 1989).

[26] 31 U.S.C. § 1514(a)(1); DOD ACCOUNTING MAN., *supra* note 10, sec. B.1.

[27] Agency regulations have the force and effect of law when they are:

> (1) "Legislative" (vs. interpretive) regulations affecting individual rights or obligations.
>
> (2) Issued pursuant to, and subject to any limitations of, a statutory grant of authority.
>
> (3) Issued in compliance with any procedural requirements (such as the Administrative Procedures Act) imposed by Congress.

See Chrysler Corp. v. Brown, 441 U.S. 281 (1979); PRINCIPLES, *supra* note 11, at 3-10-12.

[28] 31 U.S.C. § 1301(a).

[29] *Id.* § 1301(c); 13 Op. Att'y Gen. 288, 292 (1870).

[30] 31 U.S.C. § 1502(a); B-232024, 68 Comp. Gen. 170, 171 (1989).

(3) The obligation and expenditure must be within the amounts established by Congress and by the appropriate administrative subdivision of funds.[31]

The amount available for obligation generally is limited to "direct obligation authority,"[32] that portion of an apportionment, allocation, allotment, or operating budget authority (OBA) which represents funds made available for obligation by annual appropriation acts or other statutory authority.[33] Therefore, to comply with the ADA, first identify the relevant appropriation or subdivision of funds which made funds available for obligation for a particular purpose.

Administrative Subdivision of Appropriations

An appropriation is statutory authority to incur obligations and make payments out of the United States Treasury for authorized purposes. An administrative subdivision of an appropriation or other fund makes funds available in a specified amount for incurring obligations, subject to limits in the funding documents, statutes, regulations, or other applicable directives. Department of Defense policy is to establish limitations administratively at the highest practical level, consistent with assignments of responsibility. The administrative subdivisions authorized by the DOD are allocation, suballocation, allotment, and suballotment. An allocation is an administrative subdivision authorizing the commander of a major command to make suballocations and allotments available in a specified amount, subject to any other limitations on their use.[34] An allotment is an authorization by a major command to a subordinate installation or other organizational element, or to itself, to incur obligations within a specified amount.[35] Each formal subdivision is a limit on obligations and expenditures which, if exceeded, must be reported as a violation of the ADA even though it does not exceed the next higher subdivision of funds.[36]

Allocations and allotments follow program responsibility and are issued to the commanders responsible for administering the programs (holders of funds).[37] The holder of funds for most major programs in the DOD is the Agency's Senior Acquisition Executive (SAE). For other purposes, the holder of funds is usually the installation commander. Funds available in an allocation at the Headquarters (HQ) level are not available for obligation by the installation until those funds are allotted to the installation commander.

Disbursements

If disbursements on a contract exceed the amount available in an appropriation or fund, 31 U.S.C. § 1341 is violated. The *Department of Defense Accounting Manual* defines disbursements as

> The amount of checks issued, cash payments made, and "no-check-issued" disbursement transactions (charges to an appropriation or fund account that were initially charged to another appropriation or fund account with reimbursement effected without a check issuance) processed that were reported to the Treasury during the reporting period, including amounts reported on DD Forms 1400, "Statement of Interfund Transactions" and Statements of Intra-Governmental Transactions. It includes amounts of mortgages assumed, but does not include amounts of principal payments. Amount reported is net of refunds collected and reported to the Treasury and does not include nonexpenditure transactions such as appropriation transfers or investments in U.S. government securities.[38]

Therefore, "expenditures" for the purpose of the ADA clearly include payments for supplies or services upon acceptance of a CLIN (and liquidation of progress payments). Does it also include the payment of progress payments during performance

---

[31] 31 U.S.C. § 1341(a)(1)(A); PRINCIPLES, *supra* note 11, 4-2, ch. 6; DEP'T OF AIR FORCE, AIR FORCE REG. 177-16, ACCOUNTING AND FINANCE: ADMINISTRATIVE CONTROL OF FINANCE, paras. 39b(1), c (30 Nov. 1988) [hereinafter AFR 177-16].

[32] AFR 177-16, *supra* note 31, para. 30a.

[33] *Id.* para. 4h.

[34] DEP'T OF DEFENSE, DIRECTIVE 7200.1, encl. 4 [hereinafter DOD DIR. 7200.1]; AFR 177-16, *supra* note 31, para. 4b.

[35] AFR 177-16, *supra* note 31, para. 4b.

[36] *Id.* paras. 4, 19, 21. However, if determining the amount of an overobligation until after an appropriation expires is not possible, upward adjustments would be "properly chargeable to the unobligated balances at appropriation level, and not the administrative subdivision level." *Id.* para. 40B, (Intermediate Message Change (IMC) 92-1, 252335Z, Feb. 1992)).

[37] *Id.* paras. 4j, 13.

[38] DOD ACCOUNTING MAN. *supra* note 10, app. A, A-11. *See also* DEP'T OF ARMY, REG. 37-1, ARMY ACCOUNTING AND FUND CONTROL (30 Apr. 1991) [hereinafter AR 37-1]; DEP'T OF AIR FORCE, AIR FORCE REG. 177-120, CENTRAL PROCUREMENT TRANSACTIONS, atch. 1 (Feb. 1988) [hereinafter AFR 177-120].

of the contract (prior to acceptance)?[39] Payment of progress payments is a disbursement to the contractor for the purpose of financing performance. Therefore, progress payments are not expenditures as defined in *AFR 177-120*.[40] Because assuming that Congress intended progress payments to be made in the absence of available funds is illogical, Congress must have intended the term "expenditure," as used in 31 U.S.C. § 1341, to have its normal dictionary meaning of "payment" or "disbursement."[41] This is consistent with the *FAR* admonishment that "[t]he contracting officer shall not make progress payments . . . beyond the funds obligated under the contract, as amended."[42] Therefore, for the purpose of the ADA, progress payments are expenditures.[43]

Obligations

"Obligation" is the most important concept for determining violations of the ADA. A legal obligation is a duty, recognized and sanctioned by law, owed to some person or entity which has an enforceable right against the one subject to the duty. Such a duty is created by certain facts, usually expressions of agreement.[44] The General Accounting Office (GAO) "[h]as generally avoided a universally applicable legal definition of the term 'obligation,' and has instead analyzed the nature of the particular transaction at issue to determine whether an obligation has been incurred."[45] A GAO definition of obligation that covers most situations is "a definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received."[46] In a contractual context, determining whether an obligation exists requires "analysis of written arrangements and conditions agreed to by the United States and the party with whom it is dealing."[47] Therefore, to determine whether an obligation exists under an FPI contract, the *FAR* definition of "contract" is useful:

> "Contract" means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. . . . [C]ontracts include (but are not limited to) . . . bilateral contract modifications.[48]

The *DOD Accounting Manual* defines "obligations incurred" as "Amounts of orders placed, contracts awarded, services received, and similar transactions during a given accounting period that will require payments during the same or future period."[49]

---

[39] "'*Contract financing payments*' [including progress payments] are those made in '*advance of acceptance of supplies or services*,' and '*do not include invoice payments or payments for partial deliveries*.'" FAR 32.902 (emphasis added). Northrop Worldwide Aircraft Services, Inc. v. Department of the Treasury, GSBCA No. 11162-TD, 92-2 BCA ¶ 24,765.

[40] AFR 177-120, *supra* note 38, atch. 1.

[41] WEBSTER'S NEW COLLEGIATE DICTIONARY (9th ed. 1983).

[42] FAR 32.501-3(b).

[43] This is the same conclusion reached by the DOD/IG. DOD/IG Audit Report on the Titan IV Program, Report No. 92-064, at 4 (31 Mar. 1992) [hereinafter Titan IV Report]. This also is consistent with the preference on contracts with multiple appropriation fund citations "that the performing contractor's invoice or request for progress payment identify the appropriations against which payment is being requested." DOD ACCOUNTING MAN., *supra* note 10, ch. 32, sec. G.1.b.

[44] A. CORBIN, CORBIN ON CONTRACTS, sec. 2 (1952).

[45] B-192282, Apr. 18, 1979 (unpub.); B-116795, June 18, 1954, (unpub.).

[46] B-116795, June 18, 1954 (unpub.); PRINCIPLES, *supra* note 11, at 7-2.

[47] B-151613, 42 Comp. Gen. 733, 734 (1963).

[48] FAR 2.101.

[49] DOD ACCOUNTING MAN., *supra* note 10, sec. B.3.a. *Accord* DEP'T OF AIR FORCE, AIR FORCE REG. 170-8, COMPTROLLER: ACCOUNTING FOR OBLIGATIONS, para. 2a (15 Jan. 1990) [hereinafter AFR 170-8]. Title 31 U.S.C. § 1501(a) provides the following:

> An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of—
>
> (1) a binding agreement between an agency and another person (including an agency) that is—
>
> (A) in writing, in a way and form, and for a purpose authorized by law; and
>
> (B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided.

Title 31 U.S.C. § 1501(a) lists eight additional criteria for recording obligations. "In one sense, these nine criteria taken together may be said to comprise the 'definition' of an obligation." PRINCIPLES, *supra* note 11, at 7-6.

"Making" an obligation is "[a]ny *act* that legally binds the U.S. Government to make payment,"[50] or "some action that creates a liability or definite commitment on the part of the government to make a disbursement at some later time."[51] "Create" is synonymous with "make."[52] Furthermore:

> The words "any contract or other obligation" as used in 31 U.S.C. § 665 encompass not merely recorded obligations but other actions which give rise to Government liability and will ultimately require the expenditure of appropriated funds. In B-163058 . . . we suggested as one example of such action conduct by a Government agency which would result in Government liability under a clear line of judicial precedent, such as through claims proceedings.[53]

Therefore, a constructive change ordered by a government employee could conceivably violate the ADA if the cost of the changed work exceeded available funds.[54]

"Obligations" include both matured and unmatured legal liabilities. A legal liability that currently is payable is matured. A legal liability which is not yet payable, but for which a definite liability to pay nevertheless exists, is unmatured.[55] Under a fixed-price incentive (firm target) (FPIF) contract, the difference between the value of CLINs accepted and the contract's overall TP is an unmatured legal liability. That such unmatured liability may be subject to a right of cancellation—such as, a termination for convenience—does not negate the obligation. Further, the obligation takes place when the definite legal liability to pay arises (contract award), even though actual payment may not occur until a subsequent FY.[56]

Contingent Liability

A contingent, or potential, liability is not an "obligation" for the purpose of the Act. A contingent liability is "[a]n existing condition, situation, or set of circumstances involving uncertainty as to a possible loss to an agency that will ultimately be resolved when one or more future events occur or fail to occur."[57] Such liability is not an "obligation" until the contingency materializes, or becomes more definite in amount and more likely to occur; "contingent liabilities need be recorded as expenses only to the extent it is probable that a liability will be incurred and its amount reasonably estimated."[58] However, the treatment of contingent liabilities is largely a matter of sound judgment, and "[n]o hard and fast rule can be laid down. . . ."[59] Further, any implication that a contingent liability becomes an obligation as soon as it is probable to occur is contradicted by the *DOD Accounting Manual* guidance that amounts to cover "contingent liabilities for price . . . increases . . . that cannot be recorded as valid obligations . . . should be carried as outstanding commitments

---

[50] AR 37-1, *supra* note 38, para. 9-1.

[51] PRINCIPLES, *supra* note 11, at 7-4.

[52] DOD DIR. 7200.1, *supra* note 34, encl. 5, sec. K2.

[53] B-184830, 55 Comp. Gen. 812, 824 (1976). The GAO in that case decided that the government did not have to include the entire estimated amount of its government furnished property (GFP) obligation under a contract in its calculation of its obligation against the available appropriation. The GAO seemed primarily influenced by the term in the GFP clause that allowed the Navy to delete items from the list required to be furnished, subject to granting the contractor a corresponding equitable adjustment, thereby making it "impossible to determine the exact amount of recorded obligations or other liability to be incurred by Navy under the GFP provisions." *Id.* at 826. Similarly, under an FPI contract, the government has the right to delete items from the contract pursuant to the Changes clause. Although this clause does not operate to reduce the government's obligation below that of the contract TP or billing price, it may prevent the government's obligation from increasing above the contract price based solely on an estimated overrun between TP and CP that has not yet occurred.

[54] Fear of an ADA violation could influence agency personnel to dispute a claim associated with an expired account because judgments of a court or board of contract appeals are paid out of the statutory judgment fund. 41 U.S.C. § 612. The agency's reimbursement of the fund is out of current appropriations, avoiding a deficiency in the expired account. B-211229, 63 Comp. Gen. 308, 309 (1984). Similarly, if a change is characterized as out of scope, it is paid for as a new obligation out of funds current when the change occurred. B-245856.2, Feb. 7, 1992.

[55] PRINCIPLES, *supra* note 11, at 7-4.

[56] B-114841, 56 Comp. Gen. 351 (1977).

[57] GAO, GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, PAD-81-27, at 86.

[58] B-174839, 62 Comp. Gen. 143, 146 (1983) (citing the GAO *Policy and Procedures Manual for Guidance of Federal Agencies*, tit. 2, sec. 13; *see also id.* tit. 7, sec. 3.4.C). Under the facts of that decision, the government was required to recognize as an obligation its termination liability. Although contingent on a failure to renew subsequent options or on a termination for convenience, the government would incur alternative obligations in excess of its termination liability if none of the contingencies arose. In other words, the cost of avoiding the termination liability by exercising the option exceeded the cost of the termination liability. Therefore, the termination liability had to be recorded as a firm obligation because it represented the least amount for which the government would be liable under the contract. *Id.* at 147. Similarly, when a contractor has exceeded the TC of an FPI contract, the termination liability is the least amount for which the government would be liable.

[59] B-114876, 37 Comp. Gen. 691, 694 (1958).

. . . [in] amounts conservatively estimated to be sufficient to cover the additional obligations that probably will materialize, based upon judgment and experience."[60] The implication of this guidance is that not all potential liabilities that "probably will materialize" should be treated as obligations.[61] Contingencies that are unlimited in amount, even though unlikely to occur, violate 31 U.S.C. § 1341.[62]

The amount of the government's contingent liability at the time of award of an FPIF contract is the difference between TP and CP.[63] This is not an obligation, even though the government is liable to pay it if the contingency (incurring costs over the TP) ever occurs.[64] Consequently, the government may assume a legal liability to pay this contingent liability without available funds. However, even though the initial obligation (TP) was within available funds when the contract was awarded, the ADA still will be violated if upward adjustments subsequent to award cause the obligation to exceed available funds.[65] This could occur by an affirmative act of the parties increasing the contract's billing price (BP). It also may occur when a contractor's continued performance increases the government's liability under a contract clause, such as the termination for convenience of the government clause.[66] It is the obligation which occurs by the operation of a contract clause that must be closely monitored to avoid an ADA violation.

Commitments

"Committing" funds is one way to "authorize" an obligation.[67] A commitment is defined as

> A specific amount of currently available funds reserved for funding specified obligations and *authorizing* creation of an obligation without further recourse to the official responsible for certifying availability of funds. Commitments are based on firm requisitions, purchase requests, documents requiring start of actual procurement actions, or other authorized written evidence which indicates intention to incur obligations.[68]

A commitment is evidenced by an administrative commitment document (requisitions, purchase requests, *AR Form 3953, Purchase, Request, and Commitment, AF Form 616, Fund Cite Authorization)* which includes a certification of fund availability. The certification attests that adequate funds currently are available and that the obligation authorized is a proper and valid charge to the funds cited.[69] Therefore, committing funds prior to awarding an FPIF contract, or a modification thereto, "authorizes" the creation of a contractual

---

[60] DOD ACCOUNTING MAN., *supra* note 10, ch. 25, para. B.2.a. *Accord* A-27641, 8 Comp. Gen. 654 (1929); DEP'T OF AIR FORCE, AIR FORCE REG. 170-13, COMPTROLLER: ACCOUNTING FOR COMMITMENTS, para. 25 (30 July 1990) [hereinafter 170-13]; AFR 177-16, *supra* note 31, para. 36.

[61] In a case involving a contractor's challenge of an option exercise as violating the ADA, the GAO, "considering the facts . . . in the light most favorable to the Contractor," included target to ceiling escalation as an obligation on the exercise of an option which was undefinitized, but which was to be priced in accordance with an FPI clause. The GAO did so using current estimates of cost as of the time of option exercise. This is not unreasonable because the amount of an additional obligation caused by an affirmative act of the government—such as a contract modification—should be calculated using the best estimate available at the time of the modification. This is consistent with the rule that the obligation recorded at the time of award of an FPI contract should be the TP, because the TP upon initial award should be the same as the best estimate of contract price. However, when an option is exercised some time after contract award, the best estimate may no longer correspond to the TP.

[62] United States Park Police Indemnification Agreement, B-242146 (Aug. 16, 1991) (unpub.). Why does a contingency which is unlimited in amount violate the ADA while one which is certain in amount does not? If both exceed available funds, is the first an "obligation" while the second is not? Does the first "authorize" an overobligation while the second does not? A Court of Claims case addressing one type of indefinite contingent liability, an indemnification agreement, treats it as an obligation; "[The ADA] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated." California-Pacific Utilities Co. v. United States, 194 Ct. Cl. 703, 715 (1971) (citations omitted). Another view is that it violates the ADA "since it can never be said that sufficient funds have been appropriated to cover the contingency." PRINCIPLES, *supra* note 11, at 6-31, "because no one knows in advance how much the liability may be." B-201072, 62 Comp. Gen. 361, 366 (1983).

[63] 170-13, *supra* note 60, para. 25f.

[64] FAR 52.216-16, 52.216-17. A contingent liability is not an unmatured liability. PRINCIPLES, *supra* note 11, at 7-4. *See id.* at 7-48, where it states that a contingent liability is "less than an obligation." Does the assumption of a contingent liability not "authorize" an obligation based on events solely in the contractor's control? If so, would a subsequent overobligation make the one who assumed the original contingent liability responsible for the ADA violation?

[65] B-184830, 55 Comp. Gen. 812, 826 (1976); PRINCIPLES, *supra* note 11, at 6-15.

[66] FAR 52.249-2.

[67] DOD DIR. 7200.1, *supra* note 34, encl. 5, sec. K.2. "The Anti-Deficiency Act states that amounts appropriated by Congress for general or specific purposes may not be exceeded through commitment, obligation or expenditure action (emphasis added)." AFSC FINANCIAL MANAGEMENT HANDBOOK, para. 3-9d (Sept. 1990 (C1, 1 Nov. 1992)).

[68] AFR 177-120, *supra* note 38, atch. 1 (emphasis added); *see* AFR 170-13, *supra* note 60, para. 3a.

[69] AFR 170-13, *supra* note 60, para. 3d, e.

obligation without further recourse to the official responsible for certifying availability of funds.

Before awarding an FPIF contract, an agency must commit an amount sufficient to cover its best estimate of the eventual total costs. In the case of indefinite price contracts, difficulty exists in determining the precise amount of the government's legal liability at the time of contract award.[70]

> [T]here are contingent liabilities for price or quantity increases or other variables that cannot be recorded as valid obligations. . . . Amounts to cover these contingent liabilities should be carried as outstanding commitments pending determination of actual obligations. However, the amounts of such contingent liabilities need not be recorded at the maximum or ceiling prices under the contracts. Rather, *amounts conservatively estimated to be sufficient to cover the additional obligations that probably will materialize, based upon judgment and experience, should be committed.*[71]

Thus, the government should administratively commit funds based on the likelihood of its contingent liability (the amount between TP and CP) becoming an obligation. Such commitments are prudent safeguards against ADA violations, and the failure to so commit funds may make one liable for such a violation if it leads to a subsequent overobligation.[72]

Recording Obligations

Recording an obligation is often confused with creating an obligation. Recording an obligation is simply a ministerial task governed by 31 U.S.C. § 1501.[73] An amount should not be recorded as an obligation until a potential liability becomes a valid obligation, as defined by law or regulation.[74] But recording, or failing to record, an obligation cannot by itself provide sufficient basis on which to assess potential violations of the ADA. For example, although the GAO considers over-recording an obligation as prima facie evidence of an ADA violation,[75] recording an excessively high estimate might suggest a violation when none exists.[76] But "[i]f an agency incurs obligations in excess of available appropriations without authority to do so, the agency would be in violation of the Anti-Deficiency Act regardless of whether the obligations were recorded by the agency."[77] Therefore, once an obligation is incurred, it shall be recorded promptly whether or not funds are available.[78] Not concealing an obligation by failing to record it is important, because any affirmative act for the purpose of concealing a violation of the ADA may be a violation of 18 U.S.C. § 4 (concealment of the commission of a felony, punishable by a fine of not more than $500 or imprisonment of not more than 3 years, or both).[79]

In the DOD, "When the (FPI) contract is executed, an obligation must be recorded only for the amount of the target or billing price stated in the contract, even though the contract may contain a ceiling price in a larger amount."[80] Paragraph 19b of *AFR 170-8* provides the following:

> (1) Record obligations for contracts with an incentive clause at the billing price.
>
> (2) Record obligations for contracts having both a target and ceiling price in the amount of the target.
>
> (3) Adjust the obligations recorded based on amendments to the contract.

---

[70] AFR 177-16, *supra* note 31, para. 36.

[71] DOD ACCOUNTING MAN., *supra* note 10, ch. 25, sec. 2.a (emphasis added). *Accord* AFR 170-13, *supra* note 60, para. 25; AFR 177-16, *supra* note 31, para. 36.

[72] B-206283-O.M., Feb. 17, 1983, 353 (unpub.).

[73] B-219161, 65 Comp. Gen. 4, 9 (1985).

[74] DOD ACCOUNTING MAN., *supra* note 10, ch. 21, sec. E.3.

[75] *Id.*

[76] PRINCIPLES, *supra* note 11, at 6-19. "If a given transaction is not sufficient to constitute a valid obligation, recording it will not make it one." *Id.* at 7-6.

[77] 62 Comp. Gen. 693, 700 (1983); B-219161, 65 Comp. Gen. at 9. *See also* AFR 177-16, *supra* note 31, para. 36. "Conversely, failing to record a valid obligation in no way diminishes its validity or affects the fiscal year to which it is properly chargeable." PRINCIPLES, *supra* note 11, at 7-7.

[78] DOD ACCOUNTING MAN., *supra* note 10, ch. 25, sec. C.1; AFR 177-16, *supra* note 31, para. 35; DEP'T OF AIR FORCE, AIR FORCE REG. 177-101, ACCOUNTING AND FINANCE: GENERAL ACCOUNTING AND FINANCE SYSTEMS AT BASE LEVEL, para. 19-1 (15 Feb. 1991) [hereinafter AFR 177-101]; AFR 170-8, *supra* note 49, para. 4.

[79] *See also* 18 U.S.C. § 3 (making it an offense to assist an offender in order to hinder his or her apprehension).

[80] DOD ACCOUNTING MAN., *supra* note 10, ch. 25, sec. D.2. However, the GAO would object to committing funds only at the TP, if at the time of award "current agency cost estimates . . . exceed[ed] amounts currently available therefor." B-206283-O.M., Feb. 17, 1983, 354 (unpub.). This position seems to be based not on the ADA, but on 41 U.S.C. § 11, which prohibits making contracts except under an appropriation adequate to their fulfillment.

This guidance is ambiguous because (1) and (2) both apply to FPIF contracts and any increase in BP attributable to an overrun will not result in a corresponding increase in TP.[81] The Comptroller General reviewed this guidance and had "no objection" to it, but stated that "[i]t is assumed that none of these contracts with incentive clauses will have both a target price and a billing price."[82] Although FPIF contracts have both TPs and BPs, at the moment of award, they are the same. Therefore, the GAO's failure to object should at least apply to the amount recorded as an obligation at the time of award. Further, a conflict is avoided if the larger of the two amounts is recorded as the obligation (which is the practice). The Comptroller General also stated that

> the recording of obligations upon that basis . . . might well result in a violation of [the ADA] . . . unless appropriate safeguards are provided . . . in the administrative regulations issued under the latter act. . . . Such safeguards normally would consist of administrative reservations of sufficient funds to cover at least the excess of the estimated increases over the decreases.[83]

Paragraph 25 of *AFR 170-13* requires such reservation of funds based on the contracting officer's quarterly cost estimates.[84]

Funding only to the TP also is consistent with the DOD's full funding policy for production contracts. Full funding applies to the initial estimate for the total cost to be incurred in completing delivery of a given quantity of usable end items (such as missiles).[85] Estimates will change (although they shall be consistently reliable), and full funding of an item can exist only at a point in time. Because the full funding policy is not statutory, violations of that policy do not necessarily or automatically indicate a violation of the ADA.[86]

Once an FPI contract is awarded, adjustments to obligations recorded shall be based on amendments to the contract.[87] "An amount shall be recorded as an obligation only when supported by documentary evidence of the transaction,"[88] which evidence a binding written agreement between an agency and another "person" such as a contract, purchase order, or letter contract.[89]

> [W]here the precise amount is not known at the time the obligation is incurred, the obligation should be recorded on the basis of the agency's best estimate. . . . As more precise data on the liability becomes available, the obligation must be periodically adjusted. . . . [But] [r]etroactive adjustments to recorded obligations, like the initial recordings themselves, must be supported by documentary evidence.[90]

Accounting and Finance Officers (AFO) must adjust recorded obligations promptly when documentary evidence is received of any event that increases or decreases the amount of such obligation.[91] However, this is not to imply that undocumented, and therefore unrecordable, liabilities cannot violate the ADA. "[T]he word 'any contract or other obligation' as used in [the predecessor of 31 U.S.C. § 1341] encompass not merely recorded obligations but other actions which give rise to Government liability and will ultimately require the expenditure of appropriated funds."[92] Such actions include those which

---

[81] FAR 52.216-16 (f), 52.216-17 (h).

[82] B-121982, 34 Comp. Gen. 418, 420 (1955); B-184830, 55 Comp. Gen. 812, 824 (1976).

[83] B-121982, 34 Comp. Gen. at 420-21.

[84] *See also* AR 37-1, *supra* note 38, para. 8-4b(2)(a). The government should insure that "an amount equal to the maximum contingent liability of the Government is always available for obligation from appropriations current at the time the contract is made and at the time renewals thereof are made." 37 Comp. Gen. 155, 160 (1957).

[85] DEP'T OF DEFENSE, DIRECTIVE 7200.4, FULL FUNDING OF DOD PROCUREMENT PROGRAMS (Sept. 6, 1983) [hereinafter DOD DIR. 7200.4]; AFR 172-1, *supra* note 13, vol. 1. para. 8-2a.

[86] B-184830, 55 Comp. Gen. at 822. Although 41 U.S.C. § 11 prohibits a contract "unless . . . under an appropriation adequate to its fulfillment," that statute does not require "full funding." *Id.* at 826.

[87] AFR 170-8, *supra* note 49, para. 19b.

[88] DOD ACCOUNTING MAN., *supra* note 10, ch. 25, sec. C.2.

[89] AFR 170-8, *supra* note 49, para. 4 (which is consistent with 31 U.S.C. § 1501(a)(1)).

[90] PRINCIPLES, *supra* note 11, at 7-7.

[91] AFR 177-120, *supra* note 38, para. 2-27.

[92] B-184830, 55 Comp. Gen. 812, 824 (1976).

would give rise to an implied-in-fact contract,[93] or a constructive change.[94]

Bona Fide Needs Limitations

The Bona Fide Needs statute allows appropriations to be used only for needs arising in the period for which the appropriation was made.[95] Therefore, it precludes the use of a current year's appropriation to fund a prior year's obligations because such transactions constitute neither payment for expenses properly incurred, nor performance of obligations properly made, in the current year.[96] If an antecedent liability exceeds funds available in the expired year's account, the ADA has been violated and liquidating the excess may require a supplemental or deficiency appropriation, or other congressional action.[97] Although the DOD Authorization Act for FY 1993 authorizes charging an overobligation of an expired account to any current appropriation account available for the same purpose, it still requires reporting such overobligation as a violation of the ADA.[98]

If each CLIN on an FPI contract had its own CP, a contractor's overrun of the TP of a particular CLIN would have to be charged to the appropriations that funded that CLIN.[99] The contract modification which placed that CLIN on contract made the government liable for a price increase up to the CP, and the subsequent overrun made that liability fixed and certain. Therefore, the overrun liability is antecedent: it relates back to the original CLIN and is chargeable to the appropriations originally obligated by that CLIN.[100]

Avoiding Potential Violations Caused by Anticipated Overruns

In General

Agencies would avoid most ADA violations if the fund certifying official followed the regulatory requirement to request contracting officers to review their cost estimates at least quarterly and to adjust commitments to "amounts conservatively estimated to be sufficient to cover the additional obligations that probably will materialize, based upon judgment and experience."[101] However, once a system program office (SPO) learns of an overrun, it may not be able to commit additional funds: "*A valid commitment* under AFR 170-13 which authorizes the incurrence of an obligation *in excess of available funds*" *is a violation of 31 U.S.C. § 1341.*[102] If funds are not available, the alternative is to reduce the government's obligation on the contract, that is, by a deductive change or a partial termination:

> Situations may occur where a contractor revises its estimate of cost to complete an

---

[93] Requirements for an implied-in-fact contract are the same as those for an express contract: mutuality of intent to be bound; offer and acceptance; consideration; and actual authority to bind the government residing in the government employee whose conduct is relied upon. OAO Corp. v. United States, 8 FPD ¶ 69, 17 (1989).

[94] A constructive change arises when a government representative with authority to change the contract—by actions or deeds—requires the contractor to perform work different, or to higher standards, than required by the terms of the contract. J. F. Allen Co. v. United States, 11 FPD ¶ 18, 11 (1992).

[95] 31 U.S.C. § 1502(a).

[96] B-245856.7, 71 Comp. Gen. 502, 505 (1992); B-132900, 55 Comp. Gen. 768, 774 (1976).

[97] B-245856.7, 71 Comp. Gen. at 505; B-179708-O.M., June 24, 1975 (unpub.).

[98] Pub. L. 102-484, § 1004. This authority is limited to one percent of currently available funds.

[99] When an event occurs that fixes the amount of a contingent obligation, "[t]he obligation must be recorded against the same source of funds that originally was obligated for the contract." DOD ACCOUNTING MAN., *supra* note 10, ch. 25, para. D.11.c. The question then arises for a multifunded contract whether fund integrity must be maintained by accumulating and accounting for costs by appropriation. In other words, to comply with the Purpose Statute and the ADA, must costs be segregated and then allocated across all CLINs funded with the same type and FY of funds?

[100] B-195732, 59 Comp. Gen. 518 (1980), B-155876, 44 Comp. Gen. 399 (1965).

[101] DOD ACCOUNTING MAN., *supra* note 10, ch. 25, sec. B.2.a; AFR 170-13, *supra* note 60, para. 25; AR 37-1, *supra* note 38, para. 8-4a(2). For major programs, such review is contained in the quarterly Defense Acquisition Executive Summary (DAES) reports. These reports assess both cost and funding performance of the contractor. DEFENSE ACQUISITION MANAGEMENT DOCUMENTATION AND REPORTS, DOD MANUAL 5000.2-M, 16-C-4, 16-C-5 (Feb. 1991) [hereinafter DOD MAN. 5000.2-M]. The DAES was established as a "comprehensive summary reporting of technical, schedule, and cost information of major defense acquisition programs from the Program Managers to the Office of the Secretary of Defense" and also functions as "an acquisition information management tool for the acquisition oversight responsibilities of the Undersecretary of Defense (Acquisition), and serves as an information aid to the Service Acquisition Executive [SAE] and the Program Executive Officer [PEO]." *Id.* at II-1-A (1990 Draft).

[102] AFR 177-16, *supra* note 31, para. 35 (emphasis added). *See also* DOD DIR. 7200.1, *supra* note 34, pt. K; AFR 177-101, *supra* note 78, para. 18-8. *Cf.* AR 37-1, *supra* note 38, para. 8-1(b) "Issuing a commitment authorizing obligations in excess of a formal subdivision of funds *could* result in a violation of the ADA" (emphasis added). This is consistent with the AFMC position that an overcommitment violates the ADA only if it results in an overobligation or an overexpenditure. Air Force HQ AFMC/FMB Letter to all AFMC financial management and comptroller offices (FM), atch. 1 (ADA Briefing) at 6 (5 Oct. 1993) [hereinafter Air Force Letter].

FPI contract to project final price in excess of target price and total obligated funds. Additional funds must be promptly committed to the contract before billing prices and alternate liquidation rates can be adjusted. The only exception to this procedure is when an FPI contract is incrementally funded.

A question has been raised on the actions which should be taken by the administrative contracting officer (ACO) if sufficient funds are not made available in a timely manner. ACOs should be instructed to allow a reasonable period of time for the procurement contracting officer (PCO) to process the necessary paperwork to obtain the additional funds. If the PCO is not able to obtain funds or reduce contract scope within 90 days from the date the PCO is first notified of the need for additional funds, the ACO should immediately report the situation to the Executive Director of Contract Management at DLA [Defense Logistics Agency]. The Executive Director should immediately contact his counterpart within the cognizant military department to insure high level management attention is directed to resolving the problem.

Until sufficient funds are made available or the contract scope is reduced, neither billing prices nor alternate liquidation rates shall be adjusted to reflect the revised estimate of cost to complete the contract.[103]

This was a class deviation from FAR 32.5 and was to remain in effect until 31 December 1992.

Limitation of government's obligation clauses are a limit on the government's contractual liability which also should help prevent violations of the ADA under incrementally funded contracts. The LOGO clause,[104] if included in a fixed-price R&D contract, limits the government's contractual liability to the amount obligated on the contract. Another effect of a LOGO clause is to convert the costs funded in each successive increment into an obligation of the FY current when that increment's funding is placed on contract. That clause also requires the contractor to give the government notice ninety days prior to when the government's termination liability reaches eighty-five percent of the funds then obligated on the contract. If the government fails to obligate additional funds to the contract, the contractor is not obligated to continue work beyond the point at which the termination liability would approximate contract funds and the government would be required to terminate the contract for convenience on the contractor's request. The limitations implemented by the LOGO clause are similar to those contained in the limitation of cost clause included in fully funded cost-reimbursement contracts.[105] When a contract is subject to a limitation of cost clause, the contractor may not force the government to reimburse costs incurred in excess of the estimated amount specified in the contract (exclusive of fee) unless the government affirmatively approves the overrun. The contractor's only protection is to halt performance pending action on a proper funding request.[106]

Once an overobligation is discovered, an agency must take all reasonable steps to mitigate the effects of the violation insofar as it remains executory.[107] Even when expenditures plus termination liability already exceed the funds available, the SPO must promptly reduce its contractual obligation on the underfunded CLINs. Termination liability represents the least amount for which the government will be liable. Therefore, to the extent that it exceeds the TP, the amount between the TP and the CP (on an FPI contract) is converted from a contingent liability to a present liability. In such circumstances, funds must be obligated to cover the minimum present (current and actual) liabilities, that is, the termination liability.[108]

Over- or Underrecording Obligations

Obligations for contracts with an incentive clause must be recorded at the TP or the BP, whichever is greater.[109] The contracting activity must adjust obligations recorded based on amendments to the contract.[110] Further, such obligations

---

[103] Memorandum, Director of Defense Procurement (DDP) to Executive Director of Contract Management, Defense Logistics Agency (29 Apr. 1991).

[104] DFARS 252.232-7007.

[105] FAR 52.232-20.

[106] General Electric Co. v. United States, 412 F.2d 1215 (Ct.Cl. 1969); Falcon Research and Development Co., ASBCA No. 26,853, 87-1 BCA ¶ 19,458 (1986), ITT Defense Communications Div., ASBCA No. 14720, 70-2 BCA ¶ 8370 (1970).

[107] B-132900, 55 Comp. Gen. 768, 772 (1976).

[108] B-174839, 62 Comp. Gen. 143, 147 (1983), B-164908(2) 48 Comp. Gen. 497, 502 (1969).

[109] DOD ACCOUNTING MAN., *supra* note 10, ch. 25, para. D.2.

[110] *Id.* ch. 25, para. D.11.a; AFR 170-8, *supra* note 49, para. 19b; AR 37-1, *supra* note 38, tbl. 9-9.

"must be recorded in the amount of the increase at the time the changed price or fee is determined in accordance with the terms of the contract."[111] Under the terms of the incentive price revision clause, whenever the contractor submits factual data showing that the final cost will be substantially greater than the target cost (TC), the parties may negotiate an increase in BPs by any or all of the difference between the TP and the CP.[112] That clause does not make amendment of the contract mandatory. The *FAR* states that "if the contractor's properly incurred costs exceed the target price, the contracting officer may provisionally increase the price up to the ceiling or maximum price."[113] Because an anticipated overrun does not require amendment of the contract BP, the *DOD Accounting Manual* and agency regulations do not require an upward adjustment to the amount recorded as an obligation.[114] This is not unreasonable, because under the terms of the incentive price revision clause, BP adjustments represent only the government's interim obligation, they do not affect the determination of the final contract price.[115]

"Anticipated" Overruns Do Not Violate the ADA

The ADA is not violated the moment the estimated cost at completion (EAC) exceeds the TC subsequent to contract award. This was demonstrated by the GAO's unpublished memorandum on the propriety of contract restructuring actions taken by Army Missile Command in connection with the Stinger missile program.[116] In late 1980, the Army became aware that FPIF contracts for Stingers would overrun TCs up to the CPs. Attempts to obtain additional funding were unsuccessful. Therefore, in March 1981, the Army modified the contracts to delete the quantity of missiles on each so that each year's contractual obligation would not exceed available funding. The GAO concluded that the Army's actions did not violate the ADA even though an estimated overrun existed from late 1980 until March 1981. It cautioned that "the Army should have employed certain safeguards, for example through reservations of funds, to avoid potential overobligations."[117] Although the GAO could not tell from the record whether the Army had increased the amount of funds committed to cover the "current agency cost estimates" of the overrun (as required by the Army's own regulations), it stated that "such safeguards were unnecessary in the present case, as *overobligations were avoided through contract modification.*"[118] The GAO noted, however, "that if at any point prior to modification the Army had actually incurred obligations under these contracts in excess of amounts available (i.e., contract target prices), such obligations would have been in violation of the Antideficiency Act."[119] Therefore, the GAO did not consider the amount by which the EAC exceeded the TP to be an "obligation" for the purpose of the ADA, as long as action was taken to either obtain additional funds or to reduce the government's projected obligation to an amount within available funds.[120]

A similar situation arose under an Air Force Advanced Cruise Missile (ACM) program contract.[121] The ACM SPO had awarded an FPI contract for 250 ACMs, obligating FY 1987 and FY 1988 missile procurement funds. By October 1991, the SPO projected an overrun of about twelve percent ($101 million) over TP. The SPO requested additional funds, but the FY 1987 and FY 1988 missile procurement appropriations were inadequate to fund the overrun. The SPO initially used current year (FY 1992) funds for the projected overrun in

---

[111] DOD ACCOUNTING MAN., *supra* note 10, ch. 25, para. D.11.d.

[112] FAR 52.216-16(f)(2).

[113] *Id.* 32.501-3(a)(3).

[114] *Cf.* DOD ACCOUNTING MAN., *supra* note 10, para. D.11.c, which provides that a contingent obligation "must be recorded as an obligation only in the amount of the contractual liability incurred when the amendment fixing the obligation is executed or, *if no amendment is required, when the event fixing the amount of the liability under the contingent obligation occurs.*" (emphasis added). The event fixing the amount of the liability would occur when the termination liability of the contract exceeds the amount of funds obligated on the contract.

[115] FAR 52.216-16(f); FAR 42.216-17(h).

[116] B-206283-O.M., Feb. 17, 1983 (unpub.).

[117] *Id.* at 353.

[118] *Id.* at 353, 355 (emphasis added).

[119] *Id.* at 355 n.1.

[120] The GAO seemed to accept the position that under an FPI contract, an estimated overrun of available appropriations would not violate the ADA if, "before the accrual of predicted deficits," either additional funds were obtained or the contract was terminated. *Id.* at 354. But the GAO said it "would find contract actions objectionable [under the requirements of 41 U.S.C. § 11 (1976)] if, and to the extent that, such actions initiated during the fiscal year involved, 'by current estimates, costs exceeding amounts presently available therefor.'" *Id.*

[121] Air Force Letter, subject: ADA Case Studies, Advanced Cruise Missile (ACM) Overrun) (1 Oct. 1993) (from HQ AFMC/JA to all AFMC legal offices) [hereinafter ACM Letter].

compliance with short-lived DOD Comptroller guidance (June 1991) requiring the use of current year funds for any contract change resulting in additional costs. In response to a GAO challenge,[122] the DOD Comptroller reversed himself in an 8 April 1992 memorandum, reverting back to the long standing rule that in-scope changes must be funded with the same funds obligated by the CLINs being changed. Soon after the reversal, the SPO partially terminated 120 missiles from the contract to avoid a violation of the ADA. The DOD general counsel and the Secretary of the Air Force general counsel (SAF/GC) concurred in the conclusion that when an overrun is projected on an FPI contract, a violation of the ADA is avoided if the SPO adds money or reduces work, or both, before the contractor's incurred costs, plus profit and termination liability, exceed available appropriations. Stated another way: In a projected overrun situation, the government incurs an obligation under an FPI contract in excess of the TP when its termination liability exceeds available funds.[123]

The SPO then awarded a new contract for 120 missiles using FY 1992 funds which already had been appropriated by Congress for 120 missiles to be acquired in FY 1992. The DOD/IG found that the termination and reprocurement violated the ADA.[124] However, the Air Force's actions were consistent with the Bona Fide needs rule because the SPO used FY 1992 missile funds only for missile requirements arising in FY 1992. The SPO also provided the contractor the work in process on the 120 unfinished missiles from the partially terminated contract as GFP. This prevention of economic waste by requiring the contractor to use unfinished work on the new contract did not change the bona fide need for 120 missiles in FY 1992 into a FY 1987/1988 requirement.[125] This position is concurred in by SAF/GC, which establishes the Air Force position on legal issues relating to fiscal matters.[126]

The DOD/IG made a similar error in finding an ADA violation on the multifunded Titan IV program.[127] It concluded that the Air Force had failed to record an upward obligation adjustment of $45.8 million against FY 1987/1988 missile procurement (3020) accounts.[128] This finding stemmed from an unfunded estimated, or projected, overrun on the $11 billion FPI contract for expendable launch vehicles.[129] That contract included separate TPs for each FPI CLIN, but had only one overall CP on the contract for all FPI CLINs. Further, the contract requires no segregation of costs, and only requires allocation of costs by type of appropriation, but not by FY nor by individual CLIN. Finally, the contractor's accounting system is not sophisticated enough to actually segregate or track costs by individual CLIN, nor by type and FY of appropriation.[130]

Problems began when the contractor encountered technical difficulties in performing various portions of the Titan IV contract. After completion of a bottoms-up, single best estimate (SBE), the government arrived at a reasonably accurate EAC in November 1990 (allowing it to estimate the amount by

---

122 [A] contract change authorized by and enforceable under the provisions of the original contract, commonly referred to as a within-the-scope change, was considered attributable to an antecedent liability. In other words, the original contract made the government liable for a price increase under specified conditions and the subsequent contract change made that liability fixed and certain. Therefore, the liability related back to the original contract and the price increase to pay the liability was charged to the appropriation initially obligated by the contract.

B-245856.2-O.M., Feb. 7, 1992 (unpub.).

123 This is consistent with the nature of the government's contractual liability under an FPI contract. The termination for convenience clause does not lessen the government's contract liability to pay the contract price (TP) upon award of an FPI contract. This is reasonable because the TP is defined by the terms of the contract and is certain in amount. Therefore, the termination for convenience clause does not cause the government's promise to pay the TP to be illusory. It follows that the reservation of a right to terminate does not save the contract from the prohibition against binding the government in advance of appropriations. B-84262, 28 Comp. Gen. 553 (1949). However, when the government estimates an overrun of TP, even if probable, the amount of such overrun remains uncertain and is not defined by the terms of the contract. Further, it may never occur, either because the contractor's actual cost experience will prove less than estimated or because the government will terminate the contract before it occurs. Because no "definite commitment" to pay the estimated overrun amount exists, calculating the obligation based on the least amount for which the government will be liable is reasonable, that is, the amount by which the termination liability exceeds the TP. *See* B-174839, 62 Comp. Gen. 143, 147 (1983).

124 DOD/IG Audit Report No. 93-053, subject: The Missile Procurement Appropriations, Air Force, at 9 (12 Feb. 1993) [hereinafter DOD/IG Audit Report].

125 ACM Letter, *supra* note 121.

126 AFR 177-16, *supra* note 31, para. 9.

127 The Titan IV is an unmanned expendable launch vehicle that complements the space shuttle and provides heavy lift capability for national security payloads. The Titan IV contract has been modified over 900 times since contract award in 1985, and has over 600 CLINs funded with numerous types and years of funds. Such multiple sources of funds is not unusual for large systems contracts.

128 DOD/IG Audit Report, *supra* note 124, at 7.

129 Contract F04701-85-C-0019 (28 Feb. 1985).

130 Additionally, the FY 1993 DOD Appropriations Act, Pub. L. 102-396, § 9164, 106 Stat. 1876, 1947 (1992), granted the Air Force the authority to use incremental funding for the Titan IV production CLINs. It was implemented on 17 December 1992 by Program Budget Decision (PBD) 701. The SPO was cautioned that if obligations were incurred prior to the full funding waiver, the waiver would not cure an already incurred overobligation. Since that time, the SPO has fully funded to the estimated amount set forth in the LOGO clause. Therefore, the question is whether a deficiency materialized prior to that time.

which the EAC would overrun the contract's overall TP).[131] This led the contractor to propose a nonbinding "allocation matrix." The matrix, which was never put on contract, was an arbitrary plan for spreading the projected overrun of $375 million on a pro rata basis across certain CLINs then on contract, because actual cost accounting by CLIN was not possible.[132] Contractually binding allocation of the overrun occurred only by means of contract modifications which made BP adjustments as additional funds became available.[133] Recognizing that inadequate funds would be available to fully implement the proposed allocation matrix, in January 1991, the SPO requested from the Secretary of the Air Force/Financial Management Budget (SAF/FMB) additional funds from certain expired appropriations: $21 million of FY 1987 funds and the $24 million of FY 1988. No funds were made available to the SPO until July 1992, when performance of the CLINs which obligated FY 1987 3020 funds was nearly complete. If the allocation matrix were applied to allocate projected overrun costs to those CLINs at that time, the allocation would have exceeded funds allotted to the SPO (available at the administrative subdivision level) by $17.7 million. However, although the administrative subdivision is the ADA limit when funds are still current, once funds expire the ADA limit is the appropriation, "Upward adjustments in certified obligations, the amounts of which are not determined until after the account expires, are properly chargeable to the unobligated balances at appropriation level, and not the administrative subdivision level."[134]

Therefore, even if the unallocated anticipated overrun were treated as a present obligation, no ADA violation would result if (1) the overobligation did not occur until after the funds expired,[135] and (2) adequate funds remained available at the SAF/FMB level. The SAF/FMB allotted FY 1987 3020 funds in the amount requested by the SPO in July and August of 1987 and corresponding BP adjustments were made on the CLINs funded with that appropriation.

But at the same time the SAF/FMB allocated FY 1987 funds to the Titan IV contract, it allocated all remaining unobligated FY 1988 3020 funds to other Air Force contracts.[136] Therefore, the FY 1988 CLINs remained $27.7 million short of their proposed share of the unallocated overrun.[137] However, partial implementation of the proposed allocation matrix should not make it contractually binding altogether. Neither should acceptance of any one CLIN for purposes of payment trigger an allocation of the unallocated anticipated overrun. Any conclusion that a deficiency in the FY 1988 3020 accounts occurred coincident with the SAF/FMB's allocation of the remaining FY 1988 3020 funds to other contracts would be in error for the following reasons:

> (1) The contractor's "current" reported overrun is only an overrun of the amount that it had budgeted to spend as of that particular month, the actual overrun at completion remains indefinite and may be more or less than estimated.[138]
>
> (2) When actually segregating costs by type and FY of appropriations is impossible, any of several different methods may be used to allocate overrun unless the parties have agreed otherwise by contract.[139]

---

[131] An SBE was arrived at by comparing independent estimates of the contractor, the SPO, and the Defense Plant Representative Office (DPRO) and then negotiating an agreed to EAC as of that date.

[132] The matrix allocated overrun on a weighted average over all CLINs except for the launch operations CLINs.

[133] Billing price adjustments were accomplished in three phases. Once the overrun was identified, the SPO immediately requested and received M account funds of $110 million before the M account phase out began in December 1990. Phase I applied this money to adjust the BPs of all CLINs on the contract which were already "delivered," in the sense of being "accepted" for payment purposes. Phase II adjusted the BPs of those CLINs funded with currently available funds or those incrementally funded and subject to the contract's LOGO clause. Phase III BP adjustments occurred on those CLINs funded with expired funds as the expired funds became available and were allotted to the SPO. Contract F04701-85-C-0019, P00518, tab 68, Narrative of Acquisition (28 Feb. 1985).

[134] AFR 177-16, *supra* note 31, para. 40B (IMC 92-1, 252335Z Feb. 1992).

[135] The FY 1987 3020 funds expired on 30 September 1990 and the estimate was not arrived at until November 1990.

[136] The Secretary of the Air Force/Financial Management Programs (SAF/FMP) characterized the unallocated overrun as liabilities that "have already incurred (sic) that represent a must pay bill for the Air Force." Memorandum, SAF/FMP (2 July 1992). Consequently, it instructed the SPO to record the "obligation" without the certification of fund availability. The SPO did so by means of a miscellaneous obligation/reimbursement document (MORD). The SAF/FMP's confusion as to the nature of the overrun may have stemmed from the SPO's initial request which stated that "[t]he current CPR (30 Nov 90) shows an overrun of $301.3M on work performed to date." What the SAF/FMP apparently did not understand was that the cost performance reports (CPR) shows only the extent to which the contractor's total costs incurred on the entire contract have overrun its budgeted cost of work performed (BCWP) for that particular month. It does not reflect an overrun of funds available on the contract. Neither does it reflect the government's obligation on the contract. Furthermore, it does not reflect any allocation of "overrun" to individual CLINs or to subdivisions of funds.

[137] At that time, the contractor had exceeded its monthly BCWP by $496 million, only $292 million of which had been funded.

[138] The total funds available on the Titan IV contract exceeded the government's total termination liability by over $2 billion. Therefore, an overrun of any given appropriation could occur only if a portion of the unallocated anticipated overrun were allocated to, and treated as a present obligation of, CLINs funded by an appropriation with inadequate available funds.

[139] When either of two appropriations may reasonably be construed as available for an obligation, the agency has the discretion to determine which appropriation is to be used. But once the determination is made, it cannot later be changed. B-213137, 63 Comp. Gen. 422, 428 (1984). That rule clearly applies to the purpose restriction of 31 U.S.C. § 1301(a). However, even if it also applied to the availability of each appropriation as to time, no "determination" has been made as to which year's appropriation should be charged until a contract billing price adjustment is made to a particular CLIN funded with a particular year's appropriation. If the allocation matrix were held to be contractually binding and were interpreted as creating an obligation above the TP of the unadjusted CLINs, the contractor may be unable to recover for overobligations occurring after it was placed on actual notice that the government had no further FY 1988 3020 funds available. When a contractor "is deemed to have notice of the limits on the spending power of the government official with whom he contracts . . . [e]xhaustion of the appropriation will generally bar any further recovery beyond that limit." Sutton v. United States, 256 U.S. 575 (1921). PRINCIPLES, *supra* note 11, at 6-17, 18.

(3) The allocation matrix proposed by the contractor was not placed on contract and did not effect an upward BP adjustment so as to bind the government on a termination for convenience.

(4) Acceptance "[f]or payment purposes" is not a binding contractual acceptance and should not trigger allocation of previously unallocated overrun. The Titan IV contract buys launches and actual acceptance (taking title by means of a *DD Form 250 Material Inspection and Receiving Report*) does not occur until the launch vehicle to which the CLINs correspond has lifted off the pad.

(5) If the contract is only partially terminated, "[t]he TCO [termination contracting officer] shall reimburse the contractor at target price for completed articles included in the settlement proposal for which a final price has not been established."[140] Therefore, the government's termination liability for completed CLINs which have not received an upward BP adjustment is still at the TP.

(6) If the contract is completely terminated for terminated items not delivered and accepted, "the provisions of the termination clause . . . shall govern and the provisions of the incentive clause shall not apply."[141] Because TPs and BPs have contractual meaning only in the context of the incentive clause, this *FAR* provision essentially eliminates CLIN pricing for purposes of calculating termination liability for unaccepted CLINs for which the final price has not been established. Neither the inventory basis nor the total cost basis for termination settlement proposals require allocation of costs by CLIN.[142] Therefore, the source of the government's liability, the termination for convenience clause, does not mandate such allocation.

(7) The ADA requires the Titan SPO to account for obligations by subdivision of funds or by appropriation, not by CLIN.[143] Even an allocation in accordance with the matrix would result in a total of costs incurred over all FY 1988 CLINs that is less than the total of FY 1988 funds obligated on the contract. Therefore, until the total termination liability allocated by appropriation exceeds the available amount of that appropriation, the contract can be terminated and settled within the funds available.

(8) The contractor was fully aware of the limited availability of FY 1987 or FY 1988 3020 funds and knew of the government's intent not to make any BP adjustments without available funds. There was no intent that the allocation matrix be self-executing. Further, when a contractor has notice of the limits on the spending power of the government officials with whom it contracts, recovery may be barred beyond those limits.[144]

Because an obligation is a legal liability to pay which is not contingent and, when arising from a contract, is defined by the terms of the contract,[145] no deficiency occurred.

---

[140] FAR 49.115(a)(1). The settlement agreement shall include a reservation for a final price adjustment as to those items. *Id.*

[141] *Id.* 49.115(a)(2).

[142] *Id.* 49.206-2.

[143] *See infra* note 199 and accompanying text.

[144] PRINCIPLES, *supra* note 11, at 6-18, citing cases under specific line item appropriations. The principle should apply to any appropriation if the contractor is on actual notice that the available funds are exhausted. This should especially apply to the Titan facts where the contractor's own lack of diligence or reluctance led to the late identification of the extent of the projected overrun. *Cf.* Gould, Inc. v. United States, 39 CCF 76,587 (Fed. Cl. 1993). That court held that a contractor could not recover on a contract entered into in direct contravention of the federal statute upon which its claim for payment rested. The statute in question, 10 U.S.C. § 2306(h)(1)(D)(1982), allowed acquisition by multiyear contract only when "there is a stable design for the property to be acquired." The complaint in that case alleged that there was no stable design and that the contract was illegal. The court relied on Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), which held that when a plaintiff seeks payment "in direct contravention of the federal statute upon which his ultimate claim to the funds must rest. . . . It follows that Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them." Denying any payment under the illegal contract, the Court also denied any claim based on a contract implied-in-law as not within the court's jurisdiction. When a contract is determined to be invalid, the effect is that no binding agreement ever existed as required by 31 U.S.C. § 1501(a)(1), and no valid obligation of funds ever occurred. B-135996, B-135997, 38 Comp. Gen. 190 (1958). Although a contract modification which obligates the government beyond available funds may not be in "direct contravention" of the appropriation statutes, it still may be unenforceable when both parties are aware of the lack of available funds.

[145] *See supra* notes 46-49, 57-61 and accompanying text.

Termination Liability

Because the obligation under an FPI contract depends on the government's termination liability, knowing how that is calculated is essential to avoiding an ADA violation. Termination liability is the "maximum cost the government would incur if a contract is terminated."[146] If an FPI contract is terminated before the final price is established, prices shall be established pursuant to the Incentive Price Revision-FIRM Target clause (FPI clause),[147] for supplies accepted by the government. Prices shall be in accordance with other contract clauses for all other elements of termination. The amount of such "other" liability is determined primarily by the termination for convenience of the government[148] clause (and the LOGO[149] clause of the contract, if applicable). Termination liability includes the following elements:

(1) Contract price for accepted supplies and services;
(2) Costs incurred for uncompleted work;
(3) Cost of subcontract termination settlements;
(4) Profit; and
(5) Costs of settlement.[150]

The entire amount may not exceed the contract CP as reduced by prior payments, and may be adjusted downward to reflect any indicated rate of loss.[151] Therefore, the amount of termination liability at any given time during contract performance would have to be estimated.

Summary

A postaward failure to record an increased obligation under an FPIF contract in response to a *projected* (and probable) overrun of TP does not violate the ADA under the following:

(1) It is the award of the FPI contract which "makes or authorizes" the initial obligation.[152]

(2) An agreement to pay appropriated funds may not be recorded as an obligation unless supported by a writing, in some acceptable form.[153]

(3) One way for the government to incur an obligation in excess of the TP is to agree to an upward adjustment of the BP. The bilateral amendment of the contract is a binding agreement which triggers the requirement to adjust the obligation recorded.[154]

(4) The FPIF Incentive Price Revision clauses make a BP adjustment in response to an overrun discretionary, and thus the triggering event, the contract amendment, will not necessarily occur even when an overrun is projected.[155]

(5) The estimate of a cost overrun, or a potential overrun, does not "make" or "authorize" an obligation.[156]

(6) Another way for the government to incur an obligation in excess of the TP is to allow its termination liability to exceed the TP. Termination liability is an obligation of the government supported by a binding written agreement: the contract which contains

---

[146] DOD DIR. 7200.4, *supra* note 85, atch. 2; AFR 172-1, *supra* note 13, vol. 1, para. 8-2j(14).

[147] FAR 52.216-16.

[148] *Id.* 52.249-2.

[149] DFARS 252.232-7007. *See also* FAR 52.232-22.

[150] FAR 52.249-2.

[151] *Id.*

[152] DOD ACCOUNTING MAN., *supra* note 10, ch. 25, para. C.2; AFR 170-8, *supra* note 49, para. 3; AR 37-1, *supra* note 38, para. 9-5(b).

[153] 31 U.S.C. § 1501 (a)(1); PRINCIPLES, *supra* note 11, at 7-13. *See also* United States v. American Renaissance Lines, Inc., 494 F.2d 1059 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020 (1974), holding that neither party can enforce an oral contract in violation of the statute. *Cf.* Edwards v. United States, 22 Cl. Ct. 411, 420 (1991), holding that an express oral contract is enforceable if all required elements are present: "mutuality of intent to be bound, definite offer, unconditional acceptance, and consideration." The government employee involved must have also had actual authority to bind the government.

[154] *See supra* notes 87-89 and accompanying text.

[155] FAR 52.216-16(f)(2).

[156] B-206283-O.M., Feb. 17, 1983 (unpub.).

> the termination for convenience clause.[157] Therefore, such termination obligation is recordable. Because an anticipated overrun of TP is a contingent liability, it need be recorded only at the "least amount for which the Government will be liable for under the contract."[158]

This conclusion does not suggest that an agency should ignore a projected overrun on an FPIF contract. If an agency overobligates or overexpends an appropriation or administrative subdivision of funds because of an inaccurate estimate of the overrun or a failure to reserve sufficient funds, an ADA violation has occurred.[159] Therefore, when an anticipated overrun is probable, the agency should either partially terminate or descope the contract, or increase the amount of funds committed.[160]

Responsibility for an Overobligation

Once a deficiency is identified, the investigating officer must develop the facts to "clearly show what the person or persons named did or failed to do that caused the violation."[161] A government employee must "make" an expenditure. But termination liabilities accrue by a contractor's continued performance without any action on the part of a government employee. Further, such liabilities always are out ahead of expenditures because expenditures can be made only for costs already incurred and progress payments (expenditures) are usually made in an amount which is less than 100% of such incurred costs. The question then arises whether "inaction" can "make" an obligation. The legal concept of being criminally responsible for inaction is not new, such as, failure to file a tax return can be a crime. However, it would require concluding that the word "make" under 31 U.S.C. § 1341 means failure to act when one has a duty to act. If true, knowledge of a projected overrun may give rise to the duty to act, especially if coupled with regulatory guidance that requires action to prevent a deficiency. Such guidance can be found at *AR 37-1,* paragraph 9-5q(2) and *AFR 170-13,* paragraph 25, which requires the fund certifying official to adjust the amount of funds committed based on quarterly updates of the EAC from the PCO.

The conclusion just discussed makes it difficult to pin responsibility on any one individual. Many people may have knowledge of a probable overrun. The Judge Advocate General's School, United States Army, suggests that the responsible party will be the highest ranking official in the decision making process who had either actual or constructive knowledge of precisely what actions were taken (or not taken) and the impropriety or questionable nature of such actions.[162] Constructive knowledge is knowledge one does not have, but which is imputed to an individual by the law (usually limited to facts which, by the exercise of reasonable care, one would have known).[163] Furthermore, a good faith mistake does not relieve a person of responsibility for a violation. "[I]nadequate training or knowledge, error, (or) lack of adequate procedures and controls . . . would not alter the conclusion that actions of the persons named caused the violation, but would be considered by the commander in imposing disciplinary action."[164] Therefore, the proposed conclusion would make multiple parties responsible for a violation based on not doing anything in response to a duty that arises from knowledge which they do not actually have. This seems inconsistent with the *DOD Accounting Manual* which states the following:

> Commanding officers, budget officers, or fiscal officers should not be named automatically because of their overall responsibility, position, or the fact that they are designated as holders of a subdivision of funds. Instead, the investigation should lead to a specific determination of the one *act* that caused the violation, and the one individual who committed that act.[165]

The *DOD Accounting Manual* guidance focuses on action, not inaction. If inaction violates the ADA, which single lack of action caused the violation? However, *AFR 177-16* takes a

---

[157] Such clause will be read into the contract even if omitted. G.L. Christian & Associates v. United States, 160 Ct. Cl. 1, 312 F.2d 418 (1963).

[158] B-174839, 62 Comp. Gen. 143, 147 (1983); PRINCIPLES, *supra* note 11, at 7-49, 50.

[159] DOD ACCOUNTING MAN., *supra* note 10, ch. 21, sec. E.4.f.

[160] "The middle ground between recording an obligation and doing nothing is the 'administrative reservation' or 'commitment' of funds." PRINCIPLES, *supra* note 11, at 7-48.

[161] AFR 177-16, *supra* note 31, para. 51b; AR 37-1, *supra* note 38, para. 7-7.

[162] CONTRACT L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-506, THIRTY-SEVENTH FISCAL LAW COURSE, ch. 7, sec. VII.C.2.a (Nov. 1993).

[163] BLACK'S LAW DICTIONARY 284 (5th ed. 1979).

[164] AFR 177-16, *supra* note 31, para. 51c. *Accord* DOD ACCOUNTING MAN., *supra* note 10, ch. 21, sec. E.4.b.

[165] DOD ACCOUNTING MAN., *supra* note 10, ch. 21, sec. E.5.b (emphasis added).

broader view of liability and states that "The investigating officer should clearly show what the person or persons named did or failed to do that caused the violation."[166]

Because *AFR 177-16* implicitly adopts the concept that inaction can violate the ADA and that multiple parties may be responsible for the violation, what besides knowledge (or constructive knowledge) of an impending overrun makes one responsible for a violation of the ADA? One requirement might be authority to make or authorize expenditures or obligations. This would include contracting officers, fund certifying officials, and disbursing officers. Another requirement might be the authority to make programmatic decisions, which would include SPO Directors,[167] Program Executive Officers, Service Acquisition Executives,[168] and Defense Acquisition Executives. Such officials nearly always have notice of overruns due to the fund and cost reporting required to be included in the Acquisition Executive Monthly Reports (AEMR)[169] and the quarterly Defense Acquisition Executive Summaries (DAES).[170]

Failure to exercise due diligence to prevent termination liability from exceeding available funds after learning of an estimated overrun will become a reportable violation when such inaction causes available funds to be exceeded. A question may arise as to who would be responsible for an ADA violation when higher headquarters (such as, SAF/FMB) applies the only remaining available funds of a given expired appropriation to cover an overrun on one SPO's contract if such action caused an obligation on a second SPO's contract to exceed the available funds?[171] If those funds had been "available" for obligation on the second contract, the withdrawal of those funds by the SAF/FMB without prior approval of the second SPO, if not subject to being recouped or reissued,

---

[166] AFR 177-16, *supra* note 31, para. 51c.

[167] DOD MAN. 5000.2-M, *supra* note 101, pt. 16, sec. C, para. 2d, requires the SPD to

> Assess the program's cost performance status based on performance to date. . . . The major consideration is executability of the program within approved resources, based on cost and schedule performance status of the program's major contracts. . . . When a contract's cost is expected to exceed the Government's liability, a YELLOW rating normally should be assigned. . . . The Program Manager's comments should discuss what is being done to ensure contractual requirements are met, and what the effect is on estimated future contract prices.

[168] DEP'T OF DEFENSE, DIRECTIVE 5000.1, DEFENSE ACQUISITION, pt. D.1.a (Feb. 23, 1991) states

> Each DOD Component with acquisition management responsibilities shall maintain a streamlined chain of authority and accountability for managing major defense acquisition programs and highly sensitive classified programs above the cost thresholds for a major defense acquisition program. This chain of authority and accountability shall extend from a DOD Component Acquisition Executive through Program Executive Officers to individual Program Managers. . . . Program direction and control must be issued by, and flow through, this streamlined chain. This includes all matters pertaining to cost, schedule, performance, and allocated program funding.

[169] Draft Acquisition Policy Letter 93M-019 will replace the AEMR with a Monthly Acquisition Report (MAR) which, for most programs, will be submitted only when their program assessment indicators are red for cost, schedule, or performance. "Red" is defined as a major weakness, "Some event, action, or delay has occurred that seriously impedes successful accomplishment of one or more major program objectives." DOD MAN. 5000.2-M, *supra* note 101, at 16-C-2.

[170] Headquarters, Air Force Materiel Command, suggests that those accountable for ADA violations include all personnel who, in their assigned duties, are specifically authorized to distribute funds, certify fund availability, commit funds, authorize or incur obligations, or expend funds, as well as other persons who advise, oversee, or direct personnel in the use of funds or approve program actions. Such personnel may include:

- Personnel at SAF and major command levels who distribute funds. These personnel must ensure that statutory limitations are not exceeded and that funding documents are not issued in excess of availability.
- Comptroller personnel at all levels whose duties include allocation, suballocation, allotment, suballotment, operating budget authority, or the certification of funds. Certifying funds involves the certification of availability and the propriety of funds.
- All personnel authorized to commit or obligate funds.
- Program managers at all levels who program, budget, and prepare initiating documents.
- Holders of funds to whom apportionments and administrative subdivision of funds are issued will use these funds only for the purpose prescribed and not exceed funding authority and will ensure compliance with all statutory and regulatory limits on the use of Air Force funds.

Air Force Letter, *supra* note 102, atch. 1, at 10. This briefing has been jointly presented by comptroller and legal personnel at every AFMC installation to all who have financial management, program management, and contracting responsibilities.

[171] This question arose on the Titan IV program. A SAF/FMBMC staff summary sheet (SSS) of 22 June 1992 states that "[t]he adjustments for Titan IV do not exceed the balances available in the accounts at this time. . . ." The SAF/FMB proceeded to fully fund the remaining portion of an overrun allocable to FY 1987 missile procurement (3020) funded CLINs on the Titan IV contract. But it applied all remaining FY 1988 3020 funds to an overrun on the Advanced Medium Range Air-to-Air Missile (AMRAAM) program. This left unfunded that portion of the overrun on the Titan IV contract allocable to the FY 1988 funded CLINs ($27.7 million). Prior to the SAF/FMB's action, an upward adjustment by the Titan IV SPO would not have violated the ADA even though no FY 1988 3020 funds had been allotted to the SPO because "[u]pward adjustments in certified obligations, the amounts of which are not determined until after the account expires, are properly chargeable to the unobligated balances at appropriation level, and not the administrative subdivision level." AFR 177-16, *supra* note 31, para. 40B (IMC 92-1, 252335Z Feb. 1992).

would make the SAF/FMB (the withdrawing activity) responsible for any resulting violation of the ADA.[172] System program office personnel would not be responsible because a violation occurs only if "[a]n *officer or employee* of the United States Government" makes or authorizes "an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."[173] Thus, an officer or employee must somehow "cause" the overobligation to occur. The mere receipt of knowledge by SPO personnel that formerly available funds have been committed to cover the obligation of another contract—making those funds unavailable to cover obligations already incurred on this contract—does not constitute a violation. The plain language of the statute requires that a potentially responsible officer or employee must *make* the obligation at the time funds are unavailable before a violation can occur. This is because "[t]he prohibitions contained in the ADA are directed at discretionary obligations entered into by administrative officers."[174] An act which was innocent (in compliance with the law) when committed, cannot be made criminal (in violation of the law) by subsequent acts of a third party. Therefore, the second contract's SPO (the withdrawee) would not be responsible for the violation if the funds in question were available for obligation by the SPO.[175] As long as the SPO acts reasonably promptly to reduce the obligation on the contract after the unavailability of previously available funds becomes known, its personnel cannot be held to have violated the Act. However, if those funds were only available at the SAF level because they had never been allocated or allotted to the SPO, the application of those funds to the first contract by SAF/FMB would not be a "withdrawal" of available funds.[176]

If additional funding is requested in response to an anticipated overrun, is a "reasonable time" (due diligence) extended until a final SAF/FM decision is made on whether to provide additional funds? Yes, provided that (1) the SPO promptly requested the SAF/FM to provide additional funds as soon as the SPO learned that the EAC would exceed the TC; (2) the SPO promptly reduced the overrun once it learned that the SAF/FM had allocated available funds to another program; and (3) sufficient funds were available at the time the obligation (termination liability in excess of TP) was incurred. Making an obligation only violates the ADA if, at the time an obligation is made, it exceeds a limitation imposed by Congress (the appropriation), or a limitation administratively established by the OMB, the DOD, or the services.[177] Therefore, diligence must be measured against when the SPO learned that the SAF/FMBM chose to apply the available funds to another contract's overrun, thus depleting the amount potentially available to fund the SPO's overrun.

However, if the SPO allowed its termination liability to exceed the TP, simply having requested additional funds would not relieve it from responsibility for the resulting deficiency. Further, because only the SAF/FM is in a position to monitor the overruns of all programs funded from any given account, it apparently has a duty to ensure that the sum of all such obligations does not exceed available funds. Therefore, even though each SPO would be responsible for its overrun, the SAF/FM should share responsibility for the cumulative overrun occurring in all SPOs if such overrun exceeded the remaining funds available at the SAF level.

Avoiding a Violation Caused by Progress Payments

Purpose Statute

The Purpose Statute[178] provides that appropriations shall be "applied" only to the objects for which the appropriations were made, except as otherwise authorized by law. The Purpose Statute is violated on acceptance of performance or delivery under a CLIN when the funds used to pay the contractor are from an appropriation that does not match the type of work done. However, the Purpose Statute is not necessarily violated when progress payments are made from appropriations that do not reflect the type of work done, such as, by paying oldest funds, in a predetermined sequence, first.[179] No violation occurs if a more accurate distribution was not practicable. Furthermore, if the Purpose Statute has been violated, the ADA also has been violated only when such progress payment requires reimbursement of one account by another, and either the properly chargeable appropriations were not avail-

---

[172] AFR 177-16, *supra* note 31, para. 47a(2). The liability of the withdrawing activity only arises when an obligation is incurred prior to the SPO receiving notice of the withdrawal (even though the recording/adjustment of the obligation was made after the withdrawal).

[173] 31 U.S.C. § 1341(a) (emphasis added).

[174] B-144641, 42 Comp. Gen. 272, 275 (1962) (emphasis added); B-211229, 63 Comp. Gen. 308, 312 (1984); B-219161, 65 Comp. Gen. 4, 9 (1985).

[175] AFR 177-16, *supra* note 31, para. 47a(2).

[176] A more interesting question arises under the facts of the Titan IV program. If an overobligation occurred on the FY 1988 3020 funded CLINs, it did not occur until after the FY 1988 appropriation expired. In that situation, upward obligation adjustments are charged at the appropriation level, not at the subdivision level. AFR 177-16, *supra* note 31, para. 40B (IMC 92-1, 252335Z Feb. 1992). That rule apparently means that expired funds at the SAF/FMB level are "available" to the SPO for obligation. Therefore, the SAF/FMB might be responsible for any overrun resulting from its allotment of those funds to a different program.

[177] AR 37-1, *supra* note 38, 7-6a(1); AFR 177-16, *supra* note 31, para. 44.

[178] 31 U.S.C. § 1301.

[179] *See* AFR 177-120, *supra* note 38, para. 2-40d(2)(a).

able in sufficient amount at the time of the improper expenditure, or the correct funds did not remain available until the time needed to make the necessary correction.[180] Thus, a Purpose Statute violation also violates the ADA only if alternate funding sources are unavailable.[181]

Current Guidance

Generally "[t]he paying activity distributes progress payments or recoupments to the funds cited on the contractual document."[182] This cryptic statement means that the funds used to pay progress payment invoices should match the type of work performed. However, "[s]pecial procedures are authorized when multiple-fund citations are involved and the procedures in (1) above are not feasible or other more accurate procedures are not practicable for distributing these payments."[183] The special procedures are as follows:

> Distribute payments to appropriate categories of funds based on the most logical sequence. The oldest FY funds will be charged first. . . . This sequence for charging categories of funds should normally apply (fund symbols are illustrative only):
>
> 1. 57*/*3600 (AF RDT&E RBA BPAC 69 ***). . . .
> 2. 57*.*3600 (AF RDT&E—Other Than RBA BPAC 69 ****).
> 3. 97*400.0225/97*0400.2502 (DOD RDT &E—Strategic Defense Initiatives).
> 4. 57*3400 (AFSC O&M).
> 5. 57*/*/* 3010/3020/3080 (AF Procurement/ Production).
> 6. 57X4922/57X4921 (AF Working Capital Funds—Industrial Fund and Stock Fund).
> 7. 57*3400 (AF O&M—Other Major Commands).
> 8. All Other Funds (Includes Army, Navy, DOD (other than 97*0400), *etc.*).[184]

The *DOD Accounting Manual* guidance is similar in its approval of progress payments, in accordance with a predetermined sequence, but its details are somewhat different. The *DOD Accounting Manual* states that:

> a. The preferred method of matching disbursements to obligations is "that the performing contractor's invoice or request for progress payment identify the appropriations against which payment is being requested."
>
> b. If the preferred method is impractical, the program management may make distribution to the various accounting classifications in the contract based on knowledge of contractor performance.
>
> c. If that is not practical, use historical spending patterns as a basis for distribution.
>
> d. If none of the above distribution of outlays are practical, it shall be assumed that work was first performed for the ACRNs with the oldest FY financing appropriation. Payments are to be made to oldest FY appropriations first, allocated based on the percentage relationship of the unliquidated obligations (ULO) of each ACRN to the total ULO of all other ACRNs within the same FY.[185]

Therefore, assuming a breakdown of progress payment requests by appropriation for each affected subsidiary contract line item was impracticable at the time of contract award, no violation of 31 U.S.C. § 1301(a) has occurred simply by the use of a predetermined sequence. However, if a more accurate distribution of progress payments was practicable, the failure to implement such a distribution would violate the Purpose Statute if, as a consequence, the funds paid by type and year fail to match the costs incurred by type and year (that is, the costs incurred should be distributed across CLINs, and progress payments should be made with the same type and year of funds which were obligated by those CLINs). Title 31 U.S.C. § 1301 is violated when appropriations are improperly "applied" to objects other than those for which they were made. I assume that "applied" includes all disbursements, including progress payments.[186]

---

[180] Acumenics Research and Technology, Inc., B-224702, 63 Comp. Gen. 422, 424 (1984).

[181] *Id.*

[182] AFR 177-120, *supra* note 38, para. 2-40d(1).

[183] *Id.* 2-40d(2).

[184] *Id.* 2-40d(2)(a).

[185] DOD ACCOUNTING MAN., *supra* note 10, ch. 32, sec. G.1.b.

[186] *See supra* notes 39-41 and accompanying text.

Impact of LOGO Clause

If a LOGO clause includes multiple types and FYs of funds, a contractor may overrun one subdivision of funds, and underrun the funds available in another subdivision citing a different type or FY of funds. Because overrunning could lead the government to make a deductive change or partially terminate some CLINs to avoid a violation of the ADA, the contractor has no motivation to provide accurate CLIN accounting. In other words, the contractor wants to use the funds available on those CLINs which it is underrunning to fund its costs on those CLINs where it is overrunning. Because a LOGO clause would not prevent payment for a FY 1987 overrun with FY 1988 funds, or vice versa, a violation of the Purpose Statute would not be avoided. However, the contractor has constructive notice of federal law, including the Purpose Statute. Therefore, the terms of the contract must be interpreted consistently with federal law, and FY 1988 funds may not knowingly be used to pay for FY 1987 obligations. If a contractor is aware that FY 1987 funds are depleted and continues to incur costs against CLINs funded with FY 1987 funds, it may be precluded from claiming entitlement to reimbursement for the overrun, even though otherwise entitled to reimbursement under the terms of the contract.[187]

Prior to the merger of Air Force Systems Command (AFSC) and Air Force Logistics Command (AFLC), the *AFSC FAR Supplement* included a clause similar to the *DFARS* LOGO clause.[188] But the *AFSC FAR Supplement* also included another clause that placed additional risk on the contractor.[189] The latter clause limited the government's obligation to providing funding at a rate and in amounts set forth in a "funding plan" in the clause. If the contractor incurred costs exceeding the amounts and the rate in the funding plan, the government had no obligation to add funds at a faster rate or to terminate the contract. This type of clause is included in the Air Force contract for the C-17 aircraft,[190] which included fully funded production CLINs and incrementally funded R&D CLINs. During FY 1990, the contractor began overrunning the R&D funds at a rate faster than that allowed by the LOGO funding plan. Due to uncertainty of the proper allocation of costs between production and R&D, the C-17 SPO used production funds to make progress payments for R&D costs incurred in excess of the amount of R&D funds available in the funding plan for that particular funding period. Once the mistake was discovered, the SPO recovered the production funds from the contractor. At no time did the government's expenditures or its obligation to make payment for work performed under the production CLINs exceed the production funds available on the contract. Furthermore, at no time did the government's obligation to make R&D payments under the funding plan exceed available R&D funds. Nevertheless, the Air Force General Counsel (GC) concluded that the Air Force had violated the ADA by making an expenditure (or obligation?) against R&D CLINs in excess of available R&D funds, even though the payment was not made with R&D funds and even though there was no contractual obligation to make payment.[191]

The SAF/GC's conclusion on the C-17 case apparently is limited to the unique facts of that case. The SAF/GC may have been influenced by *American Electronic Laboratories v. United States*,[192] involving a limitation of funds clause. In that case, the government, with knowledge of the pending overrun, induced continued performance, and the contractor was unaware that additional funds might not be forthcoming. Under such facts, the court found that the government was estopped to deny liability. Similarly under the C-17 facts, actual payment by the government based on a reallocation of costs by the contractor with the government's acquiescence, may have estopped the government from denying liability had it terminated the contract for convenience at that time. Further, the GAO has found that an ADA violation can occur when a contracting officer obligates the government to pay for continued or automatic contractor performance for a period longer than the period of available funding,[193] even if the contract includes an availability of funds clause.[194] If analysis of a contract "discloses a legal duty on the part of the United States which constitutes a legal liability, or which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States, an obligation of funds generally may be stated to exist."[195] Thus,

---

[187] *See* Hode v. United States, 218 U.S. 322 (1910); Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327.

[188] DEP'T OF AIR FORCE, AFSC FAR SUPP. 52.232-9000 (Apr. 1987).

[189] *Id.* 52.232-9002.

[190] The C-17 is the Air Force's next generation airlifter designed to airdrop or extract outsize cargo in a tactical environment. *See* Lynch, *The C-17 Fights Headwinds*, AIR FORCE MAG., July 1993, at 34.

[191] Air Force Letter, AFMC/JA, subject: Preventing Antideficiency Act Violations, atch. 2, C-17 Case Study and Slides (27 Sept. 1993).

[192] 774 F.2d 1110 (Fed. Cir. 1985).

[193] B-164908(2), 48 Comp. Gen. 494, 496 (1969); B-144641, 42 Comp. Gen. 272 (1962).

[194] B-224081, 67 Comp. Gen. 190, 194 (1988).

[195] B-151613, 42 Comp. Gen. 733, 734 (1963).

a violation of the ADA can occur when an agreement exists to pay the contractor that is contingent solely on funds becoming available, thereby failing to require an affirmative act or the exercise of discretion by the contracting officer to obligate the government.[196] Similarly, under the C-17 facts, the mere passage of time into the next funding period may have obligated the government to pay for the contractor's overrun of the funding limitations of the previous period.[197]

New Guidance

Changes recently have been proposed to the *DOD Accounting Manual* guidance on the payment of progress payments as the result of DOD/IG audit findings on the Titan IV program

> [P]rogress payments for the multiple appropriation funded Titan IV contract were made from a predetermined sequence in accordance with guidance in Air Force Regulation 177-120. The contractor's requests for progress payment did not specify the type of work performed, and payments were made to the contractor without regard for whether the payment was made from the appropriation that reflected the type of work done. Use of a predetermined sequence by Air Force (sic) did not ensure that payments were made from the correct appropriation and, thus, violated U.S.C., Title 31, Sec. 1301, which requires that appropriations be applied only for the purposes for which the appropriations were made.[198]

The Director of Defense Procurement, Ms. Eleanor Spector, responded that

> Requiring contractors to segregate costs by appropriation would seriously complicate the contract administration process, achieve no tangible benefits, and only result in increased costs to the taxpayer. Therefore, if necessary, the Department will seek statutory changes to permit the payment of progress payments without regard to appropriation accounting, as long as strict appropriation accounting is maintained when actual deliveries occur and progress payments are liquidated.[199]

To collect costs by appropriation, the contractor would be required to collect data on all work performed, allocating that work to each and every fund cite identified in the contract funding documents. Creating the necessary accounting systems might be inordinately expensive for both the government and contractors. Further, such CLIN accounting may not result in more accurate distribution of progress payments because the DOD/IG has conceded that "[n]one of the current computer systems used for payments is programmed to permit automated distribution of progress payments in the proper manner."[200]

As a compromise resolution of the problem, a modification of *DOD Accounting Manual* chapter 32, section G.1.b, has been proposed, to the effect that "[t]he specific obligations directly related to each payment request must be identified before the requested payment is made."[201] Administrative

---

[196] GSA—Multiple Award Schedule Multiyear Contracting, B-199079, Dec. 23, 1983, 84-1 CPD ¶ 46. Title 10 U.S.C. 2306(g) and (h) provide statutory authority to DOD agencies to enter multiyear contracts with annual funds for specified services.

[197] At first glance, this principle seems to apply to the amount between TP and CP on any FPI contract. In other words, no affirmative act by the government is necessary for the contingent liability to become an obligation of the government. Such contingent liability becomes certain on the mere incurrence of costs by contractor in excess of the TC. The difference is that in the C-17 situation, the unfunded cost is just another increment of the TC, which is the negotiated and expected cost of completing performance. Whereas under a fully funded FPI contract, the amount between TP and CP is not the expected price, and is not part of the negotiated price of performance in the absence of a BP adjustment.

[198] Memorandum For Record, Mediation of Disputed Recommendations in OIG Report No. 92-064, Titan IV Program (March 31, 1992) (signed by Ms Eleanor Spector, Director, Defense Procurement) [hereinafter Mediation].

[199] Director of Defense Procurement response of 25 June 1992 to Recommendation 1 of the DOD/IG Audit Report 92-064.

[200] The Director of the DLA has advocated against requiring contractors to collect costs and bill progress payments, by appropriation. The Director pointed out that it would serve no useful purpose on FFP contracts because under such contracts the contractor would be entitled to all of the funds obligated, on successful completion of the effort. Titan IV Report, *supra* note 43; Comments from the Director of Defense Logistics Agency (27 Feb. 1992). This position is correct even under a multiple funded contract because the government's obligation on each CLIN is fixed in amount and is funded with the funds appropriate for the type of work to be done on that CLIN. The contractor's cost experience, whether an over or an underrun, does not change the government's obligation to pay the fixed price. However, this may not be true under an FPI contract where each CLIN has a TP, but the contract has only one overall CP. Under such a contract, the contractor's entitlement to payment of the contract's total CP might not relieve the government of its obligation, on acceptance of each CLIN, to pay for the costs actually incurred in performing that CLIN with funds that reflect the type of work done on that CLIN.

[201] *See* Mediation, *supra* note 198, atch. Proposed Revision to section G.1.b of chapter 32 of the DOD Accounting Manual (DOD 7220.9-M). This proposed change to the *DOD Accounting Manual* is currently in draft and undergoing review. In the case of delivery payment requests, the draft places the burden on the contractor to provide the paying office with an identification of the payment by contract subline (SLIN) or CLIN (when a CLIN does not have supporting SLINs). In the case of contract financing payments, the ACO must provide that information to the paying office.

contracting offices will have to provide the paying office with an estimated distribution of the progress payment by SLIN or CLIN with each approved contractor request for payment, or as an extended schedule for application to multiple requests on one contract.[202]

Conclusion

Increasingly restrictive fiscal laws and regulations, coupled with severe cutbacks in available funds throughout the DOD, demand a conservative, preventive law approach to the expenditure and obligation of appropriated funds. Several steps can be taken to avoid inadvertent violations of the ADA. First, provide training in coordination with contracting and finance to insure that your clients know and fully understand the myriad rules and regulations governing their authority to obligate and expend program funds. Second, award contracts which impose fiscal discipline on contractors by requiring that costs are accounted for in such a manner that we can comply with fiscal laws and regulations. If the contract is funded with multiple types and years of funds, this requires an accounting system which segregates costs, if not by CLIN, then at least by FY and type of work performed so that progress payments can be made from the proper appropriations. Third, review financial data on availability of funds for accuracy, currency, and consistency with other financial data bases. Fourth, periodically review the CPRs, MARs, and DAESs to identify projected overruns and determine if steps have been taken to obtain adequate funds or to reduce the contractual obligation to an amount within available funds. Fifth, identify when an overobligation will occur and clearly inform the programmatic, fiscal, and legal chains of authority of the gravity of the situation and the necessity for corrective action well before the deficiency materializes. Finally, keep the issue on the front burner until corrective action is taken.

---

[202] Such distribution may be based on:

(1) The contract delivery schedule;

(2) A profile of anticipated contractor expenditures developed by the program or item manager, or developed within the contract administration office, based on historical spending patterns, or other knowledge of contractor performance of similar efforts;

(3) Contract Funds Status Reports provided under a contract requirement for contractor cost reporting, if available;

(4) Other specific information that is pertinent to developing a reasonable forecast of the contractor's work progress;

(5) A best estimate of the contractor's anticipated work progress based on a general knowledge of the contractor or industry practices.

Id. This compromise recognizes that less than exact estimates are an acceptable method of aligning progress payments with their underlying obligations on the contract. It also impliedly concedes that some progress payments will be made with funds that do not match the underlying obligation or its corresponding appropriation. This guidance eliminates the option of charging the oldest FY funds first. However, see DFARS Case 93-D016, Sequence of Progress Payments. New subsection, DFARS 204.7104-i(c)(iv), requires "instructions in Subsection of the contract under the heading Payment Instructions for Multiple Fund Accounting Citations regarding a method of making payments from the funding subline items (*oldest funds first, . . .* etc.,)" (emphasis added).

Friedman v. United States, the First Competent Board Rule and the Demise of the Statute of Limitations in Military Physical Disability Cases

Major Raymond J. Jennings, Jr.
Instructor, Administrative and Civil Law Division
The Judge Advocate General's School, United States Army

Introduction

In a trio of 1962 cases,[1] the United States Court of Claims[2] attempted to settle the uncertain and confused state of the law with respect to the statute of limitations in military disability compensation cases. The Court of Claims addressed two issues in the limitations area: (1) when a military disability compensation claim accrues; and (2) whether action on a

---

[1] Lipp v. United States, 301 F.2d 674 (1962), *cert. denied,* 373 U.S. 932 (Ct. Cl. 1963); Friedman v. United States, 310 F.2d 381 (Ct. Cl. 1962), *cert. denied sub nom.* Lipp v. United States, 373 U.S. 932 (1963); Harper v. United States, 310 F.2d 405 (Ct. Cl. 1962).

[2] The United States Court of Claims, later the United States Claims Court, is now the United States Court of Federal Claims and was the predecessor of the United States Court of Appeals for the Federal Circuit. The Court of Appeals for the Federal Circuit and the United States Claims Court were established on October 1, 1982 by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, enacted on October 29, 1992 changed the name of the United States Claims Court to the United States Court of Federal Claims. That body of law represented by the holdings of the Court of Claims and the Court of Customs and Patent Appeals announced before the close of business on September 30, 1982, is binding as precedent in the Court of Appeals for the Federal Circuit. South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982).

claim for military disability compensation by a corrections board gives rise to a new cause of action. What evolved from the three decisions has come to be known as the *Friedman* Rule or the First Competent Board Rule.[3] This doctrine permits a service member—separated from the service without a board determination of fitness for active duty—to raise a claim for physical disability compensation many years after separation, without regard to the applicable statute of limitations.[4] This article will analyze the *Friedman* decision and assess the current state of the First Competent Board Rule.

The Physical Disability Evaluation System

Congress has established a comprehensive statutory scheme for determining a service member's entitlement to retirement or severance pay as a result of injuries or illness sustained while on active duty.[5] To qualify for a medical separation and the attendant disability compensation, a service member must be found "unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay . . . ."[6]

In 10 U.S.C. § 1216(a), Congress granted each Service Secretary (Secretary) the authority to prescribe implementing regulations for the physical disability review process for his or her department.[7] The process of determining whether a member is entitled to retirement or severance pay routinely begins with a medical evaluation board (MEBD).[8] Medical boards are convened to report on the present state of health of an individual service member. Medical boards may recommend that a service member be referred to a PEB for hearings, findings, and recommendations as to eligibility for disability compensation.[9] In the Army, if soldiers disagree with PEB disability determinations, soldiers may have their cases reviewed by the United States Army Physical Disability Agency and ultimately by the Army Physical Disability Appeal Board.[10]

When no apparent reason exists to question a service member's medical qualification for active duty, absent a request by the service member, normally no referral will be made to an MEBD or PEB for evaluation before separation or retirement. Title 10 U.S.C. § 1214 provides that "[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it." However, under current case law, a service member may demand a physical disability determination *after* separation or retirement for any reason.[11] Even after separation, a service member may request a physical disability determination, contest a pre-discharge determination, or seek correction of the reason for discharge through the Army Board for Correction of Military Records (ABCMR).[12] The ABCMR, like the disability review boards, acts on behalf of the Secretary. Current case law

---

[3] *Friedman*, 310 F.2d at 395-96. The term "first competent board" derives from the passage: "Congress has given the function of deciding entitlement to disability retirement to the Secretary, acting with or through a statutory board, and that the claim does not accrue until final action on the basis of the determination of the first competent board to decide." *Id.* at 392.

[4] 28 U.S.C. § 2501 (1982).

[5] 10 U.S.C. §§ 1201-1221 (1982).

[6] *Id.* § 1201.

[7] "The Secretary concerned shall prescribe regulations to carry out this chapter within his department," *Id.* § 1216(a). The Army's physical disability evaluation system is outlined in *Army Regulation (AR) 635-40.* DEP'T OF ARMY, REG. 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION (1 Sept. 1990) [hereinafter AR 635-40].

[8] Medical evaluation boards are convened to document a soldier's medical status and duty limitations so far as duty is affected by the soldier's status. The primary responsibility of MEBDs is to diagnose and describe medical conditions. An MEBD is made up of three medical corps officers. A decision is made as to the soldier's medical qualification for retention based on the criteria set out in *AR 40-501*. DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (15 May 1989) (IO2, 1 Oct. 1993). A soldier may be referred for a medical evaluation when a question arises as to the soldier's ability to perform the duties of his or her office, grade, rank, or rating because of physical disability. AR 635-40, *supra* note 7, paras. 4-6 to 4-8. The military treatment facility commander having primary medical care will conduct an examination of a soldier referred for evaluation. If a soldier appears medically unqualified to perform duty, the medical treatment facility commander will refer the soldier to a MEBD. *Id.* para. 4-9. If the MEBD determines that the soldier does not meet retention standards, the MEBD will recommend referral of the soldier to a physical evaluation board (PEB). *Id.* para. 4-13.

[9] A PEB is a fact-finding board responsible for: (1) investigating the nature, cause, degree of severity, and probable permanency of the disability of soldiers; (2) evaluating the physical condition of the soldiers against the physical requirements of their particular grades, ranks, or ratings; (3) providing full and fair hearings; and (4) making findings and recommendations required by law to establish the eligibility for disability retirement or separation. AR 635-40, *supra* note 7, para. 4-17a. A PEB is made up of three officers, only one of whom is a medical officer.

[10] AR 635-40, *supra* note 7, paras. 4-22, 4-25.

[11] Friedman v. United States, 310 F.2d 381, 392 (1962 Ct. Cl.).

[12] Title 10 U.S.C. § 1552 provides the statutory authority, "The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice." Pursuant to this authority, the Secretary of the Army has established the Army Board for the Correction of Military Records (ABMCR), whose policies, procedures, and governing rules are set out in *AR 15-185* and can be found at 32 C.F.R. § 581.3 (1993). DEP'T OF ARMY, REG. 15-185, BOARDS, COMMISSIONS AND COMMITTEES: ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (18 May 1977) (C1, 1 May 1982).

holds that in disability cases, a review board or the correction board is a "proper board" to make a disability determination in the first instance.[13]

Title 10 U.S.C. § 1201 provides the following:

> Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty . . . for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title. . . .

Similarly, 10 U.S.C. § 1203 provides:

> Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty . . . for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the member may be separated from his armed force with severance pay computed under section 1212 of this title. . . .

Thus, the Secretary—acting through statutory and regulatory boards—has the discretion to determine whether a service member is entitled to disability compensation.

Statute Of Limitations

Title 28 U.S.C. § 2501 provides that "every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." In the Court of Federal Claims the statute of limitations is jurisdictional and will be strictly construed.[14]

The statute of limitations is one of finality, designed to protect the parties from stale claims and bar the possibility of suits after a reasonable time has passed. The statute of limitations should be regarded as a "meritorious defense, in itself serving a public interest."[15]

Courts are not free to construe a congressionally enacted statute of limitations to defeat its obvious purpose, that is, to encourage the prompt presentation of claims.[16] Although the statute of limitations often makes pursuing what are otherwise perfectly valid claims impossible, that is its purpose.[17]

To determine whether a statute of limitations bars a particular claim, the court must determine when a claim first accrued. A cause of action accrues—and the statute of limitations begins to run—when a plaintiff is "armed with the facts about the harm done to him."[18] In *United States v. Kubrick*, the Supreme Court specifically rejected the contention that "accrual of a claim must await awareness by the plaintiff that his injury was negligently inflicted" or that the defendant was legally blameworthy.[19] A cause of action accrues for purposes of the statute of limitations with the breach of a duty that is owed to the plaintiff. "It is the breach of duty, not the discovery, that is generally controlling."[20] The Supreme Court concluded that a plaintiff's ignorance of his or her legal rights and ignorance of the injury or its cause should not receive the same treatment. Knowledge of injury and causation alone are sufficient for accrual of a cause of action.

The Court of Federal Claims and Court of Appeals for the Federal Circuit have established that a claim accrues when all events have occurred that fix the government's liability and entitle the claimant to institute an action.[21] A cause of action

---

[13] *Friedman*, 310 F.2d, at 392; *see also* Sawyer v. United States, 930 F.2d 1577, 1581-82 (Fed. Cir. 1991) (Correction boards have the power to evaluate a service member's entitlement to disability benefits and act on behalf of the Secretary just as a PEB does. Sufficient flexibility exists in the system to permit the corrections board and the PEB to complement or supplement one another in the interest of reaching a just result.).

[14] Soriano v. United States, 352 U.S. 270, 273-74 (1975) (Congress is entitled to assume that the limitation period it prescribed meant just that and no more); Collins v. United States, 14 Cl. Ct. 746, 751 (1988), *aff'd*, 865 F.2d 269, *cert. denied*, 492 U.S. 909 (1989); Glick v. United States, 25 Cl. Ct. 435 (1992).

[15] Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 136 (1938).

[16] United States v. Kubrick, 444 U.S. 111, 117 (1979).

[17] *Id.* at 125.

[18] *Id.* at 123.

[19] *Id.* at 122-23.

[20] Unexcelled Chemical Corp. v. United States, 345 U.S. 59, 65 (1953).

[21] Collins v. United States, 14 Cl. Ct. 746, 751 (1988).

contesting a military separation, either the fact, circumstances, or characterization of the separation, normally accrues for statute of limitations purposes at the time of the service member's separation.[22]

To toll the statute of limitations, a plaintiff must show either that the defendant has concealed his or her acts so that the plaintiff was unaware of the existence of a cause of action or that the nature of the plaintiff's injury rendered it inherently unknowable at the time the cause of action accrued.[23]

However, in *Friedman*, the Claims Court created a further judicial exception to the normal rule for accrual of a cause of action challenging or seeking a military disability discharge. Through statutory misconstruction, *Friedman* defeats the intended purpose of the statute of limitations.

The *Friedman* Decision

In *Friedman*, and the related case of *Harper v. United States*,[24] decided the same day, the Court of Claims took the opportunity to reassess its position on the bar of limitations in pay cases and, in particular, military disability compensation cases. The *Friedman* Rule reflects the holdings and rationale of the Court of Claims in three separate cases (*Lipp*, *Friedman*, and *Harper*).[25]

The Court of Claims first decided *Lipp v. United States.* Mr. Lipp was released from active duty in January 1946 for reasons other than physical disability. While on active duty, Mr. Lipp never requested an examination for physical disability or an opportunity to appear before a retiring board. After his release from duty, however, he repeatedly requested to appear before a "medical retirement board,"[26] but was denied in December 1948, July 1949, and July 1950. In 1952 and 1955, Lipp's applications to a correction board—to have his records changed to reflect a discharge for physical disability—were denied. Lipp filed suit in August 1958. The Court of Claims found that Lipp's claim accrued not later than July 1950, when his last request for a retirement board was denied. Because he did not file suit within six years of the service's refusal of his demand for a retirement board, Lipp's cause of action was barred by the statute of limitations.

In *Friedman v. United States,* Dr. Friedman served on active duty as a medical officer from January 1941 to January 1947. During his service, Dr. Friedman suffered several periods of serious illness. In October 1946, a retiring board determined that Dr. Friedman was fit for active service, but recommended temporary limited duty with re-examination and re-evaluation in six months, which was not done. In January 1947, Friedman was released from active duty, at his own request, for reasons other than physical disability. From the time of his discharge until his death in 1958, Dr. Friedman did nothing to request re-evaluation or obtain disability retirement pay. Friedman's widow sought relief from the correction board in 1960. Following denial of the requested relief by the correction board, she filed suit in 1960. The Court of Claims found that the statute of limitations barred the cause of action because it had accrued with the determination of the retirement board, more than six years prior to suit.[27] Thus, the First Competent Board Rule did not save the plaintiff's cause of action in *Friedman.*[28]

In the related case of *Harper v. United States,* however, the Court of Claims found a situation where the statute of limitations did not bar the cause of action. Prior to his discharge, Army medical authorities made a preliminary finding that, because of a back injury, Harper was fit only for limited duty. Anxious to rejoin civilian life, Harper applied for, and received, a release from active duty on the ground of hardship. Although he did not have or request a retiring board before his separation in December 1944, Harper was offered a retirement board while on active duty. To effect a quicker separation, however, Harper declined the board. Harper received continuous medical care from 1945 on, treatments that were unable to arrest his symptoms stemming from his back injury. In 1958, he applied to the correction board seeking a finding that he was permanently incapacitated at the time of his separation in 1944. Following denial of that application, he filed suit in the Court of Claims in 1959. The Court of Claims found that an individual does not waive a claim by failing to apply for board consideration before that individual's release. More importantly, the Court of Claims found that a service member's refusal of an offer of a retirement board was insufficient for accrual of the judicial cause of action when the ser-

---

[22] *Id.*; Hurick v. Lehman, 782 F.2d 984, 986 (Fed. Cir. 1986).

[23] *Collins,* 14 Cl. Ct., at 751; Huntzinger v. United States, 9 Cl. Ct. 90, 95 (1985), *aff'd,* 809 F.2d 787 (Fed. Cir. 1986), *cert. denied,* 483 U.S. 1022 (1987); Willcox v. United States, 3 Cl. Ct. 83, 85 (1983), *aff'd,* 769 F.2d 743 (Fed. Cir. 1985).

[24] 310 F.2d 405 (Ct. Cl. 1962).

[25] *See supra* note 1.

[26] Retirement boards were statutory creations now replaced by disability review boards and agencies established by the Secretaries under the authority of 10 U.S.C. § 1216(a). In the context of *Friedman* and its progeny, the term "medical retirement board" or "retiring board" refers to any board authorized to make a finding of physical disability and a recommendation that a service member be retired or separated for physical disability.

[27] *Friedman,* 310 F.2d, at 403.

[28] *See supra* note 3 and accompanying text.

vice had the authority to order the service member before a retirement board.[29]

In these three decisions, the Court of Claims first found that claims for military disability retirement were not appropriate for application of the continuing claim theory.[30] The Court of Claims distinguished disability cases from more generic pay cases involving claims for additional pay at a higher grade or more compensation in accordance with statute or regulation. In *Friedman,* the Court of Claims found that application of the continuing claim theory was appropriate only in cases where:

> (a) Congress had not entrusted an administrative officer or tribunal with the determination of the claimant's eligibility for the particular pay he sought; (b) the cases turned on pure issues of law or on specific issues of fact which the court was to decide for itself (*i.e.,* Congress had not established any administrative tribunal to decide either the factual or the legal questions); and (c) in general the cases called upon the court to resolve sharp and narrow factual issues not demanding judicial evaluation of broad concepts such as "disability" (concepts which involve the weighing of numerous factors and considerations as well as the exercise of expertise and discretion).[31]

The *Friedman* court found that where "Congress had deliberately given an administrative body the function of deciding all or part of the claimant's entitlement,. . . the claim does not accrue until the executive body has acted (if seasonably asked to act) or declines to act."[32] The Court of Claims reasoned that when Congress had provided for evaluation of the facts and the exercise of some degree of administrative discretion, a claim will not accrue when the events on which it is based occur, but only when the agency has rendered or refused its determination based on those events. Thus, the Court of Claims found that consideration by a board competent to grant or deny a disability discharge with its attendant benefits was a statutory condition precedent to the accrual of a cause of action. Rather than being a continuing claim, dependent not only on statutory or regulatory entitlement but also on continuing employment or performance of duties, the entire cause of action for disability entitlement accrues once the appropriate agency or board has acted or refused to act.[33]

Friedman recognized that, in appropriate cases, statutes can establish conditions precedent to the accrual of a cause of action. When such a condition precedent has been created, the cause of action does not ripen until the condition is fulfilled.[34] The Court of Claims interpreted the language of the retirement statutes, 10 U.S.C. §§ 1201-1221, to create such a condition precedent. The Court of Claims read the statutes as a grant of jurisdiction by Congress, not on the court, but on the Secretaries to determine a service member's right to retirement for physical disability and the consequent right to retired pay. An entitlement to military disability retirement was dependent on a prior administrative determination of unfitness by the Secretary. The Court of Claims concluded that where Congress has entrusted the Secretary—acting through the military boards—with the task of determining whether a service member should be retired for disability, no cause of action can arise, or statute of limitations run, until a proper board has acted or refused to act.[35]

---

[29] *Harper*, 310 F.2d at 406-07. This interpretation incorrectly reads 10 U.S.C. § 1214 to require the Secretary, acting through a disability review board, to make a fitness for duty determination whenever a service member is discharged, voluntarily or otherwise, instead of only when reason exists to believe that a discharge may be warranted because of physical disability. Thus, *Harper* would hold that the disability review requirement is precipitated by the discharge, for whatever reason, and not by the possibility that a discharge may be warranted because of physical disability. *Harper* held that accrual of the cause of action requires a final adverse action by the government, rejecting the service member's right to disability pay. This rejection could come either through denial of disability retirement pay by a competent board, or by the service's refusal to convene such a board on request. *Harper* found that the service is not relieved of its obligation to send the service member before a board competent to determine his or her entitlement to disability retirement pay merely because the service member failed to request it, the service member affirmatively declined it, or the service did not order it because the service could not appreciate the potential seriousness of a later diagnosed ailment. *Harper* refused to equate that the service did not order the service member before the board after he refused it with a denial or rejection of his right to disability pay. Thus, *Harper* would define waiver narrowly and only in terms of a denial of a request for a board and not in terms of a refusal of a proffered board.

[30] A continuing claim is actually a series of separate claims with different accrual dates. Although each of the separate claims may stem from a single initial act, payment is due only on the occurrence of a periodic event such as the end of a pay period. The effect of applying the continuing claim theory to periodic pay claims is to bar those claims arising more than six years prior to suit but to allow those claims arising within the six year span prior to suit even though the refusal to pay may stem from an administrative determination made more than six years prior to suit.

[31] *Friedman,* 310 F.2d at 384-85.

[32] *Id.* at 385. This conclusion makes sense only when an affirmative or mandatory duty to act exists. Under 10 U.S.C. § 1214, the affirmative duty to act on the part of the Secretary does not arise unless the service member is being "retired or separated for physical disability."

[33] *Id.* at 392.

[34] *Id.* at 390.

[35] This conclusion makes sense only by reading the "may retire" language of 10 U.S.C. § 1201 as imposing a congressional mandate on the Secretary to retire any service member that he determines is unable to perform his or her duties because of physical disabilities. The conclusion also requires a reading of the "may correct" language of 10 U.S.C. § 1552 to impose a congressional mandate on the Secretary to correct any record of his department when he "considers it necessary to correct an error or remove an injustice."

When an administrative decision is mandatory, the claim is not ready for suit until that decision has been rendered or refused. Therefore, the judicial claim for disability retirement pay does not accrue on release from active duty, but rather on final action of a board competent to pass on eligibility for disability retirement (or on refusal of a request for such a board). A disability review board is a proper board to pass on a claim for disability retirement pay. Where a claimant has not had or sought a disability review board, *Friedman* holds that the claim does not accrue until final action by a correction board which stands in the place of a disability review board as the proper tribunal to determine eligibility for disability retirement.[36]

A cause of action in a disability pay case accrues when final action is taken by the first board competent to decide the matter of entitlement. Where full and final action has been completed, or refused, by a board competent to act, later review by other disability review boards, agencies, or the correction board does not toll the statute.[37] Later review of an adverse final action cannot resuscitate a stale claim.

When a service member is released without having or requesting a disability review board, and correction board proceedings are the only ones open to determine the service member's eligibility, the service member's cause of action will accrue at the time of the action by the correction board.[38] Although normally treated as a permissive remedy, resort to a correction board—in the disability context—is viewed as a remedy for enforcing a substantive right to disability retirement embodied in 10 U.S.C. § 1201.[39] Either a retiring board or the correction board—where the correction board is the initial board—is a proper board to perform the function of advising the Secretary with respect to the eligibility determination.[40] Therefore, a service member's application to a correction board, where it is the initial board, together with the action of that board, take the place of the disability review board's function in triggering the statute of limitations.

The apparent rationale behind the Court of Claims' decision was to protect veterans who did not request disability review boards because they did not know that they were ill, or injured, or appreciate the progressive or serious character of their diseases or disabilities at the time of their release. The *Friedman* court sought to ensure that veterans would "not be cut off by limitations from pursuing their late discovered claims before the corrections boards and this court."[41] To accomplish this object, the Court of Claims grafted the requirement of administrative board action into the accrual formula for a cause of action seeking a disability discharge.[42]

In dicta, defending its position of not allowing pursuit of a permissive administrative remedy to create a new cause of action, the Court of Claims observed that to hold otherwise would enable a claimant to "in effect, pick his own time for suit, he could delay it for many years if he wished to do so, or he could bring it on at once."[43] Yet, this is precisely the result that *Friedman* achieved with the rule that it adopted governing accrual of a cause of action for disability discharges. The danger of the *Friedman* precedent is made clear by the Court of Claims' observation that "most of these disability cases involve an appraisal of the facts of the claimant's health when he left the service a considerable time before suit."[44]

---

[36] *Friedman*, 310 F.2d at 396.

[37] *Id.*

[38] *Id.* at 391. In a case when the correction board becomes the first board to act, or is asked to act, the correction board proceeding becomes a mandatory remedy. This is something of an anomaly in a jurisdiction where exhaustion of military administrative remedies is permissive, not mandatory. Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983).

[39] *Friedman*, 310 F.2d at 399.

[40] Sawyer v. United States, 930 F.2d 1577 (Fed. Cir. 1991).

[41] *Friedman*, 310 F.2d at 402.

[42] Because no judicial appeal of Veterans Affairs (VA) disability determinations existed prior to the 1988 creation of the United States Court of Veterans Appeals, the military services were frequently the only defendant against whom a veteran could bring a cause of action seeking disability related compensation. *See* 38 U.S.C. § 7251 (1988). Former section 211(a) of Title 38 U.S.C. (repealed in 1988) provided that the decisions of the Administrator on any question of law or fact under any law administered by the VA providing benefits for veterans was final and conclusive and no other official or any court of the United States had the power or jurisdiction to review such decisions. *See* Johnson v. Robison, 415 U.S. 361, 372-73 (1974) (judicial review of VA actions limited to actions challenging the constitutionality of laws providing benefits for veterans). The jurisdiction of the Court of Veterans Appeals is limited to review of final decisions of the Board of Veterans Appeals in which notice of appeal is filed within 120 days of the date on which notice of the final decision is mailed. 38 U.S.C. § 7266(a); Butler v. Derwinski, 960 F.2d 139, 141 (Fed. Cir. 1992). In addition to the 120-day prerequisite, the jurisdiction of the Court of Veterans Appeals extends only to cases in which the notice of appeal is filed after November 18, 1988. Pub. L. 100-687, § 402, 102 Stat. 4113 (1988) (codified at 38 U.S.C. §§ 7251-7298). Thus, no judicial review of VA determinations made prior to 1988 exists.

[43] *Friedman*, 310 F.2d at 399.

[44] *Id.* at 401.

In further dicta, the *Friedman* court acknowledged the equitable nature of its decision, but evidenced a basic misunderstanding of the purpose of 10 U.S.C. § 1201. "We cannot, of course know the precise statistics but it seems probable that the class of those who never had or sought a Retiring Board and later applied to the Correction Board includes a large proportion of men whose disabilities were discovered or became aggravated after release."[45] Nowhere, in the plain language of 10 U.S.C. § 1201 or in its legislative history, does it contain a mandate for the military departments to predict future disabilities which did not necessitate the premature discharge. Title 10 U.S.C. § 1201 grants to the Secretary the discretion to retire an active duty member who is unfit to perform his or her duties because of physical disability. It does not address the discretion of the Secretary to retire an active duty member who may at some future date discover that he or she has a service-connected disability. The *Friedman* decision incorrectly focuses on whether the member is sufficiently alerted to the possibility of future disability at the time of discharge and not on whether the member is fit for active duty at the time of discharge. The VA was created for the purpose of providing for veterans who suffer from service connected disabilities.

The *Friedman* court recognized that "ancient controversies, requiring the court to evaluate facts of the distant past, would be presented if disability claims were regularly allowed to wait until after the Correction Board or Disability Review Board proceedings."[46] However, the Court of Claims refused to depart from the principle that the claim for disability retirement pay does not accrue until final action of a proper board "simply because we may possibly believe too long a time has elapsed or been allowed."[47] In attempting to justify its unauthorized engrafting of an exception to the statute of limitations, the Court of Claims noted the possibility that a laches type defense may be available in instances where the "lapse of time puts the Government at too great a disadvantage in its proof."[48] However, the defense of laches would make little sense and seldom prevail if the court already has established that the government breached its duty to provide a disability review when the soldier was discharged. The existence of a possible laches defense cannot justify departure from the strict statutory construction mandated by *Soriano v. United States*.[49]

The *Friedman* court incorrectly construed the language of 10 U.S.C. § 1552(b), which was enacted on August 10, 1956, and which allowed existing claimants until October 1961 to apply for a records correction, as a congressional waiver of the statute of limitations.[50] Although Congress initially afforded claimants a longer period of time in which to seek administrative review of their applications for correction of military records, this does not evidence its intent to engraft an exception to the statute of limitations for bringing suit against the United States.

The *Friedman* decision was predicated on the assumption that 10 U.S.C. § 1214 requires a military disability board determination anytime: (1) a service member is separated or retired for physical disability, (2) a service member believes that he or she is disabled, but is separated or retired for reasons other than physical disability, or (3) after separation or retirement a former service member believes that he or she was disabled at the time of discharge. The result in *Friedman* only can be explained by reading 10 U.S.C. § 1214 to require a hearing any time a service member is separated or retired "with" a known or potential physical disability instead of separated or retired "for" a current physical disability. The *Friedman* result also redrafts 10 U.S.C. § 1201 to mandate that the Secretary "must" retire the service member, instead of Secretary "may" retire the service member, if the Secretary makes a determination of medical unfitness.[51] The *Friedman* decision strains to convert a discretionary determination into a mandatory entitlement. The rule of law announced in *Friedman* regarding accrual of a cause of action for disability compensation is a result of reading these two statutory misconstructions together.

Friedman mandates that any service member discharged for reasons other than physical disability may demand a physical disability determination by a board at the time of discharge or any later date. If the board determines that the service mem-

---

[45] *Id.* at 402.

[46] *Id.* at 401.

[47] *Id.*

[48] *Id.*

[49] 352 U.S. 270, 273-4 (1975).

[50] *Id.* The *Friedman* court noted that in the language of 10 U.S.C. § 1552(b), "Congress has allowed many servicemen a very long time in which to seek retirement pay [through application for a military records correction] and has not insisted that application be made at or upon release from active duty." From this statutory language governing the initial filing period for an administrative correction of military records, the *Friedman* court incorrectly construed a waiver of statute of limitations applicable in the United States Claims Court, 28 U.S.C. § 2501.

[51] *See* Sawyer v. United States, 930 F.2d 1577, 1580 (Fed. Cir. 1990) (once the Secretary finds a disability qualifying, the Secretary has no discretion whether to pay out retirement funds); Kirwin v. United States, 23 Cl. Ct. 497 (1991); *But see* OPM v. Richmond, 496 U.S. 414 (1990) (funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a statute). Congress specifically defined the terms "may" and "shall" and accorded these terms their plain and simple meanings: the first is discretionary, and the second is mandatory. 10 U.S.C. § 101 (28),(29).

ber is unfit for duty, the Secretary must retire that service member. If the service member is refused a board or disagrees with a board determination, that service member's cause of action does not accrue until the board determination or refusal is final, regardless of date of discharge.

The *Friedman* court also addressed the issue of whether an action by the correction board gives rise to a new cause of action. For those who have never had, nor requested, a disability review board, the correction board does not create a new claim but simply ripens or accrues the plaintiff's initial claim. The "only claim upon which suit could be brought necessarily accrued upon final action by the initial board," whether that board be a disability review board or a correction board.[52]

To hold otherwise, the Court of Claims reasoned, would be to allow two or more causes of action stemming from the same events or transactions to arise at different times. The Court of Claims adhered to the principle that from one set of facts and circumstances involving a claimant's separation, but one claim for the same kind of relief (disability compensation) could arise.[53]

Application and Extension of Friedman

In *Friedman*, the Court of Claims announced "the rules we shall now follow" with respect to the statute of limitations and suits for disability retirement compensation.[54] The Court of Federal Claims and the Court of Appeals for the Federal Circuit have consistently followed the First Competent Board Rule.[55] A recognized exception to the First Competent Board Rule is the "Informed Waiver Rule."[56] Where a service member is aware of (1) the disability and (2) its causation, and fails to object to an independent determination that a board is not warranted, or waives the right to appear before a board for the purpose of contesting a finding of fitness, the statute is not tolled.[57]

Until recently, the knowledge criteria of injury and causation for statute of limitations determinations has been made on an objective basis and without regard to statutory entitlement. A cause of action against the government normally will first accrue when all events that fix the government's alleged liability have occurred and the plaintiff was, or should have been, aware of their existence.[58] Under *United States v. Kubrick*,[59] an action accrues not later than when a claimant has knowledge of the underlying facts (injury and cause) which give rise to the claim and not necessarily when the claimant learns that the injury was legally blameworthy.

In *Real v. United States*,[60] the Court of Appeals for the Federal Circuit reaffirmed The First Competent Board Rule and more strictly defined what would constitute an informed waiver. *Real* effectively converted the test for informed waiver into a subjective one. After serving three consecutive tours in Vietnam and while still on active duty, Mr. Real voluntarily sought assistance from Navy doctors. Mr. Real complained of visual and auditory hallucinations, uncontrollable anxiety, and physical aggression towards his family. He was hospitalized and underwent several psychiatric examinations while on active duty. At the time of his honorable discharge from the Navy in February 1974, Real was examined by Navy physicians, who concluded that he was fit for full active duty. Real certified in writing that he understood that because he was found fit for active duty he was not eligible for a disability pension from the military. He further certified that he had been informed of and understood his right to contest the fitness determination.

---

[52] *Friedman*, 310 F.2d at 393.

[53] *Id.* at 400-01.

[54] *Id.* at 384.

[55] *See* Black v. United States, 928 F.2d 412 (Fed. Cir. 1991) (claim for retirement pay accrued only when an appropriate board denied the claim or refused to hear it 10 years after discharge); Hoppock v. United States, 163 Ct. Cl. 87 (1963) (claim for disability retirement accrued with application to correction board 17 years after discharge); Kingsley v. United States, 172 Ct. Cl. 549 (1965); Diamond v. United States, 344 F.2d 703 (Ct. Cl. 1965); Bruno v. United States, 556 F.2d 1104 (Ct. Cl. 1977) (where service member had a PEB prior to his 1952 discharge, his cause of action accrued then and not with his later application to a correction board); Eurell v. United States, 566 F.2d 1146 (Ct. Cl. 1977); Brownfield v. United States, 589 F.2d 1035 (Ct. Cl. 1978); Sagar v. United States, 229 Ct. Cl. 806 (1982).

[56] Huffaker v. United States, 2 Cl. Ct. 662, 665-66 (1983).

[57] Miller v. United States, 361 F.2d 245 (1966) (service member hospitalized for several weeks prior to discharge and received written notification that his case would not be referred to a retiring board); Huffaker v. United States, 2 Cl. Ct. 662 (1983) (after combat injury and extended hospitalization, service member is told that in absence of his objection he would receive no more consideration on claim for disability retirement).

[58] Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988).

[59] 444 U.S. 111 (1976).

[60] 906 F.2d 1557 (Fed. Cir. 1990).

In 1982, Real made a claim for VA disability compensation. Later in that year, Real was first diagnosed as suffering from Post Traumatic Stress Disorder (PTSD) following a referral to a VA facility. In 1983, Real was granted a ten percent disability rating retroactive to October 18, 1982 and a 100% disability rating after September 26, 1983. In 1986, Real filed an application with the correction board requesting that his records be corrected to reflect that he was retired because of physical disability effective on the date of his 1974 discharge.[61] The correction board denied his application and Real filed suit in the Claims Court in 1989, some fifteen years after his discharge.[62]

The *Real* court added a third element to the knowledge portion of the accrual test. The *Real* decision required inquiry into the sufficiency of the individual veteran's knowledge of his or her condition and its causation with respect to statutory entitlement to disability compensation. The *Real* test seeks to determine at what point knowledge can imputed to the individual plaintiff of the statutory entitlement to disability compensation.

The *Real* court quoted extensively from *Friedman* in discussing the accrual date of the cause of action. The court began with the statement that "the generally accepted rule is that claims of entitlement to disability retirement pay do not accrue until the appropriate board either finally denies such a claim or refuses to hear it."[63] The court recognized that limited circumstances existed where the failure of a service member, with knowledge of a potentially disabling injury or illness and the right to a disability review board, to request a hearing could "have the same effect as a refusal by the service to provide board review."[64]

The *Real* court concluded that a mere finding that a plaintiff knew of the existence of some mental or physical problem at the time of discharge was not sufficient in every case to begin the limitations period. *Real* interpreted *Friedman* to require "some inquiry into the extent of the veteran's understanding of the seriousness of his condition."[65] The court further concluded that to be sufficient for accrual purposes, the veteran's knowledge "must be determined by reference to the statutory requirements for entitlement."[66] The *Real* court held that in the absence of a board or refusal of a board, a service member's cause of action does not accrue as a matter of law at the time of discharge and cannot accrue until the service member has "actual or constructive knowledge" of the potential entitlement to military disability compensation.[67] In effect, the cause of action does not accrue until the service member knows that he or she has a legally compensable claim.

In *Black v. United States*, the Court of Appeals for the Federal Circuit further distorted the plain language of the applicable statute of limitations.[68] The *Black* court held that a suit to amend the reason for a 1979 discharge from paranoid personality to paranoid schizophrenia[69] was not a challenge to the merits or lawfulness of the discharge itself, but of the 1989 denial of a request for amendment made to a corrections board. In *Black*, the Federal Circuit cited the First Competent Board Rule in reversing the Claims Court's dismissal of the suit as barred by the statute of limitations. The *Black* court reasoned that when a former soldier did not discover the basis of his 1979 discharge—a basis that left him ineligible for disability benefits—until 1986, his claim did not accrue until the corrections board denied his request for records amendment in 1989. Thus a ten-year-old claim was revived under the fiction

---

[61] Despite that the VA has to make a determination of service connection in granting a disability rating, it generally cannot award disability compensation for any period prior to the date of receipt of application for disability compensation. 38 U.S.C. § 5110(a). The exception to this rule is when application for compensation is made within one year of discharge. 38 U.S.C. § 5110(b)(1) (effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release). Real was discharged on February 24, 1974 and made his first application to the VA for disability compensation on October 18, 1982. Thus, disability compensation or disability retirement would be available, if at all, only from the Navy. The requested records correction would have entitled Real, among other things, to disability severance pay or disability retirement for the period February 24, 1974, through October 18, 1982. Therein lies the incentive for suit against the military service when the VA makes a finding of service connected disability some time after discharge.

[62] In advisory opinions, the Commander of the Navy Medical Command determined that Real had been suffering from PTSD at the time of his discharge; nevertheless, the Central Physical Evaluation Board opined that he had been fit for duty at the time of his discharge and recommended that his application for records correction be denied.

[63] *Id.* at 1560.

[64] *Id.* (citing Miller v. United States, 361 F.2d 245 (Ct. Cl. 1966); Huffaker v. United States, 2 Cl. Ct. 662 (1983)).

[65] *Id.* at 1562.

[66] *Id.*

[67] *Id.* at 1563.

[68] 928 F.2d 412 (Fed. Cir. 1991).

[69] A separation based on a diagnosis of paranoid schizophrenia would have made Mr. Black eligible for disability retirement benefits under 10 U.S.C. § 1201. The separation based on a diagnosis of paranoid personality left Mr. Black ineligible for disability retirement benefits under 10 U.S.C. § 1201.

that it did not accrue until the claimant knew that it was legally compensable.[70]

Since *Real*, the Claims Court has decided two significant disability compensation cases that seem to restore some vitality to the informed waiver exception to the First Competent Board Rule. In *Burns v. United States*,[71] the court found that when the plaintiff had precise knowledge of the nature, cause, and extent of his injury and disability at the time of discharge, his claim would accrue at that time. Mr. Burns suffered the traumatic amputation of his legs when a projectile that he was carrying, while he was intoxicated and trespassing in an off-limits artillery impact area, exploded. His cause of action brought seventeen years after his discharge was held to be barred by the statute of limitations, 28 U.S.C. § 2501.

In *Burton v. United States*,[72] the court found that a cause of action accrued at discharge when Burton, who on his seventh day of active duty, complained of a injury that he admitted was incurred before his enlistment and requested a release from active duty based on that physical limitation. An MEBD found Mr. Burton unfit because of an injury existing prior to service. Mr. Burton waived consideration by a PEB. The court found that "failure to request a disability hearing prior to discharge may trigger the running of the statute of limitations where the service member has full knowledge of the condition."[73] The court found persuasive that in requesting separation from the service, Burton acknowledged that he did not meet retention standards. The court found that Burton knew, or at the very least, should have known, the full extent of his disability at the time of his discharge. The court concluded that despite that Burton did not appear before a PEB, a correction board decision was not a necessary prerequisite for accrual of his claim. Thus, it appears the Court of Federal Claims may limit the requirement of the *Real* additional knowledge element to those disability cases involving injuries or diseases having latent or delayed symptoms.

Analysis of the First Competent Board Rule

The First Competent Board Rule is an impermissible judicially created exception to the congressionally enacted statute of limitations. It conflicts with the plain and literal language of 28 U.S.C. § 2501. It ignores the holding of the Supreme Court in *Soriano v. United States* that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."[74] However, the First Competent Board Rule is the settled law of the Federal Circuit.

The First Competent Board Rule represents a distortion of the literal language of 10 U.S.C. § 1214 to the point of requiring a "full and fair hearing" not only when a service member is retired or separated for physical disability, but when a service member is retired or separated with a physical disability, regardless of when that disability is discovered. The First Competent Board Rule represents an impermissible judicial revision of section 1214, replacing the term "for" with the term "with." The rule represents a misconstruction of 10 U.S.C. §§ 1201 and 1203. It requires a misreading of what are plainly discretionary acts under sections 1201 and 1203, and transforms them into mandatory acts by the Secretary. The rule represents a judicial revision of the statutes, by replacing the discretionary term "may" with the mandatory term "shall."

The *Real* court's extension of *Friedman*—to the extent that a cause of action accrues only on actual or constructive knowledge of potential statutory entitlement—directly conflicts with Supreme Court precedent in *Kubrick* and *Unexcelled Chemical Corp. v. United States*[75] establishing that accrual of a claim need not await knowledge by the claimant that the claim is legally cognizable.[76] The extension of the rule reflects the Federal Circuit's circumvention of *Kubrick*'s specific rejection of the proposition that a claim does not accrue until a plaintiff is aware not only of his injury and its cause but also knows, or at least suspects, that a defendant is legally blameworthy. Despite *Real*, the informed waiver rule retains some viability as an exception to the First Competent Board Rule.

Conclusion

Through the First Competent Board Rule, the Court of Federal Claims has enabled claimants to toll almost indefinitely

---

[70] On remand, the Court of Federal Claims granted the government's motion for summary judgment, finding that the correction board's decision to deny Mr. Black's petition for correction of his records was not arbitrary, capricious, unsupported by substantial evidence, or contrary to law because substantial evidence supported the board's determination. Black v. United States, 28 Fed. Cl. 177 (1993).

[71] 20 Cl. Ct. 758 (1990).

[72] 22 Cl. Ct. 706 (1991).

[73] *Id.* at 709.

[74] 352 U.S. 270, 276 (1957); *See* Kendall v. United States, 107 U.S. 123, 125 (1883) (In creating the Court of Claims, Congress gave the government's consent to be sued only in certain classes of claims which do not include those defined as barred if not asserted within the time limited by statute. While some legal disabilities may toll the running of the statute of limitations, courts do not have the authority to engraft additional disabilities on the statute.).

[75] 345 U.S. 59 (1953).

[76] United States v. Kubrick, 444 U.S. 111, 123 (1979); *Unexcelled Chemical Corp.*, 345 U.S. 59, 65-66 (1953).

the running of the statute of limitations with respect to claims for military disability compensation. The First Competent Board Rule is most troublesome in defending claims of disability that stem from alleged illness or disease that are characterized by latent and delayed symptoms such as PTSD. In such cases, an informed waiver will be very difficult to establish. In the meantime, the courts will continue to entertain suits challenging discharges occurring more than six years ago.

Given the number of potential cases and the inherent difficulty of defending claims[77] that are based on events of more than six years ago, it may be time for a legislative remedy. To protect the services from the undue burden of defending countless stale claims seeking disability compensation relating to long past discharges, apparently two legislative options exist. Title 28 U.S.C. § 2501, which sets forth the statute of limitations for bringing a cause of action in the Court of Federal Claims, could be amended to precisely spell out when a "claim first accrues." A more viable option would be to amend 10 U.S.C. § 1214 to require that any member's demand for a "full and fair hearing" must be made before that member is retired or separated.

[77] The National Vietnam Veterans Readjustment Study conducted by the VA in 1985 concluded that approximately 480,000 service members who served in Vietnam currently suffer from PTSD. That study estimated that an equal number of Vietnam veterans had previously suffered from PTSD but no longer exhibit symptoms of the disorder. Estimates vary by branch of the service, the study estimated that up to 16% of Army veterans who served in Vietnam suffer from PTSD.

The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service"

Lieutenant Colonel Steven B. Rich
National Guard Bureau

Introduction

As part of its effort to increase military support to law enforcement agencies in combatting illegal drug trafficking and use, Congress enacted 32 U.S.C. § 112. This authorizes federal funding of state National Guard support for drug interdiction and counterdrug activities.[1] This program is separate and apart from the authority for military support to civil authorities by the Title 10 active forces and reserves.[2] A number of characteristics distinguish the National Guard program from the Title 10 program. One characteristic is that National Guard personnel conducting National Guard counterdrug operations funded under § 112 must not be "in federal service."[3] This article examines the meaning of that phrase, its legal effect, and the application of the Posse Comitatus Act.[4]

The National Guard has an "unusual hybrid" status as an agency with both federal and state characteristics.[5] Because of this unique state-federal structure, understanding its constitutional and statutory basis is necessary to analyze whether the Guard is performing as a state or federal organization. Eventually, one must understand how a National Guard member can wear a United States Army uniform, fly in a United States Army helicopter, receive federal pay and allowances, be covered by the Federal Tort Claims Act and federal military medical care, yet not perform this service in the United States

[1] The provisions of the statute are discussed *infra.*

[2] *See, e.g.,* 10 U.S.C. § 124 (1988) (The Department of Defense is the lead agency for the detection and monitoring of aerial and maritime transit of illegal drugs); The National Defense Authorization Act for Fiscal Year 1991, § 1004 (personnel and logistical support for civilian law enforcement agencies counterdrug activities); 10 U.S.C. § 371-81 (1988).

[3] 32 U.S.C. § 112(f)(1) (1988).

[4] While this article is limited to the Army National Guard, the same analysis would apply to the Air National Guard.

[5] Jorden v. National Guard Bureau et al., 799 F.2d 99, 101 (3d Cir. 1986).

Armed Forces, not be subject to the Uniform Code of Military Justice, and have a governor for a Commander-in-Chief rather than the President of the United States.[6] On the other hand, one also must understand how the legal status can change so that this same National Guard member can be considered a part of the United States Army, be subject to the Uniform Code of Military Justice, and answer to the President instead of the Governor.

The Legal Basis of the National Guard

The legal basis of the Militia[7] is founded not only in federal constitutional and statutory law, but in state constitutions and statutes as well. Because of the scope and purpose of this article, the discussion is limited to federal law. In many questions regarding National Guard issues, however, state law is a significant, if not controlling, factor.

Federal Constitutional Provisions

Congress has the power to raise and support "armies" (the "Army clause"),[8] to provide and maintain a Navy,[9] and make rules for the government and regulation of the land and naval forces.[10] Apart from the Army clause, Congress has authority over the militia under what are commonly known as "the Militia Clauses." Congress thereby has the separate powers to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, repel invasions,[11] and

> to provide for the organizing, arming, and disciplining, the Militia, *and for governing such Part of them as may be employed in the Service of the United States,* reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[12]

The President is the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, *when called into the actual Service of the United States.*"[13]

In *Perpich v. Department of Defense,*[14] the United States Supreme Court examined the constitutional and statutory history and legal basis of the National Guard.[15] *Perpich* noted that

> two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a

---

[6] Except in the case of the District of Columbia, where the President is the Commander-in-Chief of the District of Columbia National Guard. D.C. CODE ANN. § 109 (1993). That authority has been delegated to the Secretary of Defense. Exec. Order No. 11,485 (1969). The authority for law enforcement support to civil authorities has been delegated from the Secretary of Defense to the Secretary of the Army. Memorandum, Secretary of Defense (10 Oct. 1969). The Secretary of the Army has assigned responsibility for the administration and oversight of the District of Columbia Guard to the Under Secretary of the Army. Dep't of Army, Gen. Order No. 24 (23 Nov. 1993). The Under Secretary of the Army may exercise the law enforcement support authority, and the Assistant Secretary of the Army (Installations, Logistics, and Environment) is the principal assistant in overseeing military support activities to civilian law enforcement and for disaster relief. *Id.* The Commanding General of the District of Columbia National Guard performs the functions of the Governor for purposes of the National Guard counterdrug support program. 32 U.S.C. §112(f)(2) (1988).

[7] The National Guard is the modern militia reserved to the states by Article I, section 8, clauses 15 and 16 of the United States Constitution. Maryland for Use of Levin v. United States, 381 U.S. 41, 46, *vacated on other grounds,* 382 U.S. 159, 86 S.Ct. 305 (1965). The Army National Guard is the "organized militia" which is a land force, federally recognized and trained, and which has its officers appointed under the Militia Clause. 10 U.S.C. §101(c)(2) (1988). For examples of state law provisions for the National Guard, *see* VA. CONSTIT. art. I, § 13, art. IV, § 7; VA. CODE ANN. tit. 44; FLA. CONSTIT. art. IV, § 1; Fla. Stat. Ann. § 250.01 (1988).

[8] U.S. CONST. art I, § 8, cl. 12.

[9] *Id.* art. I, § 8, cl. 13

[10] *Id.* art. I, § 8, cl 14.

[11] *Id.* art. I, § 8, cl. 15.

[12] *Id.* art. I, § 8, cl. 16 (emphasis added).

[13] *Id.* art II, § 2 (emphasis added). Finally, the right to indictment by Grand Jury does not apply to "cases arising in the land or naval forces, or in the Militia, *when in actual service in time of War or public danger.*" *Id.* amend. V (emphasis added). The Second Amendment also references the Militia in regards to the right to keep and bear arms.

[14] 496 U.S. 334 (1990).

[15] A reading of *Perpich* is required for anyone dealing with the legal basis and state-federal relationship of the National Guard.

> recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national Army and also to organize the Militia.[16]

The essential constitutional concept is that while Congress has certain powers and responsibilities regarding the militia, the selection of its officers and command and control remain with the states except during periods in the actual service of the United States. The court in *United States v. Dern* examined this concept as follows:

> It is clear that Congress, in carrying out its constitutional powers, has almost from the beginning provided by law for organizing, arming, and disciplining the militia, and that the process has been one of gradual enlargement, the United States assuming constantly increasing responsibility and exercising more and more control in organization and discipline, but it is clear notwithstanding all of this, that except when employed in the service of the United States, officers of the National Guard continue to be officers of the state and not officers of the United States or of the Military Establishment of the United States. And this limitation of power was always recognized by the Congress. . . . there must be a State National Guard before there can be a National Guard of the United States . . . it is also true that Congress has authority to determine the extent of the aid, support, and assistance which shall be given the National Guard of the various states and the terms upon which it shall be granted. . . . But, except when employed in the service of the United States, the whole government of the militia is within the province of the state, and this follows because of the precise limitations of the constitutional grant. The United States may organize, may arm, and may discipline, but all of this is in contemplation of, and preparation for, the time when the militia may be called into the national service. Until that event, the government of the militia is committed to the states.[17]

Furthermore, the Supreme Court has held

> The Governor . . . remain[s] in charge of the National Guard in each State except when the Guard [is] called into active federal service; in most instances the Governor administer[s] the Guard through the State Adjutant General, who [is] required by [law] to report periodically to the National Guard Bureau, a federal organization, on the guard's reserve status. . . . . It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States.[18]

Federal Statutory Provisions

The Dual-Component Status

In 1933, Congress created two overlapping, but distinct, organizations—the National Guard of the various states (ARNG) and the National Guard of the United States (ARNGUS).[19] State ARNG members must simultaneously enroll in the ARNGUS.[20] The dual enlistment system is a legitimate use of Congress's power to raise and support Armies.[21]

---

[16] *Id.* at 340.

[17] 74 F.2d 485, 487 (D.C. Cir. 1934).

[18] Maryland for Use of Levin v. United States, 381 U.S. 41, 48 (1965) (decided before statutory inclusion under the Federal Tort Claims Act of National Guard members performing duty under Title 32; *see infra* note 58).

[19] National Defense Act Amendments of 1933, Pub. L. 73-64, 48 Stat. 153 (1933). Congress subsequently limited the "National Guard of the United States" to the Army component and created a separate Air National Guard of the United States. Armed Forces Reserve Act of 1952, Pub. L. 82-476, 66 Stat. 481, 498, 501 (1952). Finally, the definitions were changed to their present form by creation of the "Army National Guard of the United States" (and the elimination of the term "National Guard of the United States"). Pub. L. 1028, 70A Stat. 3 (1956).

[20] 10 U.S.C. §§ 101(c)(3), 591(A), 3261 (1988); 32 U.S.C. §§ 101(5), 312 (1988); *Perpich*, 496 U.S. at 345.

[21] Johnson v. Powell, 414 F.2d 1060, 1063 (5th Cir. 1969).

Understanding the distinction between the state ARNG and the federal ARNGUS is crucial.

The "Armed Forces" of the United States includes the Army.[22] The Army consists of the Regular Army, the ARNGUS, the ARNG *while in service of the United States,* and the Army Reserve.[23] The ARNGUS is a reserve component of the Army whose members must be members of the state ARNG.[24] The ARNG is a component of the Army only while in service of the United States.[25]

Therefore, a member of the National Guard belongs to a state organization, the ARNG, and a federal organization, the ARNGUS. Additionally, the Guard member is a civilian when not in a military status. As stated in *Perpich,* notwithstanding the brief periods of federal service, the members of the state Guard unit continue to satisfy the description of a militia.[26] "In a sense, all [National Guard members] now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time."[27] When the state militia hat is being worn, drilling and other exercises are performed pursuant to "the Authority of training the Militia according to the discipline prescribed by Congress," but when that hat is replaced by the federal hat, the Militia Clause is no longer applicable.[28]

The Duty Statuses of the National Guard

"Active Duty" means "full-time duty in the active military service of the United States."[29] It does not include "full-time National Guard Duty."[30] Members of the ARNGUS are not in active federal service except when ordered thereto under law.[31] Members of the ARNGUS ordered to active duty shall be ordered to duty as reserves of the Army.[32] However, when members of the ARNG (as such, and not as members of the ARNGUS) are called into federal service, it occurs because of the constitutional authority to federalize the militia, and not because of the authority over the Army.[33] Duty performed when members or units of the ARNGUS are ordered into federal service as reserves of the Armed Forces is performed by the Army and not by the militia from which the member has been temporarily disassociated.[34] The National Guard is only a potential part of the United States Armed Forces and does not become a part thereof until the requisite entry into active federal service.[35]

---

[22] 10 U.S.C. § 101(a)(4) (1988).

[23] *Id.* § 3062(c) (emphasis added).

[24] *Id.* §§ 101(c)(3), 261(1). The purpose of each reserve component is military readiness. *Id.* § 262. As the court stated in *Jorden*

> [W]e recognize that "[t]he Guard is an essential reserve component of the Armed Forces of the United States." [citing Gilligan v. Morgan, 93 S.Ct. 2440, 2444 (1973)]. It is common knowledge that, in the event of a surprise attack, the Guard may be the first line of defense. See 32 U.S.C. §102 ("[I]t is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defense of the United States be maintained and assured at all times.") Indeed, Congress recently passed a resolution, Pub. L. No. 99-290, 100 Stat. 413 (1986), designed to "reaffirm Congressional recognition of the vital role played by members of the National Guard . . . in the nation's armed forces. [citing H.R. REP. No. 504, 99th Cong., 2d Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 1294].

Jorden v. National Guard Bureau et al., 799 F.2d, 101, 106 (3d Cir. 1986).

[25] 10 U.S.C. § 3078 (1988).

[26]
> Lexicographers and others define militia, and so the common understanding is, to be "a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace." That is the case as to the active militia of this State. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it.

Perpich v. Department of Defense, 496 U.S., 334, 348 (1990) (citing Dunne v. People, 94 Ill. 120, 138 (1879)).

[27] *Id.* at 348.

[28] *Id.*

[29] 10 U.S.C. § 101(d)(1) (1988).

[30] *Id.*

[31] *Id.* § 3495.

[32] *Id.* § 3497.

[33] *Id.* § 3500. *See infra* the explanation of the difference between the calling into federal service of the militia ARNG and the ordering to active duty of the Reserve Component ARNGUS.

[34] Perpich v. Department of Defense, 496 U.S. 334, 347 (1990).

[35] Sorrentino v. Ohio Nat'l Guard, 560 N.E.2d 186, 190 (Ohio 1990).

Units or individual members of the National Guard may enter "active duty" (that is, federal service) in two ways:

(1) One is the call into federal service of the militia.[36] Congress has the separate powers to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.[37] Congress has exercised that power by enacting chapter 15 of Title 10 which provides for the President to call the militia into federal service to suppress insurrections,[38] enforce federal law,[39] or to protect civil rights.[40] While in federal service, the ARNG is a component of the Army.[41]

(2) The second procedure is the ordering to active duty of a member or unit of a reserve component.[42] Because the ARNGUS is the reserve component, the order to active duty is done because of the membership in that component. The order is not a call into federal service of the state National Guard (the organized militia). The power of Congress to provide for the ordering to active duty of the Army National Guard of the United States stems not from the "Militia Clauses" but rather from the "Army clause."[43] Examples of this authority include up to fifteen days without the consent of the individual but with the consent of the Governor;[44] an unspecified time with the consent of the individual and the Governor;[45] in time of national emergency declared by the President;[46] and the President, without declaration of a national emergency, may order to active duty up to 200,000 members of the Selected Reserve.[47]

A member of the National Guard who is ordered onto active federal duty is relieved from service in the ARNG during this period.[48] Under the dual-enlistment rationale, the states' authority over training of the militia, reserved in the Militia Clause, does not apply to the period during which members of the militia are on active duty as part of the ARNGUS.[49] Thus, the commander-in-chief becomes the President, not the Governor, and the federal Uniform Code of Military Justice jurisdiction applies.[50]

---

[36] The National Guard constitutes the "organized militia." 10 U.S.C. § 311(b) (1988). The Virgin Islands National Guard was called into federal service for Hurricane Hugo and the California National Guard was called into federal service for the Los Angeles riots. The presidential order in each case cited only chapter 15 of Title 10, without specifying any particular section thereof.

[37] U.S. CONST. art 1, § 8, cl. 15.

[38] 10 U.S.C. § 331 (1988). The authority for this section derives from the authority found in the first Militia Clause to call forth the Militia to suppress insurrections, U.S. CONST. art. I, § 8, cl. 15 and the responsibility of the federal government to guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence. *Id.* art. IV, § 4.

[39] 10 U.S.C. § 332 (1988).

[40] *Id.* § 333. Authority for Congress to enact statutes to effectuate constitutional protections of due process of law and equal protection of the laws may be found in Amendment XIV, sections 1 and 5 of the United States Constitution.

[41] 10 U.S.C. § 3062(c) (1988). An example of the call to federal service of the militia under this authority is the Los Angeles riots in 1992.

[42] 10 U.S.C. § 672 (1988). *See id.* § 263; 32 U.S.C. §102 (1988). National Guard units were called to active duty for Operation Desert Storm/Desert Shield. At first, it was under the presidential "200 K" call-up authority of 10 U.S.C. § 673b. A subsequent partial mobilization occurred under the National Emergency provisions of 10 U.S.C. § 673.

[43] U.S. CONST. art 1, § 8, cl. 12. *See* Perpich v. Department of Defense, 496 U.S. 334 (1990).

[44] 10 U.S.C. § 672(b) (1988). This 15-day period is the normal authority used for periods of "Active Duty for Training" (ADT) where ADT is being performed in lieu of the Annual Training required by 32 U.S.C. § 502(a).

[45] *Id.* § 672(d). This is the statutory authority for such occurrences as the Active Guard and Reserve (AGR) members serving at the National Guard Bureau and other federal institutions.

[46] *Id.* § 673.

[47] *Id.* § 673b.

[48] 32 U.S.C. § 325 (1988).

[49] Dukakis v. Department of Defense, 686 F. Supp. 30, 36 (D. Mass 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988).

[50] 10 U.S.C. § 802(3) (1988).

"Full-time National Guard Duty" means "training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States *in the member's status as a member of the National Guard of a State or territory,* the Commonwealth of Puerto Rico, or the District of Columbia under §§ 316, 502, 503, 504, or 505 of Title 32."[51]

While not in federal service, the National Guard is authorized to conduct state courts-martial.[52] Because only the "state militia hat" is being worn,[53] the drilling and other exercises are performed pursuant to the Militia Clause, as Congress has the authority to prescribe the discipline therefore.[54]

The issue of status depends on command and control and *not* on whether: state or federal benefits apply; state or federal funds are being used; the authority for the duty lies in state or federal law; or any combination thereof. The militia status could be either full-time National Guard duty,[55] Inactive Duty for Training[56] (IDT), or state active duty (which is performed under authority of state law and paid for with state funds).[57] Although National Guard members receive federal pay and allowances, retirement points, certain medical benefits, and Federal Tort Claims Act protection while performing full-time National Guard Duty and IDT under Title 32,[58] this occurs in the status of the ARNG, not the ARNGUS. When not on "active duty," members of Army National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Army National Guard.[59] Thus, in determining whether the National Guard member is "in federal service" or not, the crucial issue is which "hat" (state militia or Army) is being worn. Neither case law nor federal statutes make the distinction based on the source of funds or benefits provided.[60]

The Posse Comitatus Act and National Guard Counterdrug Duty

Title 18 U.S.C. § 1385 is commonly known as the "Posse Comitatus Act" (PCA) and, regarding the use of Army and Air Force as posse comitatus

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined by not more than $10,000 or imprisoned not more than two years, or both.[61]

This article is limited to the question of the applicability of the Posse Comitatus Act to the National Guard when in duty under Title 10, Title 32, or state active duty. Therefore, the issue is the meaning of "any part of the Army or the Air Force."

---

[51] *Id.* § 101(d)(5) (emphasis added). Inactive Duty for Training (IDT, that is, weekend drills) and annual training (AT) are performed under the authority of 32 U.S.C. § 502(a). Training in addition to IDT and AT, and "other duties," are performed under § 502(f). Active Guard and Reserve members, under *National Guard Reserve (Army) 600-5,* are performing full-time National Guard duty as "other duty" within the meaning of § 502(f). *See* DEP'T OF ARMY, NAT'L GUARD BUREAU REG. 600-5, THE ACTIVE GUARD/RESERVE (AGR) PROGRAM TITLE 32, FULL-TIME NATIONAL GUARD DUTY (FTNGD) (20 Feb. 1990).

[52] *See* 32 U.S.C. §§ 326-33 (1988). *See, e.g.,* Colorado Code of Military Justice, COLO. REV. STAT. §§ 28-3.1-101; Texas Code of Military Justice, TEXAS EXEC. BRANCH CODE, ch. 432. The federal provisions regulating state courts-martial presumedly are based on Congress's constitutional authority to provide for the disciplining of the militia. U.S. CONST. art. I, § 8, cl. 16. They have the effect of prescribing how the states are to adjudicate a dishonorable discharge or dismissal which affect the status as a member of the federal reserve component. 32 U.S.C. § 327 (1988). Thus, a state court-martial has the unusual circumstance of a criminal case being based on both state and federal law.

[53] A National Guard member can only be in one status at a time. Perpich v. Department of Defense, 496 U.S. 334, 348 (1990).

[54] *Id.*; U.S. CONST. art I, § 8.

[55] 32 U.S.C. § 502(a), (f) (1988).

[56] *Id.* § 502(a).

[57] One must avoid the pitfall of believing that the militia "hat" means only state active duty; that is, when the militia performs duty as authorized by state law—usually for emergencies such as civil disturbances and natural disasters—and is paid for with state funds. Jorden v. National Guard Bureau et al., 799 F.2d 99, 101 (3d Cir. 1986).

[58] For the purposes of laws providing benefits for members of the ARNGUS and their dependents and beneficiaries, full-time National Guard duty is deemed to be active duty in federal service. 10 U.S.C. § 3686(2) (1988). For purposes of the Federal Tort Claims Act, "employees of the government" includes members of the National Guard while engaged in training or other duty under §§ 316, 502, 503, 504, or 505 of Title 32. The definition of "scope of employment" can include duty performed by a member of the state ARNG as defined by 32 U.S.C. § 101(3). 28 U.S.C. § 2671 (1988); 32 U.S.C. § 715 (1988).

[59] 10 U.S.C. § 3079 (1988).

[60] For a synopsis of the distinctions between the National Guard's state and federal statuses, *see* DEP'T OF ARMY, PAMPHLET 27-21, LEGAL SERVICES: ADMINISTRATIVE AND CIVIL LAW HANDBOOK, para. 6-4 (15 Mar. 1992).

[61] 18 U.S.C. § 1385 (1988).

History and Purpose of the Act

The PCA[62] was intended as an attempt to end the use of *federal troops* in ex-Confederate states[63] and was passed shortly after the Civil War to deal with presumed abuses of military authority in the southern states.[64] The PCA is designed to limit direct active use of *federal troops* by civil law enforcement officers to enforce the laws of the nation.[65]

The legislative history shows that when the PCA was enacted, many Southerners resented the use of federal troops in places where the government had been reestablished, especially because such use often was directed, in their view, toward altering the outcome of elections in their states.[66] By using the words "posse comitatus" the Congress intended to preclude the Army from assisting local law enforcement officers in carrying out their duties.[67]

The National Guard's Counterdrug Program

With the enactment of the National Defense Authorization Act for fiscal years 1990 and 1991,[68] Congress authorized funding to support state National Guard drug interdiction and counterdrug activities. Codified at 32 U.S.C. § 112, it authorizes the Secretary of Defense to provide funds to a Governor for use of that state's National Guard for the purpose of "drug interdiction and counter-drug activities."[69] The term "counter-drug activities" is defined to include "the use of National Guard personnel, *while not in Federal service,* in any law enforcement activities authorized by State and local law and requested by the Governor."[70] The Governor submits a request for federal funds through a state plan which must, *inter alia,* certify that "those [counterdrug] operations are to be conducted at a time when the personnel involved are not in Federal service."[71]

The statute gives broad discretion to the Secretary of Defense as to what activities can be funded. The statutory requirements are satisfied as long as the activity is a counterdrug law-enforcement activity, is authorized by state law, the Guard personnel are not in federal service, and the Governor has submitted a state plan.[72]

Therefore, the statutory limitation as to duty status is that Guard personnel not be in federal service. The constitutional and statutory concept of "federal service" is limited to active

---

[62] "Posse Comitatus" derives from the Latin, meaning the power or force of the county. BLACK'S LAW DICTIONARY 1324 (4th ed. 1968). It is the power under which a sheriff may summon the entire population of the county above a certain age to his assistance. *Id.* The right of the sheriff to summon a posse comitatus exists by virtue of the common law. 80 C.J.S. *Sheriffs and Constables* § 34 (1953).

[63] United States v. Allred, 867 F.2d 856, 870 (5th Cir. 1989).

[64] Moon v. State, 785 P.2d 45, 46 (Alaska Ct. App. 1990).

[65] United States v. Hartley, 796 F.2d 112 (5th Cir. 1986). *See* United States v. Hartley, 486 F. Supp. 1348 (M.D. Fla. 1980); State v. Sanders, 281 S.E.2d 7 (N.C. 1981), *cert. den.*, 454 U.S. 973 (1981).

[66] United States v. Red Feather, 392 F. Supp. 916, 922 (D.S.D. 1975). The court observed that

> in the disputed Tilden-Hayes election of 1876, Rutherford B. Hayes obtained the necessary electoral votes only because the disputed votes of South Carolina, Louisiana, and Florida were all awarded to him. In each of these states the elections were accomplished by the use of federal troops, ostensibly to preserve the peace, and in each state when elections were contested, the troops supported the reconstruction candidates. . . . Of primary concern was the prospect of United States marshals, on their own initiative, calling upon troops to form a posse or to otherwise perform direct law enforcement functions to execute the law. Thus, Representative Knott, the House sponsor of the legislation, stated as explanation that the act was intended to stop army troops, whether one or many, from answering the call of any marshal or deputy marshal to perform direct law enforcement duties to aid in execution of the law. The appropriations restriction for fiscal year 1879 was therefore directed specifically to the "employment of any troops in violation of this section." Other courts have interpreted the statute and have reached the same conclusion. In Chandler v. United States the Court stated: Originally a section inserted into an Army Appropriation Act as a backwash of the Reconstruction period following the Civil War. Its legislative history, as set forth in Lieber, The Use of the Army in Aid of the Civil Power, indicates that the immediate objective of the legislation was to put an end to the *use of federal troops to police* state elections in the ex-Confederate states where the civil power had been reestablished.

(citations omitted).

[67] Gillars v. United States, 182 F.2d 935, 972 (D.C. App. 1950).

[68] Pub. L. 101-189, 103 Stat. 1352, 1565 (1989).

[69] 32 U.S.C. § 112(a) (1988).

[70] *Id.* § 112(f) (emphasis added).

[71] *Id.* § 112(b)(2).

[72] Although statutory authority to fund "any law enforcement activity" authorized by state law exists, the Secretary of Defense has limited funding to 16 defined "missions": Surface Reconnaissance; Surface Surveillance; Surface Transportation Support; Aerial Reconnaissance; Aerial Surveillance; Aerial Transportation Support; Ground Radar Support; Cargo Inspection; Training Programs; Aerial Photo Reconnaissance; Coordination, Liaison and Management; Marijuana Greenhouse/Drug Laboratory Detection; Film Processing for Photo Reconnaissance; Administrative, Information, Logistics, and Maintenance Support; Engineer Support; and Aerial Interdiction. DEP'TS OF ARMY & AIR FORCE, ARMY NAT'L GUARD REG., 500-2 / AIR NAT'L GUARD REG. 10-801, NATIONAL GUARD COUNTERDRUG SUPPORT, para. 2-5g (June 1994) [hereinafter NGR(AR) 500-2/ANGR 10-801]; DEP'TS OF ARMY & AIR FORCE, ARMY NAT'L GUARD PAMPHLET 500-2 / AIR NAT'L GUARD PAMPHLET 10-801, para. 2-10 (1993).

duty under the authority of Title 10, where the command and control has changed from state channels and the Governor to federal channels and the President. Considering the requirement for authority under state law,[73] Congress, in enacting § 112, apparently did not intend to intrude on the tradition of the PCA by giving this open-ended law enforcement authority to federal troops. While the statute prohibits funding for personnel in federal service, it is silent as to what other duty statuses may be used. However, both state active duty and Title 32 full-time National Guard duty are not in federal service and, therefore, are consistent with the statutory language regarding the restriction against federal service.[74] Regulation provides the authority for full-time National Guard duty and funding for state active duty.[75]

Application of the PCA to the National Guard

Because the PCA, by its terms, applies to the Army, the first question is whether, or when, it applies to the Army National Guard. The ARNG, that is, the militia, is a part of the Army only when in active federal service. Therefore, the ARNG, by definition, is not within the PCA's coverage.[76]

The PCA's purpose was to protect the states from the abuses of federal troops. The ARNG, unless called into federal service, are not "federal troops." Because command and control remains with the states, the perceived abuses of federal power which the PCA is designed to protect against could not occur. Additionally, because the counterdrug funding statute requires authority under state law and a request by the Governor,[77] further protections exist against federal abuses by giving a state the option to change state law to withhold or withdraw legal authority, or by the Governor simply not requesting the funding.[78]

The PCA provides that it does not apply if the activity is otherwise authorized by the United States Constitution or federal law.[79] Even if full-time National Guard duty were to be considered in federal service or otherwise somehow covered by the PCA, § 112 would constitute an explicit statutory exception.[80] Finally, Congress indicated its belief that the provision of funds for the National Guard counterdrug program does not place the National Guard in federal status for the purposes of the PCA.[81]

Only a few cases dealing with the PCA and the National Guard counterdrug program have resulted. In *United States v. Benish*,[82] the defendant argued that the use of the Pennsylvania National Guard—funded under 32 U.S.C. § 112—by the state police to bivouac on his property, conduct surveillance, and seize contraband violated the PCA. The court ruled that the Guard was not in federal service and, therefore, the PCA did not apply.[83]

---

[73] 32 U.S.C. § 112(f)(1) (1988).

[74] The statute makes some mention of duty status. Title 32 U.S.C. §112(e) provides that members of the National Guard on active duty or full-time National Guard duty for the purpose of *administering* that section are exempt from certain end-strength computations. Active duty Guard personnel assigned to the National Guard Bureau—normally in an Active Guard/Reserve (AGR) status under the provisions of 10 U.S.C. 672(d) and *National Guard Reserve (Army) 600-10*—perform management and administrative functions at that level, but do not perform counterdrug support operations. *See* DEP'T OF ARMY, NAT'L GUARD BUREAU REG. 600-10, ARNG TOUR PROGRAM (NGB CONTROLLED TITLE 10 USC TOURS) (24 Feb. 1983). Additionally, "AGRs" are at the state level (a form of full-time National Guard duty) serving under the provisions of 32 U.S.C. § 502(f) ("other duty") and *Army National Guard Regulation 600-5* who perform similar functions at the state level. Active Guard/Reserve personnel are part of the full-time manning of the reserve components and have the function of "organizing, administering, recruiting, instructing or training the reserve components," and for which there is a separate end-strength authorized. *See, e.g.*, § 412 of Pub. L. 102-484, the National Defense Authorization Act for Fiscal Year 1993.

[75] NGR(AR) 500-2/ANGR 10-801 *supra* note 72, para. 2-8.

[76] *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 16-17 (1972) (Douglas, J., dissenting):

> Whether the "militia" could be given powers comparable to those granted the FBI is a question not now raised, for we deal here not with the "militia" but with "armies." . . . [T]he upshot is that the Armed Services—as distinguished from the "militia"—are not regulatory agencies or bureaus that may be created as Congress desires and granted such powers as seem necessary and proper.

[77] 32 U.S.C. § 112(f)(1) (1988).

[78] The Governor also can choose not to use the funds provided and return them.

[79] *See* the text of 18 U.S.C. § 1385 (1988).

[80] *See, e.g.*, United States v. Kyllo, 809 F. Supp. 787, 793 (D. Ore. 1992).

[81] H.R. CONF. REP. NO. 100-989, 100th Cong., 2d Sess. 217, 455 (1988) *reprinted in* 1988 U.S.C.C.A.N. at 2583.

[82] 5 F.3d 20 (3d Cir. 1993).

[83] *Id.* at 26. While the case is silent as to duty status, the duty was performed in a Title 32 full-time National Guard duty status. The defendant also argued that Pennsylvania state law did not authorize the National Guard to engage in this type of operation, as required by § 112. The court rejected that argument. It stated that § 112 addresses only the requirements for federal funding and by its plain language does not govern the legality of the actions of the National Guard. It cited § 112(d), which provides that nothing in § 112 "shall be construed as a limitation on the authority of any unit of the National Guard of a State, when such unit is not in Federal service, to perform law enforcement functions authorized to be performed by the National Guard by the laws of the State concerned."

United States v. Kyllo supports the above analysis regarding nonapplication of the PCA to the National Guard.[84] In *Kyllo*, the defendant moved to suppress evidence produced as a result of the use of a National Guard member to operate a thermal imaging device, contending that the use of a member of the Oregon National Guard to enforce federal law in the State of Oregon is unlawful under the PCA. The defendant argued that the Oregon National Guard is a component of the federal Army National Guard, which cannot be used for domestic law enforcement without legislative approval.[85] In denying the defense motion, the court stated that the Guard sergeant who

> operated the thermal imaging device, is a member of the Oregon National Guard and is an employee of the State of Oregon until and unless he is called into federal service. The Commander-in-Chief of Staff Sergeant Haas is the Governor of the State of Oregon. The Supreme Court has recognized the dual nature of a National Guard and the fact that National Guardsmen only lose their status as a member [sic] of a state National Guard when they are "drafted into federal service by the President." As a member of the Oregon National Guard, Staff Sergeant Haas is permitted to assist the federal government in law enforcement, as he did here.[86]

The absence of PCA restrictions does not mean, however, that the states, when funded under § 112 authority, are free to do as they please. First, the activity in question must be authorized (either explicitly or implicitly) under state law. By policy, the federal government, in addition to limiting funding to the sixteen missions, has set certain restrictions. For instance, direct participation in arrests, searches, and seizures is precluded, although an exigent circumstances exception exists;[87] surveillance will not be directed at specific individuals;[88] and minimum rules of engagement concerning the use of force exist.[89] While these and other policy restrictions are similar to those of the PCA, and other rules that apply to federal forces,[90] they are not necessarily the same, nor are they as encompassing as the PCA. Therefore, stating that the federal policy is to have the Guard subject to the PCA is incorrect.

Conclusion

Although initial appearances are rather complex, the state-federal nature of the National Guard is easily understood if one grasps the basic concept: the National Guard is a state organization, and retains that character except for the times when its individual members or units are formally called to, or ordered into, federal service. Even though the Guard trains for its federal military mission, and the federal government provides pay and allowances, equipment and supplies, and related expenses, it continues to do so in its state capacity. Most importantly, the Governor continues as Commander-in-Chief. This distinction is especially critical when looking at the purposes of PCA restrictions. Although one might argue that the federal funding and resources, federal statutory and regulatory authority, and certain federal protections and benefits make the Guard a de facto federal organization, the constitutional and legal separation remains clear. Even in a Title 32 status, duty is performed in the capacity of the state National Guard, and this remains true regardless of resourcing by the federal government. Thus, the Guard is "not in federal service" for purposes of 32 U.S.C. § 112 and is not a part of the Army for purposes of the PCA.

---

[84] *Kyllo*, 809 F. Supp. at 787.

[85] *Id.* at 787, 792. The prosecution contended that National Guardsmen play a dual role as both federal and state employees but remain state employees, and therefore, are exempt from the restrictions of the federal Posse Comitatus Act unless they are called into federal service by the President of the United States. *Id.* at 793.

[86] *Id.* (citations omitted). While the court does not refer to duty status, it is the author's understanding that it was performed in Title 32, full-time National Guard duty.

[87] NGR(AR) 500-2/ANGR 10-801, *supra* note 72, para. 2-1d.

[88] *Id.* para. 2-1e.

[89] *Id.* para. 2-2; app. B.

[90] *See, e.g.*, 10 U.S.C. § 375 (1988).

The Survey of Soldiers on Legal Assistance

Colonel Alfred F. Arquilla
Chief, Legal Assistance Division
Office of The Judge Advocate General

Introduction

The Army Personnel Survey Office (APSO), United States Army Research Institute for the Behavioral and Social Sciences (ARI)[1] conducts the Sample Survey of Military Personnel (SSMP) twice a year. The results of the last survey, conducted in the Fall of 1993, included for the first time questions submitted by the Office of The Judge Advocate General (OTJAG) on legal assistance use and client satisfaction.

Army lawyers can take pride in the results of this survey. The survey data indicate that we are providing legal services that fully meet the needs of soldiers throughout the Army and that soldiers are satisfied with the quality of the legal services that they are receiving. In meeting their legal needs, this important quality-of-life (QOL) program is doing its part to foster readiness, high morale, and retention of soldiers throughout the Army.[2]

Survey Methodology

The survey was conducted of Army officers[3] and enlisted soldiers[4] throughout the active component.[5] Army family members will be surveyed at a later time.[6] Those surveyed were selected at random using the last one or two digits of their social security numbers. Approximately ten percent[7] of all officers and two to three percent of all enlisted soldiers were mailed a survey questionnaire. Of those, 4492 officers and 5120 enlisted soldiers returned a completed survey questionnaire. This represents a response rate of about fifty to sixty percent, a relatively high rate in comparison with other ARI surveys. Consequently, any nonresponse bias—that is, the possibility that those not answering the survey had different attitudes or experiences than those answering the survey—is relatively small.

Because of the large size of the sample surveyed, the sampling error (SE) is rather small, particularly with regard to questions answered by almost everyone surveyed, such as possession of an up-to-date will. The SE on the response to this and similar questions was ±4% for warrant officers (WO-1 through MW-4), ±2% for second lieutenants through captains (0-1 through 0-3), and ±2% for majors through generals (0-4 through 0-10). The SE for all officers as a group was ±1%.[8] The SE for each of the three groupings of enlisted soldiers—that is, private through corporal/specialist (E-2 through

---

[1] The author acknowledges the assistance of Ms. June Taylor Jones, who prepared the legal assistance findings of the survey performed by this office, and provided advice, and further statistical research, on this article.

[2] Legal assistance, like Army medical services, housing, logistics support, family programs, and morale, welfare, and recreation (MWR) programs, is a quality of life (QOL) program. During this period of the so-called "downsizing" of the military—including many Army installations—efforts are underway to develop Army QOL guidelines to address the frustration of soldiers and their families as they move from installation to installation and find lack of consistency in the quality of life they experience. *See* Memorandum, Department of the Army, Assistant Chief of Staff for Installation Management, to the Senior Staff Council Members, subject: Quality of Life (QOL) Guidelines (18 March 1994).

[3] Unless indicated otherwise, all statistics on officers include both commissioned and warrant officers.

[4] Private E-1s were not surveyed because most soldiers of this rank are in basic or advanced individual training, have no permanent duty assignment, and have too little experience with the military to have a basis for an opinion on many of the subjects addressed by ARI surveys. For legal assistance, this means that the use of legal assistance by enlisted soldiers is somewhat understated. This omission may also skew some of the other statistics, such as those on client satisfaction and possession of up-to-date wills, but, in the author's opinion, not to any appreciable degree.

[5] The survey excluded all other categories of eligible legal assistance clients, such as family members, other military service members, and all military retirees. It also excluded other categories, such as Reserve officers and enlisted soldiers and Department of Defense civilian employees, who, under certain circumstances, are authorized legal assistance. *See* DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 2-5 (30 Sept. 1992) [hereinafter AR 27-3].

[6] Many of those responding may have answered the survey based on legal services received by both the soldier and his or her spouse and children. In some instances, for example, both the soldier and spouse may have obtained wills or powers of attorney, or sought help together on a legal problem they shared, or the soldier may have sought assistance on behalf of a son or daughter, such as legal advice on handling a traffic ticket received by the child.

[7] Throughout this article, percentages are rounded out to the nearest whole number. Thus, 4.4% is rounded to 4% and 4.5% is rounded to 5%. An asterisk (*) is used to denote percentages less than 0.5%. Because percentages are rounded, the totals for various data subgroups do not always equal 100%.

[8] For example, if, as indicated below, 65% of all officers surveyed responded that they have an up-to-date will, an SE of ±1% means that there is a 95% probability that the percentage of officers who have an up-to-date will in the total population of all Army officers falls within the range of 64% to 66%. ARI guidance provides that data with an SE of ±5% is acceptable; data with an SE between ±6% and ±10% should be used with caution; and data with an SE greater than ±10% should not be used at all.

E-4), sergeant through staff sergeant (E-5 through E-6), and sergeant first class through command sergeant major (E-7 through E-9)— was ±2%. For all enlisted soldiers as a group, the SE was ±1%. The SE is larger for any grouping of officers and enlisted soldiers for survey data based on questions not answered by every soldier responding to the survey.[9] Where this is the case, the higher SE is indicated in this article.

Legal Assistance Services

Those surveyed were asked about their use of—and satisfaction with—legal-assistance-type services from all sources,[10] limited, however, to the twenty-four months prior to completing the survey. This is roughly the period following the 1991 Persian Gulf War, from the Fall of 1991 through the Fall of 1993. A longer period than twenty-four months was not used because of the desire to obtain current statistics on legal assistance use and satisfaction. On the other hand, a shorter period, such as twelve months, was rejected because it was feared that use of any particular legal service during a shorter period would be too small, thereby increasing the SE for each question answered.

Of those responding to the survey, sixty-seven percent of the officers and fifty-two percent of enlisted soldiers received some form of legal assistance from the military during the past twenty-four months.[11] Not surprisingly, married soldiers utilize legal assistance more frequently than single soldiers. During the twenty-four months prior to completing the survey, about seven out of ten married officers (sixty-nine percent) and enlisted soldiers (seventy percent) and one out of two single officers (fifty-three percent) and enlisted soldiers (forty-five percent) received legal assistance from the military. These percentages represent significantly large numbers, particularly when considered in light of similar statistics on soldier use of many of the Army's family and MWR programs.[12]

Those surveyed also were asked to indicate whether, during the same period of time, they had received legal services on the same type of matters from attorneys in private practice. Of those responding to the survey, twenty-six percent of the officers and twenty-four percent of enlisted soldiers responded that they had received such services.

The following table is a breakdown by military pay grade depicting the percentage of all those responding to the survey who received help from legal assistance attorneys ("M") and the percent of all those responding who received help from attorneys in private practice ("C"):

	M	*C*
E-2 thru E-4	42%	20%
E-5 thru E-6	61%	29%
E-7 thru E-9	66%	28%
WO-1 thru MW-4	68%	28%
0-1 thru 0-3	64%	20%
0-4 thru 0-10	70%	34%

Many undoubtedly received legal help from both legal assistance attorneys and attorneys in private practice on the same or different legal problems, and were allowed to indicate this on the survey. Helping clients with referrals to lawyers in and outside the military is one of the more important legal assistance services within the Army, particularly with regard to matters requiring in-court representation and on matters outside the scope of the legal assistance program.[13] Nevertheless, the survey data indicates that both officers and enlisted

---

[9] For example, the number of officers indicating whether or not they have an up-to-date will—which includes all officers surveyed—is far larger than the number of *divorced* officers indicating whether or not they have an up-to-date will. The SE for the former, as previously indicated, is ±1% while the SE for the latter is ±7. The former grouping contains fairly reliable data while the latter grouping contains data that should be used only with caution. For the same reason, the SE increases—thereby making the data less reliable—if the survey data are further broken down into other subgroups, such as by the major command or installation assignment of each soldier responding to the survey.

[10] Soldiers were asked about their use of—and satisfaction with—"*professional* legal services . . . received for *personal legal matters* only." They were cautioned that the survey questions "do *not* pertain to legal services that you may have received from Trial Defense Service (TDS) (such as courts-martial, Article 15, etc.) or for claims (such as shipping damage to household goods, POVs, etc.)." Legal services from the following sources were addressed: "Military legal assistance attorney/staff," "civilian (private practice) attorney/staff," and "other." As expected, the response for "other" was negligible—almost always under one to two percent for officers and four to five percent for enlisted soldiers. The exceptions were "taxes," obviously reflecting the use of commercial tax preparers, where the figures were five percent for officers and nine percent for enlisted soldiers, and advice/help on SGLI, probably reflecting advice from nonlegal third parties, where the figures were eight percent for both officers and enlisted soldiers. The discussion of the use of "other," the makeup of which is speculative at best, is not addressed in this article except for tax assistance services. *See* Mark Hansen, *A Shunned Justice System,* A.B.A.J., Apr. 1994, at 18, in which the author, citing a survey conducted by the American Bar Association's Consortium on Legal Services during 1992, concludes that about half of all low and moderate income families in the United States with a legal need attempt to deal with the problem themselves, turn to nonlegal third parties for help, or take no action at all.

[11] The survey measured legal assistance services received by Army officers and enlisted soldiers from all military legal offices regardless of the military legal office's departmental affiliation. However, because it is beyond dispute that the overwhelming number of soldiers who receive legal assistance receive that assistance from Army legal offices, the survey results can be deemed an accurate reflection of Army legal assistance services.

[12] Because of its different funding and supervision, the Army legal assistance program is generally not considered a family or MWR program. Nevertheless, the use of legal assistance compares favorably to such programs. For example, less than ten percent of single soldiers report *using* relocation counseling, crisis hot line, emergency long-distance telephone calls, or premarriage counseling. Although soldiers are more aware of the various MWR programs—such as, indoor gym activities, bowling, music and theater, and youth activities—their use of these activities is "sporadic" and they often prefer civilian services. Segal & Harris, *What We know about Army Families,* U.S. ARMY RESEARCH INSTITUTE FOR THE BEHAVIOR AND SOCIAL SCIENCES, 46-48 (Sept. 1993).

[13] *See* AR 27-3, *supra* note 5, paras. 3-7g, h, i; 3-8.

soldiers, regardless of rank, rely far more on the legal assistance program than civilian attorneys in private practice for handling most of their legal problems and needs. Not surprisingly, the survey also indicates that officers and enlisted soldiers utilize legal services from both sources with increasing frequency as they advance in rank, and, presumably, as they grow older and acquire more property and additional family and other responsibilities.

Following the format of the legal assistance report,[14] those surveyed *who received legal help* also were asked about the types of legal cases in which they sought that help. The following table depicts—using the exact language contained in the survey—the percentage of those responding to the survey who received help from legal assistance attorneys and the percent of those responding who received help from attorneys in private practice by category of case:

Category of Cases	Officer		Enlisted	
	M	*C*	*M*	*C*
Administrative matters (*e.g.*, powers of attorney, notarizations, name changes, immigration)	50%	2%	39%	3%
Estate matters (*e.g.*, wills, probate, trusts, Servicemen's Group Life Insurance (SGLI))	38%	3%	8%	3%
Taxes (*e.g.*, income tax returns, inheritance)	11%	8%	14%	11%
Military administrative (*e.g.*, line-of-duty investigations, reports of survey, evaluation reports)	21%	*	10%	1%
Real property matters (*e.g.*, purchase/sale/lease of home)	5%	15%	5%	8%
Personal property matters (*e.g.*, contracts, warranties, consumer affairs)	5%	4%	6%	5%
Family matters (*e.g.*, divorce, paternity, child support/custody)	5%	5%	7%	7%
Financial matters (*e.g.*, debts, bankruptcy, property insurance)	2%	6%	5%	6%
Torts (*e.g.*, accidents, medical insurance	2%	2%	3%	3%
Civilian criminal matters (*e.g.*, juvenile proceedings)	1%	1%	3%	3%
Other	1%	*	2%	2%

Those responding were asked to indicate all categories of cases in which they received legal assistance. Therefore, more than one category of case may have been indicated by some of those responding to the survey. Not surprisingly, both officers and enlisted soldiers indicate that they receive most of their legal services in the military. For both officers and enlisted soldiers, the four largest categories of legal assistance cases were, in decreasing order: administrative matters, military administration, estate matters, and taxes. These data indicate that for just one category of legal case—that is, administrative matters—fifty percent of all officers and thirty-nine percent of all enlisted soldiers on active duty during the past two years received legal assistance. For legal services obtained from attorneys in private practice, the two largest categories for both officers and enlisted soldiers, although on a much smaller scale, were real property matters and taxes. Financial and family matters were a close third for enlisted soldiers.

Legal Documents

Lawyers frequently are called on to draft legal documents, to review legal documents drafted by others, and to provide advice on completing legal documents to be filed with courts and other governmental bodies. These legal services occur, from time to time, in just about every type of legal case, and are important to clients seeking help on their legal problems and needs.[15]

Those responding to the survey were asked whether, during the last twenty-four months, they "obtained professional legal advice/help on" certain legal documents, and if so, from whom did they receive that help. The following table depicts, using the exact language contained in the survey, the percentage of those responding to the survey who received help on the legal documents listed below from legal assistance attorneys and the percentage of those responding who received help from attorneys in private practice:

	Officer		Enlisted	
	M	*C*	*M*	*C*
Power of attorney	53%	2%	44%	2%
Last will and testament	39%	2%	31%	3%
Servicemen's Group Life Insurance (SGLI) form	27%	1%	33%	1%
Health care directives (such as a living will)	8%	1%	9%	1%
Lease	4%	6%	6%	4%
Bill of sale	4%	4%	5%	4%
Contract	3%	5%	5%	4%
Marital separation agreement	2%	3%	5%	3%
Trust (outside the will)	2%	2%	5%	2%

Approximately half of all officer and enlisted soldiers have obtained powers of attorney during the past two years. Undoubtedly, a large number of these soldiers obtained their

[14] Dep't of Army, DA Form 4944-R, Report on Legal Assistance Services. *See* AR 27-3, *supra* note 5, para. 5-3.

[15] *See* AR 27-3, *supra* note 5, para. 3-7 e, f.

powers of attorney during readiness exercises, in addition to those who obtained them for particular purposes, such as to sell or transfer property or assist a spouse in handling personal family affairs during an anticipated absence.

The strong reliance on legal advice by both officers and enlisted soldiers in making their SGLI beneficiary designations is especially gratifying. An important lesson from the Persian Gulf War and the 1985 Gander crash is that obtaining legal advice on making certain SGLI beneficiary designations is often more important for many soldiers than obtaining a will, especially now that the maximum amount of SGLI coverage has been increased to $200,000. By regulation, legal assistance attorneys are now required to advise soldiers on their SGLI beneficiary designations whenever they assist them during the course of drafting or updating their wills.[16]

Wills

Sixty-five percent of all officers and forty-three percent of all enlisted soldiers responding to the survey report having up-to-date wills. Whether a will was up to date was left to the individual judgment of those surveyed. However, the large number of officers and enlisted soldiers indicating that they have up-to-date wills roughly corresponds with the number of those who sought legal assistance on estate matters (which includes wills) during the last twenty-four months, reflecting, perhaps, that many soldiers have wills that have been updated recently. The following table depicts the breakdown by military pay grade of those indicating they have up-to-date wills:

Pay Grade	*Percent with up-to-date wills*
E-2 thru E-4	29%
E-5 thru E-6	55%
E-7 thru E-9	63%
WO-1 thru MW-4	69%
0-1 thru 0-3	57%
0-4 thru 0-10	76%

The following table depicts the marital status of officers and enlisted soldiers stating they possessed up-to-date wills:

Percent with Up-To-Date Wills

Marital Status	*Officer*	*SE*	*Enlisted*	*SE*
Single	45%	± 4%	25%	± 3%
Married	70%	± 2%	50%	± 2%
Separated	63%	±11%	40%	± 7%
Divorced	63%	± 7%	51%	± 7%
Widowed	55%	±22%	42%	±22%
Remarried	70%	± 4%	60%	± 5%

An initial glance at these data might suggest that more effort needs to be made assisting enlisted soldiers in the lower grades with obtaining wills, particularly those who are single. On the other hand, one might conclude that these statistics do not reveal a problem because enlisted soldiers in the lower grades—particularly those who are single—in most instances do not need wills. The exceptions would be those who are sole parents or possess a large amount of property—presumably, a small minority, but soldiers, who, nevertheless, should be targeted as part of the Army's will execution efforts.

A greater effort also must be made in providing wills to officer and enlisted soldiers of all grades who are separated, divorced, widowed, or remarried.[17] In most cases, they have a greater need for wills than soldiers in first marriages who often own most of their property in joint tenancy with their spouses.

Income Tax Assistance Services

Within the Army, tax assistance services continue to be an important aspect of legal assistance.[18] Most legal assistance offices, often using volunteers, assist clients with preparing their federal and state income tax returns, and provide electronic filing of federal income tax returns. For clients entitled to federal tax refunds because of overwithholding or overpayment of taxes, electronic filing will produce refund payments within a period of about two weeks.

All those responding to the survey were asked "which *one* of the following reasons comes closest to explaining why you do not use the free tax assistance services provided by the Army?" The question is not tied to any particular time period. The following table depicts, using the exact language contained in the survey, the percentage of officers and enlisted soldiers responding to the survey who use Army tax assistance services, and, for those who do not, the percent of officers and enlisted soldiers responding to the survey who gave the reasons listed below for *not* using those services:

	Officer	*Enlisted*
Does not apply; I *do* use the Army free tax assistance	18%	29%
I prepare my own income tax return.	53%	31%
My spouse/a relative/friend prepares my tax return.	7%	9%
I prefer a civilian tax preparer.	13%	13%
I did not know the Army provided free tax assistance.	4%	8%
On my installation, there is no free tax assistance.	1%	1%

[16] *Id.* para. 3-5b.

[17] The SE on the data pertaining to officers and enlisted soldiers who are widowed and on officers who are separated exceeds ±10%. The data on up-to-date wills for these soldiers is not usable. The SE on officers and enlisted soldiers who are divorced and on enlisted soldiers who are separated equals ±7%. This data should, therefore, be used with caution. *See supra* note 8.

[18] *See* AR 27-3, *supra* note 5, paras. 3-6i, 3-7f(1).

	Officer	*Enlisted*
It takes too long to obtain tax assistance through the Army.	3%	5%
Electronic filing was not available for me.	*	1%
The Army does not offer a loan program against refund amounts.	*	2%
Other.	3%	2%

The survey reveals that sixty percent of officers and forty percent of enlisted soldiers either prepare their own income tax returns or rely on a spouse, relative, or friend to prepare them. This is not to say that these officers and enlisted soldiers do not rely on the Army to provide information about federal and state income tax return preparation, or the tax forms needed to prepare those returns. As any legal assistance attorney knows, a great amount of time and effort is devoted to providing information and tax forms to individual clients, and to the military community at large.

The Army's primary efforts in this area, however, focus on helping those who need assistance in preparing their returns. That so many are able to prepare their own returns without assistance allows the Army to concentrate on helping the many who do need help with their returns. In this important area, the Army provides free tax assistance to almost one out of five officers and one out of three enlisted soldiers. Unlike many commercial tax preparation businesses, our tax assistance services do not revolve around high-interest loan gimmicks designed to relieve soldiers of part of their tax refunds, but are focused on providing high quality tax assistance services and timely information to soldiers and other eligible clients, many of whose tax problems have become complicated by military service.

The survey was not intended to measure the number of those who use commercial tax preparers, although those numbers can be gleaned from the foregoing data. These numbers do not exceed twenty-three percent of officers or thirty-one percent of enlisted soldiers.[19] And here, the use of commercial tax preparers appears to be more one of preference as opposed to any deficiencies in Army tax assistance services.

Satisfaction with Legal Services

Finally, those surveyed who obtained legal help during the last twenty-four months were asked about their level of satisfaction with the legal services they received. The following table depicts, with regard to those who *received* legal assistance or legal services from attorneys in private service during the past two years, the degree of satisfaction or dissatisfaction expressed by clients with legal services from each of those sources:

Satisfaction with legal Services	Officer		Enlisted	
	M	*C*	*M*	*C*
Extremely satisfied	24%	20%	21%	22%
Very satisfied	49%	43%	41%	34%
Moderately satisfied	19%	24%	25%	27%
Slightly satisfied	5%	7%	6%	9%
Not satisfied	2%	6%	6%	8%
SE	±2%	±3%	±2%	±9%

Officers and enlisted soldiers are satisfied with the legal services that they are receiving from all sources. Officers are slightly more satisfied than enlisted soldiers with legal assistance services, but neither category indicates any significant degree of dissatisfaction with legal services from any source.

The following table depicts the degree of satisfaction or dissatisfaction, with legal assistance services only, among the different subgroups of officers and enlisted soldiers who responded that they *received* legal assistance services during the past two years.

Satisfaction with Legal Assistance	*E2-4*	*E5-6*	*E7-9*	*W1-4*	*O1-3*	*O4-10*
Extremely satisfied	19%	22%	25%	21%	23%	27%
Very satisfied	38%	41%	48%	49%	50%	48%
Moderately satisfied	29%	25%	18%	20%	20%	18%
Slightly satisfied	7%	6%	5%	5%	5%	5%
Not satisfied	7%	5%	5%	4%	2%	2%
SE	±3%	±3%	±3%	±5%	±3%	±3%

[19] These figures assume that those surveyed who responded that they did *not* use the Army's free tax assistance, did *not* prepare their own returns, and did *not* have a spouse, relative, or friend prepare returns, obtained tax assistance from commercial tax preparers. The following table depicts, with regard to officers and enlisted soldiers who *received* commercial tax preparation services, the degree of customer satisfaction or dissatisfaction during the past twenty-four months with those services:

	Officer	*Enlisted*
Extremely satisfied	25%	22%
Very satisfied	41%	37%
Moderately satisfied	22%	25%
Slightly satisfied	7%	9%
Not satisfied	5%	6%
SE	±3%	±8%

The foregoing does not measure the degree of satisfaction or dissatisfaction with any particular private or commercial tax preparer because certified public accountants, bookkeepers, and independent and commercial-chain tax preparers fit into the category of "commercial tax preparers." However, the survey excluded attorneys in private practice from this category.

Again, little difference exists among the various military grade subgroups of officers and enlisted soldiers in their satisfaction with legal assistance services. High ranking officers appear to be as satisfied with legal assistance as low ranking enlisted soldiers. Eighty-six to ninety-three percent of all officers and enlisted soldiers, regardless of their military grade subgroup, indicate that they are moderately to extremely satisfied with legal assistance services. Fifty-seven to seventy-five percent of all officers and enlisted soldiers, regardless of their military grade subgroup, indicate that they are very to extremely satisfied with legal assistance services. Although a majority of enlisted soldiers in the grades E-2 through E-6, gave legal assistance these highest two ratings, the percentages ranged from fifty-seven percent to sixty-three percent.

Very few officers or enlisted soldiers, regardless of their military grade subgroup, indicate that they are only slightly satisfied, and even fewer indicate outright dissatisfaction. Nevertheless, the survey data does indicate that greater attention needs to be given in ensuring that the degree of dissatisfaction is kept to a bare minimum and that we do all we can do for soldiers of all grades, and other clients, within the resources available to us.

Conclusion

Given the often expensive nature of legal services in the private sector, the legal assistance program saves soldiers millions of dollars each year in unnecessary legal costs. Furthermore, the legal assistance program's educational and other preventive law efforts avert many legal problems from ever occurring, particularly in the consumer law area, and the success of those efforts are not susceptible to statistical measurement. The program's overall value in terms of soldier morale, readiness, and retention are well known and beyond dispute.

The survey validates what many of us already knew about our legal assistance program. We are doing great work on behalf of soldiers, and they appreciate our efforts in their behalf. Although we cannot rest on our laurels and must continue our efforts to excel even further, it is gratifying to know that we have a program, without equal, of which we can all be proud.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin (Bulletin)*, designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue (volume 1, number 7) is reproduced below:

Water Law

Energy and Water Conservation

On 8 March 1994, the President signed Executive Order (EO) 12,902, Energy Efficiency and Water Conservation in Federal Facilities. The EO establishes a comprehensive energy and water conservation program for federal facilities and implements the federal energy management provisions of the Energy Policy Act of 1992. Through the use of mandatory conservation, incentives for new technology, and implementation of available technology, the EO's goals are to reduce energy use in federal buildings and facilities by thirty percent and improve industrial energy efficiency by twenty percent by 2005. The EO requires agencies to implement all cost effective water efficiency and conservation measures. The lead agency is the Department of Energy. The Department of Defense (DOD) is developing guidance, which should be available within the next few months.

Clean Water Act Reauthorization Update

The House now has a comprehensive Clean Water Act reauthorization bill, H.R. 3948. The Senate has marked up S.1114. The Senate bill includes some provisions from the President's Clean Water Initiative and incorporates provisions from other bills. Both the House and Senate bills include waivers of sovereign immunity for federal facilities, enhanced enforcement authorities, to include citizen suits for past violations, and nonpoint source and watershed planning requirements.

Army Environmental Manager's Handbook Series—Water Quality Management

The United States Army Construction Engineering and Research Laboratories (USACERL), Corps of Engineers, is developing a series of handbooks for environmental managers

and installation personnel who are recently hired or working outside their area of expertise. The latest draft in the series is the "Water Quality Management" handbook. The USACERL sent this draft to the MACOMs and field agencies for review and comment. We encourage environmental law specialists (ELS) to review and comment on this draft. Additionally, ELS should ensure that appropriate MACOM and installation staff are aware of the handbook series and the titles that will be available (such as, Clean Air Act, Endangered Species, Asbestos Management). Lieutenant Colonel Graham.

Clean Air Act (CAA)

Transportation Control Programs and Transportation Incentives

An increasing number of Army installations are subject to mandatory state and local transportation control programs (TCP) to reduce air pollution from motor vehicles. For areas that the Environmental Protection Agency (EPA) has classified as severe or extreme ozone or serious carbon monoxide nonattainment areas, states must implement TCPs to reduce the vehicle miles traveled within those areas (CAA §§ 182(d)(1)(A); 187(b)(2)).[1] In other areas, even though not required, states may enact such programs as a means of attaining or maintaining National Ambient Air Quality Standards (NAAQS) for ozone and carbon monoxide (CAA § 116).[2] Section 108(f) of the CAA specifically lists "employer-based transportation management plans, including incentives," as one of the measures available to states and localities to meet the above CAA requirements.[3] Transportation control programs that are required by the CAA, at a minimum, must require employers of 100 or more persons to "increase average passenger occupancy per vehicle in commuting trips between home and the workplace during peak travel periods by not less than 25 percent" (CAA § 182(d)(1)(B)).[4]

Transportation control programs can include requirements for employers to provide "transit passes" and other financial incentives or subsidies to employees to reduce vehicle miles traveled and the resulting air pollution. The Comptroller General has opined that the waiver of sovereign immunity in CAA § 118 "provides the statutory basis for an agency's use of appropriated funds to comply with a state regulation under which employers *are required* to provide financial incentives to employees for commuting to work by means of public transportation, carpooling and vanpooling, bicycling, and walking."[5] Under this decision, based on CAA § 118, DOD departments must provide financial subsidies or incentives if *required* by a state or local transportation control program.

Additionally, Public Law (P.L.) 103-172,[6] effective 1 January 1994, specifically authorizes federal agencies to use appropriated funds to provide military and civilian employees with "transit passes (including cash reimbursements therefor, but only if a voucher or similar item which may be exchanged only for a transit pass is not readily available for direct distribution by the agency)."[7] The law adopts the definition of "transit pass" contained in the Internal Revenue Service Code.[8] The latter section defines "transit pass" to mean "any pass, token, farecard, voucher, or similar item entitling a person to transportation" on mass transit facilities and on certain commercially operated van and bus services.[9] Consequently, under P.L. 103-172, even if not required by a state or local transportation control program, federal agencies may provide "transit passes," if permitted under agency policy. Additionally, P.L. 103-172 allows DOD departments to provide space, facilities, or services to bicyclists; and other nonmonetary incentives otherwise permitted by law.

Current DOD policy does not allow the payment of transportation incentives or subsidies *(including transit passes)* to employees under any circumstances. The policy is currently under review. We expect that the DOD will change its policy to allow payment of incentives or subsidies if specifically *required* by law and, possibly, in other cases when necessary to meet CAA requirements.

Neither P.L. 103-172 nor CAA § 118 provide authority for DOD departments to *voluntarily* provide financial incentives to employees who commute to work by means other than public transportation (such as, carpooling, bicycling, walking).

---

[1] 42 U.S.C. § 7511(a)(d)(1)(A); 7512(a).

[2] *Id.* § 7416.

[3] *Id.* § 7408.

[4] *Id.* § 7511(a)(d)(1)(B).

[5] *See* B-250400, Comp. Gen. 4-5 (28 May 1993) (emphasis added).

[6] Pub. L. No. 103-72, 107 Stat. 1995 (1994).

[7] *Id.*

[8] 26 U.S.C. § 132(f) (1994).

[9] *Id.*

Conformity Determinations

Early experience has shown that legal counsel need to actively participate in determining the applicability of the new conformity rule[10] and in making conformity determinations under the rule. For actions requiring a conformity determination under the rule, counsel should coordinate with the MACOM ELS and the ELD early in the planning process.

Title V Operating Permit Program Update

The EPA has decided to repropose that portion of its Title V Operating Permit Program Rule,[11] dealing with operational flexibility under an operating permit. Considering that most states have already submitted Title V programs to the EPA for approval and that many installations will have to submit Title V permit applications to the states in 1994 and 1995, the EPA's decision will further complicate the permit application process for installations. Therefore, ELSs should be actively involved in installation planning to meet Title V requirements. Title V permitting will be a challenge for everyone involved.

To assist installations, the United States Army Environmental Hygiene Agency (USAEHA) is preparing a guide, entitled "Title V Permit Assistance Guide for Army Installations and Activities." The guide should be available within the next month. To get on the mailing list contact USAEHA, ATTN: Ms. Polyak, Aberdeen Proving Ground, Maryland 21010-5422. Major Teller.

Endangered Species (ESA)

ESA § 9 "Take" Prohibition

Section 9(a)(1)(B) of the ESA prohibits the "taking" of any endangered wildlife species. Section 3(19) broadly defines "take" to mean: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct." The implementing Department of Interior (DOI) regulation defines "harm," as used in the definition of "take," to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[12] In a major setback for the DOI, the D.C. Circuit, in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, Secretary of the Interior*,[13] held that the destruction of habitat, without a showing of direct injury to wildlife, is not sufficient to constitute a "taking" under ESA § 9. In essence, the court found that the destruction of habitat leading indirectly to injury to a listed species is not sufficient to constitute a violation of § 9. Consequently, the court held invalid the DOI regulation that defines "harm" to include habitat modifications. *Sweet Home*, considering the broad venue of the D.C. Circuit, casts uncertainty over the nationwide enforcement of § 9(a)(1)(B) regarding habitat modifications. The DOI has decided to continue to enforce ESA § 9 as it has in the past, pending a request for a rehearing en banc. Section 9 has been the primary means of protecting listed species habitat on private lands. While federal agencies are subject to ESA § 9(a)(1)(B), unlike private entities, federal agencies also are precluded from modifying or destroying listed species habitat under ESA § 7. Under *Sweet Home*, however, agencies would not have to worry about a "take" resulting from habitat destruction. Major Teller.

---

[10] 40 C.F.R. pt. 93 (1994).

[11] *Id.* pt. 70 (1994).

[12] 50 C.F.R. § 17.3 (1994).

[13] No. 92-5255, 1994 U.S. App. LEXIS 4341 (D.C. Cir. Mar. 11, 1994).

International and Operational Law Division Notes

International and Operational Law Division, OTJAG

International Law Note

International Training Activities

International Training Generally

The international scope of United States Army missions is increasing. Greater emphasis on international peacekeeping and the trend toward coalition contingency operations are but two of several reasons why Army commanders are attempting routinely to incorporate international units and personnel into United States Army training and exercise initiatives. This is both logical and necessary, but current laws and policies present unfamiliar challenges to many Army planners. This note summarizes common programs and legal challenges that commanders and legal advisors must address before these initiatives become formal invitations for international personnel to participate.

The General Rule

Under the Foreign Assistance Act[1] and Armed Export Control Act[2] United States forces generally may not train foreign forces unless such training is conducted under security assistance regulations.[3] Further, with very limited exceptions, appropriated funds may not be used to pay the expenses of foreign units associated with their participation in combined exercises.[4] Thus, appropriated funds may not ordinarily be used to pay the unreimbursed costs of support and services.

Training v. Exercising

Initially differentiating between "training" and "exercises" is important. This often is a very fine distinction, but one which makes a vital difference in associated legal requirements. Essentially, training is teaching or validating concepts or procedures not previously known or mastered. Exercising is practicing what is already known well. United States forces may exercise with international units, so long as participants pay their fair share of support costs. We may not train international personnel, however, unless we are paid for the value of the training received under a foreign military sales (FMS) case or other security assistance arrangement. NATO units often exercise together to practice interoperability challenges. United States forces do not routinely train NATO units, however, in the underlying doctrinal or operational concepts being practiced. International units participating in training rotations at either the Joint Readiness Training Center (JRTC) or the National Training Center (NTC), for example, must pay for the value of the training under security assistance regulations, unless careful planning organizes particular rotations to serve as combined exercises or the rotations fit within one of the exceptions discussed below.

Legislative Exceptions to the General Rules

A few exceptions to these general rules exist. They include the following:

(1) Title 10 U.S.C. § 2010[5] permits payment of incremental expenses for participation of developing countries in combined exercises. The legislation does not permit paying for training. Among prerequisites, the Department of Defense (DOD) must consult with the Department of State. The DOD reports annually to Congress.

(2) Title 10 U.S.C. § 2011[6] permits United States special operations forces to train, and train with, friendly foreign forces. The DOD has opined that the legislative history of this legislation makes it clear that it applies only overseas. The DOD may pay incremental expenses incurred by friendly developing countries as the direct result of such training. Training must primarily benefit United States special operations forces. The DOD reports annually to Congress.

(3) Title 10 U.S.C. § 1050[7] permits the Secretary of the Army to approve payment of travel, subsistence, and special compensation of officers and students of Latin American countries, and other necessary expenses for Latin American cooperation. The HQDA proponent for this program is ODCSOPS, ATTN: DAMO-SSM.

(4) Title 22 U.S.C. 2770a[8] permits reciprocal unit exchanges in accordance with a bilateral international agreement. This permits United States Army units to train and support foreign units, including training at JRTC or NTC, provided that they reciprocate with equivalent value training within one year. This statute is implemented by *Army Regulation (AR) 12-15*,[9] a tri-Service regulation. Training must be as a unit. Chief of Staff, Army, is the approval authority. Reciprocity must occur within twelve months; if not, the foreign force must reimburse the DOD for the value of the training and the support received. The DOD reports annually to Congress. The HQDA proponent is ODCSOPS, ATTN: DAMO-TRO.

(5) Title 10 U.S.C. chapter 138[10] outlines authority to enter into bilateral or multilateral mutual support agreements with NATO and other allied countries. Agreements outline order-

---

[1] 22 U.S.C. §§ 2151-2429 (1988).

[2] *Id.* §§ 2751-2796.

[3] *See, e.g.*, DEP'TS OF ARMY, NAVY, & AIR FORCE, REG. 12-15, SECURITY ASSISTANCE AND INTERNATIONAL LOGISTICS: JOINT SECURITY ASSISTANCE TRAINING (JSAT) REGULATION (28 Feb. 1990) [hereinafter AR 12-15]. An exception for certain special operations forces training is discussed *supra*.

[4] *Id.* ch. 5 sect. III.

[5] 10 U.S.C. § 2010 (1988).

[6] *Id.* § 2011.

[7] *Id.* § 1050.

[8] 22 U.S.C. 2770a (1988).

[9] *See* AR 12-15, *supra* note 3.

[10] 10 U.S.C. ch. 138 (1988).

ing, delivery, pricing, and reimbursement procedures for providing logistics support and services. Reimbursement, in cash or in kind, is required under the specific terms of each agreement.[11] This legislation does not provide independent authority for the underlying training or exercise.

(6) Title 10 U.S.C. § 166a[12] permits the Chairman, Joint Chiefs of Staff, to provide commanders of unified and specified commands with "CINC initiative funds" for various purposes, including such international activities as humanitarian and civic assistance; military education and training to military and related civilians of foreign countries; and bilateral or multilateral cooperation programs. These funds are not available for activities that have been denied authorization by Congress.

(7) Specific annual appropriations permit the DOD to promulgate procedures for other international activities, such as expanded military-to-military contacts, international training to enhance human rights and democratic principles, and training of counterdrug law enforcement agencies. These authorities change annually in their scope and amount of appropriations.

Other International Programs

Two other common international activities require mention: the Personnel Exchange Program (PEP) and foreign liaison officers.

Personnel Exchange Program personnel integrate into host nation forces under the specific terms of an international agreement. Thus, a foreign officer may perform as part of a United States Army unit staff, and vice versa. These are PCS assignments for a period of years. The United States Army has several such agreements. Exchanges must be reciprocal. Title 31 U.S.C. § 1342 generally bars United States acceptance of voluntary services (that is, "one-way" exchange).[13] Personnel Program Exchange personnel may not also act as liaison officers. Department of Defense Directory 5230.20[14] and *AR 614-10*[15] outline substantive and procedural rules. The HQDA proponent is ODSCOPS, ATTN: DAMO-SSF.

Foreign liaison officers formally represent their parent service. Their activities must be limited to the representational responsibilities of their government described in the United States certification. They may not integrate into a United States Army position. Security managers are responsible for drafting appropriate information disclosure documents. Department of Defense Directive 5230.20 and *AR 380-10*[16] outline substantive and procedural rules. The HQDA proponent is ODCSINT, ATTN: DAMI-CIT.

Department of Defense Directive 5230.20 and *AR 380-10* governs visits by foreign personnel to DOD components, as well as various disclosure authorities. Requests for visits must be sent by the foreign government's military attache to the HQDA proponent, ODCSOPS (DAMI-CIT) at least thirty days before the visit begins.

Summary

The laws and policies governing the training and exercising with foreign forces are narrowly crafted. Army planners must carefully design training of, or exercising with, foreign forces, and must learn to coordinate proposed international activities with their legal advisors well in advance of proposed activities. Legal advisors must be sensitive to the fiscal restraints highlighted above. Lieutenant Colonel Dubia.

---

[11] *See also* DEP'T OF ARMY, REG. 12-16, SECURITY ASSISTANCE AND INTERNATIONAL LOGISTICS: MUTUAL LOGISTICS SUPPORT BETWEEN THE UNITED STATES AND GOVERNMENTS OF ELIGIBLE COUNTRIES (6 Jan. 1992); Stationing Agreement (STANAG) 3381.

[12] 10 U.S.C. § 166a (1988).

[13] 31 U.S.C. § 1342 (1988).

[14] DEP'T OF DEFENSE, DIRECTIVE 5230.20, VISITORS AND ASSIGNMENTS OF FOREIGN REPRESENTATIVES (24 Apr. 1992).

[15] DEP'T OF ARMY, REG. 614-10, ASSIGNMENTS DETAILS AND TRANSFERS: UNITED STATES ARMY PERSONNEL EXCHANGE PROGRAM WITH ARMIES OF OTHER NATIONS (1 July 1977).

[16] DEP'T OF ARMY, REG. 380-10, SECURITY: DISCLOSURE OF INFORMATION AND VISITS AND ACCREDITATION OF FOREIGN NATIONALS (29 July 1988).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

Do You *Really* Want a Lawyer?

On 29 March 1994, the Supreme Court heard argument in the case of *Davis v. United States,*[1] one of the few military cases heard by the Court that could have precedential significance outside the military arena. In a case that could impact thousands of state and federal criminal investigations, the Court confronted the question of how a criminal investigator should respond when a suspect being questioned makes either an equivocal request for counsel or an ambiguous statement that might be interpreted as a request for counsel.

Seaman Apprentice Davis, suspected of killing a fellow sailor with a pool cue for refusing to pay a pool wager, was escorted to the Naval Investigative Service (NIS) at Charleston Naval Base to be interviewed.[2] After being advised of his Article 31(b)[3] rights, Davis executed a written waiver of his rights.[4] The NIS agents then interrogated Davis while he sat handcuffed to a chair.

Over one hour after Davis's interrogation had commenced and after he explicitly and unequivocally had waived his right to counsel, he made the statement at issue in this case—"Maybe I should talk to a lawyer."[5] According to one of the NIS agents who testified at trial, the interrogators responded to Davis's statement in the following manner:

> [We] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I'm not asking for a lawyer," and then he continued on. . . .[6]

A short while later, after making some incriminating statements, Davis said, "I think I want a lawyer before I say anything else."[7] The agents then ended the interrogation.[8]

At trial, Davis moved to suppress the statements that he had made to NIS agents during his interrogation, claiming that he had invoked his right to counsel and that the interrogation should have ceased.[9] The trial judge denied the defense motion, and a general court-martial composed of officer members convicted Davis of unpremeditated murder.[10] His approved sentence provided for a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1.[11] Both the United States Navy-Marine Corps Court of Military Review (NMCMR)[12] and the United States Court of Military Appeals (COMA)[13] affirmed the findings and sentence.

As the COMA noted in its unanimous decision authored by Judge Gierke, a wide variety of methods exist for dealing with situations in which a suspect makes an ambiguous request for counsel.

---

[1] No. 92-1949 (U.S. Mar. 29, 1994).

[2] United States v. Davis, 36 M.J. 337, 338 (C.M.A. 1993).

[3] UCMJ art. 31(b) (1988).

[4] *Davis,* 36 M.J. at 339.

[5] *Id.*

[6] *Id.* at 340.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 338.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 342.

> Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions, including several federal circuits, have held that "all interrogation" about the offense "must immediately cease" whenever a suspect mentions counsel, but they allow interrogators to ask "narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel."[14]

The COMA held that ambiguous references to counsel can—and indeed must—be clarified before interrogation may continue.[15] Judge Gierke noted, however, that "[f]urther questioning is limited to clarifying the suspect's desires regarding counsel."[16]

The petitioner[17] asked the Supreme Court to impose a bright line rule that all questioning must cease when a suspect makes any kind of ambiguous or equivocal request for counsel. Allowing any sort of clarification, the petitioner argued, could result in impermissible attempts to influence the suspect's decisionmaking process. He contended that the very nature of custodial interrogation affects many suspects' ability to make themselves understood and makes them particularly susceptible to subtle coercion, even if it is in the guise of "clarification."

The petitioner argued in the alternative that, *even if* some sort of clarification were permissible, the comments made by the investigators in *Davis* were improper. Justice Souter appeared to focus on this alternative argument and asked petitioner's counsel whether the entire issue could be resolved simply by telling all investigators faced with an equivocal or ambiguous statement to ask one very simple and straightforward question—"Do you want a lawyer?" The petitioner rejected this proposal and contended that the tone or manner in which this question is asked could itself be coercive.

Several Justices, including Chief Justice Rehnquist and Justices Kennedy and Scalia, focused on the plain wording of the statement. Chief Justice Rehnquist appeared to dispute the petitioner's claim that the statement in this case was ambiguous, asking petitioner's counsel numerous questions intended to distinguish between "indecision" and "ambiguity." The Chief Justice focused on the difference between being undecided about whether to invoke the right to counsel (the equivocal invocation) and ambiguously invoking that right.

Justice Kennedy also appeared to disagree with the petitioner's claim that the statement at issue in this case necessarily was "ambiguous." After questioning petitioner's counsel about numerous other hypothetical statements that might be made by a suspect, Justice Kennedy announced to the Court his "surprise" at petitioner's characterization of these statements as "ambiguous." Justice Kennedy also noted that the petitioner's proposed "bright line rule" seemed to him to be quite inefficient and unworkable.

Also focusing on the plain language of the statement, Justice Scalia expressed frustration with the petitioner's claim that the law must protect him from his own inarticulateness. "We cannot run a system for idiots." Justice Scalia rejected the petitioner's claim that many suspects are too weak and timid to ask for a lawyer directly, noting that Davis had "somehow" managed to express himself quite clearly later in the interview when he stated "I think I want a lawyer before I say anything else."

Justice Stevens expressed dismay at the failure of both the prosecutor and defense counsel at trial to get the agents to clarify exactly what they said in response to Davis's statement. He asked petitioner how the Court could possibly determine the propriety of the agent's comments without knowing precisely what was said. Justice Stevens noted somewhat skeptically that the agents were able to recall precisely what they said during other stages of the interview, but were somewhat more vague about what took place during the portion of the interview at issue.

Justice O'Connor noted that Davis had waived his right to counsel at the outset of the interrogation and asked petitioner's counsel whether he agreed that this affected the entire analysis of this case. Counsel responded that he thought the prior waiver was irrelevant and stated that it should be no more difficult for suspects to invoke their right to counsel merely because they had waived their rights at the outset of the interrogation.

Justice Ginsberg questioned petitioner's counsel on his contention that Davis was unable to clearly invoke his rights. Like Justice Scalia, Justice Ginsberg focused on that Davis was quite successful later in the interrogation in invoking his right to counsel and therefore appeared fully capable of communicating his desires.

---

[14] *Id.* at 338 (quoting Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984)).

[15] *Id.*

[16] *Id.*

[17] Major David S. Jonas, a Marine Corps graduate of TJAGSA's 39th Graduate Course, represented the petitioner before the Court. The author was present during this oral argument.

The government's position[18] before the Court was that investigators may ask any questions necessary to clarify a suspect's intentions whenever the suspect makes an ambiguous or equivocal statement concerning the right to counsel. Justice Souter asked whether the government would agree to guidance from the Court in the form of a single question that interrogators could ask when attempting to clarify a suspect's intent. When the government responded that it was unrealistic to expect the Court to script a particular exchange between an interviewer and a suspect, Justice Souter grinned and noted that the Court had been quite successful in *Miranda*[19] at scripting such exchanges.

Government counsel also had to answer several questions on how 18 U.S.C. § 3501[20] applied to the issue. Several of the Justices—including Justices Scalia, Kennedy, and O'Connor—questioned the government on the interplay between § 3501, the Fifth and Sixth Amendments,[21] and Military Rules of Evidence 304 and 305.[22]

Counsel stated that the government was not taking any position on whether § 3501 would require a different result than the Fifth Amendment. Justice Scalia appeared quite frustrated with this response and exclaimed, "I find it extraordinary that you take no position on that!"

In a rather confusing exchange with the Court, government counsel claimed that § 3501 did not apply to this case because military courts-martial are not federal criminal prosecutions by the United States. Again referring to the plain language of the statute, Justice Scalia seemed incredulous that the government would not acknowledge the applicability of the statute to the issue in this case. Only after repeated questioning by the Court did counsel clarify that the government was relying on decisions in which the Court had held that courts-martial were not federal criminal prosecutions *for purposes of the Sixth Amendment right to trial by a jury*. Government counsel went on to admit that the Court had never said that courts-martial were not federal criminal prosecutions for purposes of the Fifth Amendment.

The government also drew critical questioning from the Court when its counsel insinuated that the decision in this case could be limited in applicability to military courts-martial. Justices Scalia and O'Connor were astounded that the government wanted the Court to adopt three separate rules: one each for courts-martial, other federal criminal trials, and state court prosecutions. The government appeared to retreat from this position, which had no support on the bench.

A recurrent theme throughout the questioning was the need for a standard that could be understood by law enforcement personnel and administered and applied by thousands of trial courts. Whatever the result of this appeal may be for Seaman Davis, the Court's decision seems likely to include some form of bright line rule or clear guidance. The Court seems determined to put an end to the wide variety of methods and rules for dealing with this issue. Major Matthew Winter, IMA, Criminal Law Division.

Legal Assistance Items

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

1993 Chief of Staff Award for Excellence in Legal Assistance

The Legal Assistance Division of The Judge Advocate General's Corps recently announced the winners of the 1993 Chief of Staff Award for Excellence in Legal Assistance. Of the seventy-three Army legal assistance office nominees, forty-one were selected. Each year has brought an increase in nominations over the previous year. Last year, thirty-three of sixty-two nominations received awards and, in 1991, thirty-seven of forty-eight nominations won. Congratulations to these legal assistance offices:

Aberdeen Proving Ground
Dugway Proving Ground
Fort Monmouth
Fort Meade
Fort Eustis
Fort Sill
Fort Leavenworth
Fort Gordon

[18] Deputy Solicitor General Richard H. Seamon argued the case on behalf of the government.

[19] Miranda v. Arizona, 384 U.S. 436 (1966).

[20] 18 U.S.C. § 3501 (1988). This statute governs the admissibility of confessions "[i]n any criminal prosecution brought by the United States or by the District of Columbia." Among other matters, it sets forth the factors that the trial judge is to consider in determining voluntariness of a statement.

[21] U.S. CONST. amends. V, VI.

[22] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 304, 305 (1984).

Fort Benning
Fort Lee
Fort Leonard Wood
Fort McClellan
Fort Bliss
Fort Stewart
Fort McPherson
2d Armored Division
1st Cavalry Division
III Corps & Fort Hood
Fort Campbell
XVIII Airborne Corps
82d Airborne Division
Fort Sam Houston
Fort Riley
Presidio of San Francisco
6th Infantry Division
IX Corps and US Army Japan
25th Infantry Division
3d Infantry Division
1st Armored Division
Legal Service Center—Brussels
Kaiserslautern Law Center
Northern Law Center, 21st TAACOM
Mannheim Legal Service Center
32d Army Air Defense Command
U.S. Army, Berlin
Headquarters, V Corps
Kirch Goens Legal Center, V Corps
Fulda Branch Office, V Corps
8th Support Group, Camp Darby
2d Infantry Division
U.S. Army South, Panama

Tax Notes

Home Buyer's Tax Treatment of Seller-Paid "Points"[23]

The Internal Revenue Service (IRS) recently approved a deduction for home buyers when the seller pays points to help the home buyer secure financing.[24] Home buyers may now deduct the amount of seller-paid points if the home buyer lowers the buyer's basis (that is, his or her purchase price) by the amount of the seller's point payment and certain other requirements. This allows the home buyer an income tax deduction and affects the current home buyer's profit later when the home is sold.

---

[23]This note updates two earlier notes, TJAGSA Practice Note, *Deductibility of Loan Origination Fees,* ARMY LAW., Sept. 1992, at 32; TJAGSA Practice Note, *Deductibility of Home Mortgage "Points,"* ARMY LAW., Mar. 1992, at 41. These notes discussed Revenue Procedure 92-12, as amended by Revenue Procedure 92-12A, and the deductibility of Veterans Affairs loan origination fees as interest.

[24]Rev. Proc. 94-27, 1994-15 I.R.B. This revenue procedure updates and supersedes Revenue Procedures 92-12 and 92-12A discussed in the previous TJAGSA Practice Notes, *supra* note 1. The IRS will now treat as deductible points any amounts paid by a cash basis taxpayer during the taxable year in cases where all of the following requirements are satisfied:

> .01 Designated on Uniform Settlement Statement. The Uniform Settlement Statement prescribed under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. sections 2601 et seq. (i.e., the Form HUD-1) must clearly designate the amounts as points payable in connection with the loan, for example as "loan origination fees" (including amounts so designated on Veterans Affairs (VA) and Federal Housing Administration (FHA) loans), "loan discount," "discount points," or "points." The amounts designated as points on the Form HUD-1 may be shown as paid from either the borrower's or the seller's funds at settlement.
>
> .02 Computed As Percentage of Amount Borrowed. The amounts must be computed as a percentage of the stated principal amount of the indebtedness incurred by the taxpayer.
>
> .03 Charged Under Established Business Practice. The amounts paid must conform to an established business practice of charging points for loans for the acquisition of principal residences in the area in which the residence is located, and the amount of points paid must not exceed the amount generally charged in that area. Thus, if amounts designated as points are paid in lieu of amounts that are ordinarily stated separately on the settlement statement (such as appraisal fees, inspection fees, title fees, attorney fees, and property taxes), those amounts are not deductible as points under this revenue procedure.
>
> .04 Paid for Acquisition of Principal Residence. The amounts must be paid in connection with the acquisition of the taxpayer's principal residence, and the loan must be secured by that residence. See sections 4.02 through 4.04 of this revenue procedure for examples of points that do not satisfy this requirement.
>
> .05 Paid Directly by Taxpayer. The amounts must be paid directly by the taxpayer. An amount is so paid if the taxpayer provides, from funds that have not been borrowed for this purpose as part of the overall transaction, an amount at least equal to the amount required to be applied as points at the closing. The amount provided may include down payments, escrow deposits, earnest money applied at the closing, and other funds actually paid over by the taxpayer at the closing. *In addition, for purposes of this section 3.05, points paid by the seller (including points charged to the seller) in connection with the loan to the taxpayer will be treated as paid directly by the taxpayer from funds that have not been borrowed for this purpose, provided the taxpayer subtracts the amount of any seller-paid points from the purchase price of the residence in computing the basis of the residence.* See section 1.1273-2(g)(5), Example 3, of the Income Tax Regulations.

Id. sec. 3 (emphasis added).

The buyer who chooses to deduct the seller-paid points reduces the basis[25] by the amount of the seller-paid points, taking an interest deduction on his or her Schedule A.[26] For example, assume CPT Taxpayer, stationed in the United States, purchased a home on 1 February 1993 for $105,000, paying $5000 down, and financing $100,000. Assume further, CPT Taxpayer's lender charged the seller 2.5 points ($2500) for CPT Taxpayer's loan.[27] If CPT Taxpayer deducted this amount on her 1993 federal income tax return (Schedule A), she would reduce her original basis in the home ($105,000) by the amount of the points deduction ($2500), leaving her new adjusted basis as $102,500. If she later sells her house for $120,000 she has a gain of $17,500 instead of only $15,000 (if she did not deduct the seller-paid points). If she timely buys and occupies a qualifying replacement home, she may be able to postpone payment of tax on this gain under Internal Revenue Code section 1034.[28]

The change in tax treatment for seller-paid points is effective retroactive to 1 January 1991. This means many military taxpayers who purchased homes on or after 1 January 1991 will be able to amend their federal income tax return for the year they purchased their home and increase their itemized deductions by the amount of the seller-paid points (provided they also reduce the basis of the home). Home buyers should complete *Form 1040X*[29] within three years after the date the original return was filed, or within two years after the date the tax was paid, whichever is later. If CPT Taxpayer had purchased the home on 1 February 1991, she would have taken her mortgage interest deduction on her 1991 federal income tax return filed by 15 April 1992. She has until 15 April 1995 to file a *Form 1040X* to increase her itemized deductions. According to the recent revenue procedure, when CPT Taxpayer files an amended return, she should write *"Seller-Paid Points"* in the top right margin of the amended return, and she should attach a copy of the applicable *Form HUD-1* (or other settlement statement) showing the amount of points paid by the seller in connection with the transaction.

Under the revenue procedure, home owners who refinance are *not* entitled to deduct points charged in connection with a pure refinancing transaction[30] nor may they deduct points a lender charges in lieu of amounts ordinarily reported on the *HUD-1 Settlement Statement* (such as, appraisal fees, title fees, attorney fees).[31] Lieutenant Colonel Hancock.

---

[25] Basis is a way of measuring the taxpayer's investment for tax purposes. Taxpayers who add capital improvements (such as, finish a basement, add a deck or garage) increase the home's basis by the costs of the improvements. The basis adjustment for seller-paid points *lowers* the home buyer's basis. Consequently, home buyers who later sell the house may realize more gain as a result of lowering the basis. The tradeoff is the current interest deduction on the income tax return for the year in which the home was purchased.

[26] Internal Revenue Serv., Form 1040, U.S. Individual Income Tax Return (1993), Schedule A, Itemized Deductions. Taxpayers who have not filed their 1993 federal income tax return may claim a deduction for points paid in 1993 by including the amount paid on line 9a of Schedule A of their 1993 *Form 1040* if the points were reported to the taxpayer on *Form 1098*, or on line 10 if the points were not reported on *Form 1098*.

[27] Captain Taxpayer's *HUD-1, U.S. Department of Housing and Urban Development Settlement Statement*, item 802 (Loan Discount) would reflect $2500 in the "Paid from Seller's Funds at Settlement" column. Revenue Procedure 94-27 does not address the seller's tax treatment of paying points. Before Revenue Procedure 94-27, the seller could deduct the points paid as a "selling expense," reducing the amount realized. Rev. Rul. 68-650, 1968-2 C.B. 78. Arguably, the seller still should be able to deduct seller-paid points in computing the amount realized. After all, the seller bears the economic consequences of seller-paid points by actually paying them. On the other hand, as a result of the IRS recent policy change, the home buyer gets a present income tax deduction at the potentially later expense of having a larger capital gain subject to tax as a result of the buyer lowering his or her basis. Thus, both the buyer who deducts seller-paid points, reducing the home's basis, and the seller who reduces the amount realized by the points paid, experience an actual economic consequence.

[28] I.R.C. § 1034 (RIA 1994). *See* Crisalli, *How to Transfer Property and Defer Taxes*, THE LAMPLIGHTER, Spring/Summer 1992, at 1; Ingold, *Buying, Selling, and Renting the Family Home: Tax Consequences for the Military Taxpayer After the Tax Reform Act of 1986*, ARMY LAW., Oct. 1987, at 23.

[29] Internal Revenue Serv., Form 1040X, Amended U.S. Individual Income Tax Return.

[30] Revenue Procedure 94-27, section 4, provides the following:

> This revenue procedure does not apply to the following amounts:
>
> .01 Points paid in connection with the acquisition of a principal residence, to the extent that the points are allocable to an amount of principal in excess of the aggregate amount that may be treated as acquisition indebtedness under section 163(h)(3)(B)(ii) of the Code.
>
> .02 Points paid for loans the proceeds of which are to be used for the improvement, as opposed to the acquisition, of a principal residence.
>
> .03 Points paid for loans to purchase or improve a residence that is not the taxpayer's principal residence, such as a second home, vacation property, investment property, or trade or business property.
>
> .04 Points paid on a refinancing loan, home equity loan, or line of credit, even though the indebtedness is secured by a principal residence.

[31] Revenue Procedure 94-27, section 3.03, provides that "if amounts designated as points are paid in lieu of amounts that are originally stated separately on the settlement statement (such as appraisal fees, inspection fees, title fees, attorney fees, property taxes, and mortgage insurance premiums) those amounts are not deductible as points under this revenue procedure." *See* Rev. Rul. 69-188, 1969-1 C.B. 54.

Taxation of Moving Expense Allowances

Legal assistance attorneys should be aware of the following recent message on the taxation of moving expense allowances.[32]

1. As a result of changes to the income tax laws in the Omnibus Reconciliation Act of 1993, it appears that certain allowances intended to reimburse soldiers for their expenses incurred because of permanent change of station (PCS) moves are now taxable. These allowances include temporary lodging allowance (TLA), temporary lodging expense (TLE), dislocation allowance (DLA), and move-in-housing allowance (MIHA). These new rules apply for all PCS moves on or after 1 January 1994.

2. Prior tax law permitted deductions for many expenses soldiers incurred in PCS moves (such as, traveling—to include lodging and meals—on househunting trips, travel from the old to the new place of residence, meals and lodging while occupying temporary quarters in the new location for a period of up to thirty consecutive days (ninety days in the case of foreign moves)).

3. The new income tax laws, which affect all taxpayers, reduced the types of moving expenses for which reimbursement is excluded from income.

A. The following expenses are now recognized by the IRS as deductible moving expenses. Reimbursement for these expenses is not considered taxable income:

(1) Moving household goods and personal effects;

(2) Traveling (including lodging but not meals) from the old to the new place of residence.

B. The following expenses are not deductible. Reimbursement for any of these expenses is considered taxable income:

(1) Traveling (including meals and lodging) on househunting trips;

(2) Meals and lodging while occupying temporary quarters in the new location;

(3) Expenses of selling the old home and purchasing the new home, or settling the old lease and obtaining a new lease.

4. Because the allowances listed in paragraph 1 now appear to be taxable, the Defense Finance and Accounting Service (DFAS) will have to withhold taxes from payment for these allowances. The DFAS is currently reviewing its internal procedures to determine when it will begin withholding taxes. The DFAS expects to withhold tax at a flat rate of twenty-eight percent which will reduce the amount of the allowance that soldiers actually receive to pay their expenses.

5. The DOD is attempting to lessen this tax burden. The Armed Forces Tax Council plans to seek relief from the mandatory twenty-eight percent withholding on all lump sum payments. However, there is no guarantee that this will be successful. The DOD is preparing legislation to exempt military PCS from this tax liability. There is also no guarantee that we will get this legislation in time to help those soldiers moving in Fiscal Year 1994.

6. Soldiers who moved after 1 January 1994 and who did not have any taxes withheld for moving may owe additional taxes based on the income reported on their 1994 *Form W-2*. These soldiers should take steps to ensure they can pay the additional tax, if any, on this income. They may adjust their withholding now by submitting a new *Form W-4* to cover the amount of the expected additional tax, or they may wish to pay quarterly estimated taxes by submitting IRS *Form 1040ES*. (Army Community Service (ACS) financial counselors can help with this decision).

7. Soldiers who will PCS in the future should consider the following:

(1) if DFAS must begin withholding the mandatory twenty-eight percent, soldiers might need additional cash to pay for temporary lodging. Soldiers may request an advance of pay to cover these costs. Many soldiers whose marginal tax rate is less than twenty-eight percent will have excess taxes withheld and may wish to decrease the withholding on their *Form W-4;*

[32] Message, Headquarters, Dep't of Army, DAPE-MBB-C/DAJA-LA, subject: Taxation of Moving Expense Allowances (U) (051330Z Apr 94).

(2) use deferred travel so that temporary quarters and meal expenses are not incurred or are reduced;

(3) keep temporary expenses to a minimum.

8. Soldiers need to be aware that they may be liable for a penalty for underpayment of taxes if they have not paid or withheld sufficient taxes during the year. Generally soldiers will not have to pay this penalty if during 1994 they have paid at least ninety percent of the total tax liability shown on their return for tax year 1994, or at least 100 percent of the total tax liability that was shown on their 1993 return.

9. Soldiers who have questions should contact a legal assistance attorney or an ACS financial counselor. Expiration date of the message cannot be predetermined.

Administrative Law Notes

The Civil Rights Act of 1991 Does *Not* Apply Retroactively

In two written decisions, released on 26 April 1994, the United States Supreme Court held that key provisions of the Civil Rights Act of 1991[33] (1991 Act or Act) do not apply to cases pending when the Act became law. Justice Stevens authored the 8-1 decisions, which end three years of debate and thousands of hours in litigation over the issue of the Act's application to pre-Act conduct.[34] Although these decisions render moot the philosophical issue of the Act's retroactive application, many issues on implementing the decisions remain unanswered.

The flood of litigation over the Act's retroactivity was caused by Congress's intentional omission of what President Bush had labeled "unfair retroactivity rules" in previous versions of the bill.[35] Congressional sponsors of the 1991 version of the Act omitted express retroactivity language from the vetoed Civil Rights Act of 1990 as an inducement for President Bush to sign the bill. The Court found that the omission of this retroactivity provision "was a factor in the passage of the 1991 bill."[36]

The Court joined two cases for oral argument at the beginning of the October term. The plaintiff's sexual harassment suit in *Landgraf v. USI Film Products*[37] was pending appeal in the United States Court of Appeals for the Fifth Circuit when President Bush signed the 1991 Act into law. The plaintiff claimed that she was entitled to a remand to the district court for a jury trial under § 102 of the Act. *Rivers v. Roadway Express, Inc.*[38] required the Court to interpret § 101 of the Act, which legislatively reversed a prior decision of the Court. In *Patterson v. McLean Credit Union,* the Court held that 42 U.S.C. § 1981 prohibits discrimination only during the hiring process of an employment contract and not discrimination during the employment relationship or in firing an employee. Although § 101 of the Act arguably "restored" an interpretation of § 1981 applied before *Patterson,* the Court held that Congress disclosed no clear intent to apply this section retroactively.

The Supreme Court's pronouncements in these cases do not necessarily resolve all issues surrounding the retroactivity of the 1991 Act. In *Landgraf,* the Court held that the Act will not apply to cases pending appeal at the time of passage. The Court did not describe, however, how far back into the administrative process the nonretroactivity presumption applies.

The Equal Employment Opportunity Commission (EEOC) is preparing instructions for implementing the Court's holdings. The EEOC initially announced that it would not apply the Act retroactively,[39] only to reverse itself after the Clinton Administration took office.[40] The EEOC now must reassess

---

[33] Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

[34] Seven of the circuit courts of appeals and scores of district courts issued decisions on the retroactivity issue before the Court accepted review of these cases. For a partial list of cases and a more thorough discussion of the issue, see Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts,* 141 MIL. L. REV. 1, 8-22 (1993).

[35] *President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990,* 26 WEEKLY COMP. PRES. DOC. 1632-1634 (Oct. 22, 1990), *reprinted in* 136 CONG. REC. S16418, 16419 (Oct. 22, 1990).

[36] *Landgraf v. USI Film Products,* 1994 Daily Lab. Rep. 80 d31, at 25.

[37] 968 F.2d 427 (4th Cir. 1992), *cert. granted,* 113 S. Ct. 1250 (1993).

[38] 973 F.2d 490 (6th Cir. 1992), *cert. granted,* 113 S. Ct. 1250 (1993).

[39] *Equal Employment Opportunity Commission Policy guidance on Retroactivity of the Civil Rights Act of 1991,* EEOC NOTICE NO. 915.002 (Dec. 27, 1991).

[40] *See* 59 Daily Lab. Rep. (BNA) AA-1 (Mar. 30, 1993).

thousands of cases left in limbo during consideration of the retroactivity cases.[41] The EEOC implementing instructions will define precisely at which point in the administrative complaint process application of the Act would be considered retroactive. It could, for example, define retroactive application as barring only those cases in trial before a district court when the 1991 Act became law. Another possible definition would allow application of the Act to cases in various stages of the administrative complaint process.

To faithfully implement the Court's decisions in *Landgraf* and *Rivers*, the EEOC can apply the 1991 Act only to discriminatory *conduct* that occurred after the Act became law. The Court stated that the Act does not retroactively impose new liabilities on employers.[42] Applying the Act to any pre-passage conduct would violate the Court's clear message. The issue may be resolved, but the dispute lives on. Major Hernicz.

---

[41] *Id.* Departing Chairman Kemp estimated that a reversal of position on retroactivity of the 1991 Act would effect roughly 10% of the EEOC's pending caseload of over 60,000 cases.

[42] 1994 Daily Lab. Rep. 80, d31, at 24.

Claims Report

United States Army Claims Service

Tort Claims Note

Correcting Error Reports

The Tort Claims Division recently began monitoring error reports to ensure that claims offices are correcting the errors each month. To ensure the integrity of the Claims Legal Automated Information Management System (CLAIMS) database, our system will not upload claims records with certain types of errors until the errors are corrected. We have noticed common errors on several claims offices' reports. Some of the more common errors and the solutions are discussed below.

Incorrect Use of CO4 Office Code for Tort Claims

Some claims offices transfer tort claim files to the United States Army Claims Service (USARCS) using CO4 as the designation office code. While CO4 is correct when forwarding personnel claims for recovery actions, you must, and can, *only* use C01 (Tort Claims), C02 (Maritime Claims), or C90 (Foreign Claims Commission) as office codes when forwarding tort claims.

Incorrect Dates

Entering data into the CLAIMS program *daily* is essential. When you attempt to back date, you create unnecessary work for yourself and may create mistakes that you must correct after receiving your monthly error report. Remember that the last action date cannot be later than the current date. Check to ensure that the dates you enter are correct.

Date Filed or Fiscal Year (FY) on Claim Number Incorrect

This is a variation of incorrect date errors. This problem is more prevalent in October after claims offices change their "environment [set up] screen" which essentially tells the CLAIMS program to begin using the new FY and restart the claim numbering process when automatically assigning claims numbers when new claims are logged in. Several claims offices have attempted to log in claims records, received prior to the current FY (that is, 1 October 1993), using the new (1994) fiscal number.

Log in claims when you receive them! If you change your "environment screen" and then attempt to enter a claim that you received during the prior FY, an error message will appear. To properly log in a claim received during the prior FY, you need to change the "environment screen" to the prior FY. This way the database and claim number will properly reflect the year the claimant filed the claim. Once you have completed logging in the claim, remember to change your "environment screen" back to the current fiscal year.

Invalid Codes

The most common invalid code observed is the tort type. When you input the tort type or injury/damage code, only use the codes listed in Appendix C or H, "Tort & Special Claim Category Codes," in the *User's Manual for Tort & Special Claims Management Program (User's Manual).* A much easier method is to simply view and select the correct code by pressing the "TAB" key.

Duplicate ID

This error message in the "Error Field" on your error report may occur for various reasons. Several claims offices are currently upgrading their computer hardware. Keep in mind several items when upgrading your system. Before you upgrade your system, read Sections C and D entitled "Network Installation" and "System Memory" in Appendix L, entitled "System Administration & Troubleshooting" of your *User's Manual.*

You cannot install the CLAIMS program onto either a local area network (LAN) or a computer with a LAN in its memory. It is designed only for stand alone operations and does not have the capability of allowing multiple users to work with the database at the same time. If you install the CLAIMS program onto a local area network, you may not only cause it to crash, but it also may cause other software or programs you have on your computer system to crash as well.

The "Duplicate ID" error message also may occur if, and when, the CLAIMS program does not have enough system memory available to run. You should not run any memory resident programs (known as TSRs), such as Sidekick, SuperKey, or other printer management utilities, while you are operating the CLAIMS program. Because TSRs actually occupy physical areas in the computer's memory, they do not leave enough memory for the CLAIMS program to run. Conflicts may arise when you attempt to operate the CLAIMS program with TRSs on the computer's memory. These conflicts, which you may not notice at the time that you are inputting data, may cause internal system errors and program crashes later on.

Summary

By eliminating these errors, we can ensure that the data on the CLAIMS database is correct. Review and correct the errors noted on your error report every month, particularly before forwarding your next monthly upload to the USARCS. If you do not receive a copy of your error report, contact our office as soon as possible. Also ensure that you read and periodically review your *User's Manual.* If you have any questions on how to correct a "Duplicate ID" or any other error, call the Information Management Office at DSN 923-2031/4344/6044 or (301) 621-7001, extensions 242 or 244, or the Operation & Records Branch at DSN 923-3472 or (301) 621-7001, extension 214. The Information Management Office's telephone numbers also are listed on the last screen as you leave the CLAIMS program. Sergeant First Class Wagner.

Personnel Claims Note

Requesting *DD Form 788* for Privately Owned Vehicle (POV) Shipment Claim

The original or completed copy of the *DD Form 788* is becoming increasingly important in processing POV claims damaged in shipment. The claimant's copy of the *DD Form 788* provided after the initial inspection of the POV at turn in may, in many cases, be sufficient to adjudicate and compensate the claimant, but it is not sufficient to pursue recovery afterwards.

As new initiatives—such as the Single Contractor POV Pilot Program to be tested this summer—are activated, emphasis on POV recoveries will increase. The key document to a successful recovery will be the completed *DD Form 788,* and you have to know how to obtain it if the claimant does not have it.

This Service has learned that various port authorities that you would turn to as a source to acquire the completed *DD Form 788* have different guidelines on how long they keep the completed forms on file. To help you determine how much time you have to contact the appropriate port authority, the following list will give you filing periods and telephone numbers of the major port authorities receiving service members. Remember that *DD Form 788s* are filed by a service member's last name and the last four numbers of the social security number. Ms. Holderness.

Military Ocean Terminals—POV DD Form 788 Requests

Port Designation Code/ Location		*Port Phone Number*	*Length of Time DD 788s are Held*
3DK	Oakland, CA	DSN: 859-2331/2129	Current calendar year in office. 2 years in storage.
3H2	Compton, CA	DSN: 833-3835 COM: 310-763-5620	Keeps current calendar year + 1 year in office. 1 yr in stg. Total up to 3 years.
1R1	Cape Canaveral, FL (Cape Canaveral Terminal)	1-800-862-9471 DSN: 467-7713 COM: 407-853-XXXX	Current calendar year in office. 2 years in storage.

Military Ocean Terminals—POV (cont')
DD Form 788 Requests

Port Designation Code/ Location		*Port Phone Number*	*Length of Time DD 788s are Held*
2GC	Granite City, IL (MTMC POV Processing Ctr)	1-800-275-3706 DSN: 892-4650/4651 COM: 618-452-XXXX	Current calendar year + 1 full previous calendar year in ofc. 1 year in storage.
2DC	New Orleans, LA (MTMC Gulf Outport)	DSN: 363-1218/1196 1228 COM: 504-948-XXXX	Current calendar year in office. 2 years in storage.
1LA	Baltimore, MD (Dundalk Marine Terminal)	1-800-892-9267 DSN: 584-6350/6351 COM: 301-285-XXXX	2 calendar years in office, then destroyed.
1GC	Bayonne, N.J. (Military Ocean Terminal)	DSN: 247-6606/6079 COM: 201-823-XXXX	Usually keeps 6 mths in office. Then to stg. (Destroyed 3 yrs from date of POV p/u by clmt).
1P2	Charleston, S.C. (MTMC South Atlantic Outport)	DSN: 563-5472/5470 COM: 803-743-XXXX	Keeps DD 788's only 1 year. 1 FY from when clmt picks up POV, then they are destroyed.
1MJ	Norfolk, VA (Navy Supply Ctr)	1-800-358-4326 DSN: 564-4505/4636 COM: 804-444-XXXX	2 yrs in ofc. 3 yrs in storage Total 5 years destroyed.
4DL	Seattle, WA	DSN: 744-3109 COM: 206-762-9200 206-833-5108 206-764-6537	Current calendar yr in ofc. In storage up to 2 yrs, depending on when POV was delivered.
	Balboa, Panama (MTMC Terminal Battalion)	DSN: 313-282-4642/4641 (4306/4303) COM: 011-507-82-XXXX FAX: 011-507-62-2546	Filed by FY (Oct-Sep). In ofc current FY, then to stg for 1 yr. (Total = 2 FY)
	San Juan, P.R. (MTMC Terminal Detachment)	COM: 809-749-4327(4308) COM: 809-723-1199	DD 788's are placed in the Manifest w/the vessel files so they have them in the office for 6-7 years.

Professional Responsibility Notes

Department of the Army Standards of Conduct Office

Ethical Awareness

The first section of the Professional Responsibility Notes describes the application of the Army's *Rules of Professional Conduct for Lawyers (Army Rules)*[1] to an actual professional responsibility case. To stress education and protect privacy, the identities of the particular Army installation and the attorney are not published.

The second section discusses feedback from the field concerning *Professional Responsibility Committee Opinion 93-2*, which was published in the December 1993 issue of *The Army*

[1]DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

Lawyer. The third section reports recent unrelated developments in the Department of Justice regarding an attorney's communications with a represented person without the consent of that person's attorney. Mr. Eveland.

Case Summary

Army Rule 1.7(b) (Conflict of Interest)

Army lawyer serving as Federal Magistrate's Court prosecutor improperly used his official position in an attempt to date a law student representing a defendant.

Army Rule 4.1 (Truthfulness in Statements to Others)

Army Rule 8.4(c) (Dishonesty, fraud, deceit, or misrepresentation)

Army lawyer committed professional misconduct when he made false statements about maximum statutory fine to a law student representing a defendant, and later denied to preliminary screening official that he had attempted to date the law student.

Army Rule 8.4(d) (Conduct prejudicial to the administration of justice)

Army lawyer committed professional misconduct by offering to fix a defendant's case in exchange for a date with the defendant's law student counsel.

Army Rule 8.4(e) (Stating or implying ability to influence improperly government or official)

Army lawyer committed professional misconduct when he implied that he could affect the outcome of a case by reducing the fine by one hundred dollars if the defendant's law student counsel had lunch with him.

Captain *F* was an Army lawyer designated as an Assistant United States Attorney to prosecute cases before a United States Magistrate. Ms. *G* was a law student participating in her school's clinical program. She represented various defendants under the supervision of a senior trial attorney. Captain *F*'s first encounter with Ms. *G* was when he telephoned her clinic to discuss a case. After he asked her if she was "that cute little blonde" whom he had met the week before, she politely told him that he was speaking with the wrong person.

In court some days later, Ms. *G* was appointed to represent a client, Mr. *X*, against charges of disorderly conduct, forgery, resisting arrest, and assault. While Captain *F* and Ms. *G* were discussing a guilty plea, he misled her about the maximum fine that Mr. *X* would have to accept for a single charge of disorderly conduct in exchange for dismissal of the three more serious counts. Although disorderly conduct carried a $250 maximum fine, he told her that it was $350. Ms. *G* then talked with Mr. *X* and learned that Mr. *X* also was in jeopardy for a potential parole violation if he was to be convicted of any of the three more serious offenses.

Ms. *G* resumed negotiations with Captain *F* in an attempt to reduce the fine from $350. Captain *F* told her that he would recommend a lower fine of $250 if she agreed to have lunch with him. Ms. *G* objected and told Captain *F* that there was a conflict. He told her that he was not going to change his position, and that he wanted to see how much the client really meant to Ms. *G*. After a few minutes, Captain *F* told her that the $350 fine was required by statute. Ms. *G* persisted in telling Captain *F* that she wanted to talk about lunch later.

When Mr. *X*'s case was called, Captain *F* announced that a plea agreement had been reached under which Mr. *X* would agree to pay a $250 fine. This surprised Ms. *G*, who immediately interpreted the lowered amount as having been motivated by a mistaken belief that she had agreed to lunch. Mr. *X*'s agreement to pay the $250 fine concluded his case. After court recessed, Captain *F* once again invited Ms. *G* to have "coffee or something," which she once again declined.

Ms. *G* reported Captain *F*'s conduct to his staff judge advocate, convinced that Captain *F* had lowered the fine as a result of his mistaken belief that she had consented to a date. She told the preliminary screening official (PSO) that she had been placed in a "terrible position" that was aggravated by her inexperience and student status. Ms. *G* also told the PSO that in her opinion Captain *F* did not deliberately misbehave; he was unaware that he was doing something wrong when he kept pursuing her for a date.

Captain *F* denied that the events happened, asserting that such conduct was out of character for him. Interviews with fourteen women lawyers who had been assigned with Captain *F*, however, found that he had either attempted flirtation or dating with most of them. They described him as being a chauvinist, a person with views about women that some would consider offensive, and an attorney of questionable character.

The PSO found that Captain *F* committed professional misconduct by making a false statement to Ms. *G* about the maximum statutory fine, and compounded his misconduct by denying to the PSO that he had attempted to date Ms. *G*. The PSO also found that Captain *F* committed professional misconduct by using his official position in an attempt to date Ms. *G* and by implying an ability to affect, and then offering to affect, the outcome of Mr. *X*'s case.[2]

---

[2] *See* Disciplinary Counsel v. Smakula, 529 N.E.2d 1376 (Ohio 1988) (One year suspension from practice of law where prosecutor, who pled guilty to three misdemeanor counts of ticket fixing, had received no money, and prosecutor's misconduct was result of naivete and poor judgment); Romualdo P. Eclavea, Annotation, *Disciplinary Action against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney,* 10 A.L.R. 4TH 605 (1991).

Captain *F* received a letter of reprimand. It stated that Captain *F*'s abuse of his position and dishonesty were inexcusable, that there were serious questions about his potential for further service, that he failed to uphold the standards of integrity expected of Army lawyers, and that he had embarrassed both himself and the Judge Advocate General's Corps. Mr. Eveland.

Opinion 93-2 (Advisory Opinion)

The DA Standards of Conduct Office has received informal feedback which may indicate some confusion in the field regarding *Professional Responsibility Committee Opinion 93-2*, published in the December 1993 issue of *The Army Lawyer*. In that opinion the following occurred:

> (a) a commander met with his soldier
> (b) as part of an informal investigation,
> (c) but no statute or regulation prescribed procedures for the investigation;
> (d) the SJA was present,
> (e) the SJA knew that the soldier was represented by counsel in the matter being discussed,
> (f) neither the SJA nor anyone else notified the soldier's counsel of the meeting, and
> (g) the soldier's counsel neither knew of nor consented to the SJA's presence during the meeting.

The Committee concluded that, under the circumstances, the SJA's presence at the meeting amounted to "communication" with the represented soldier. Inasmuch as the SJA knew that the soldier was represented by counsel in the matter being inquired into at the meeting, but did not have the consent of the other lawyer to communicate with his client (and had not even informed him of the meeting), the Committee determined that Rule 4.2 of the *Army Rules* had been violated. To comply with Rule 4.2 under such circumstances, the Committee stated that an SJA must notify the soldier's counsel of the meeting and not communicate with the soldier (that is, in this case, not attend the informal, investigatory meeting) without consent of the other lawyer.

That the ethical problem identified by the Committee will occur often is doubtful. It can be eliminated in most cases by taking the simple precaution of notifying a soldier's counsel prior to an investigative interview by a commander at which a government attorney will be present.[3] Ordinarily, the soldier's counsel will either refuse to allow the soldier to be interviewed at all, or elect to be present at the interview.

The Committee's opinion is fact specific. By its terms, it applies to "informal procedures not specifically prescribed by statute or regulation." Procedures such as nonjudicial punishment hearings fall outside the scope of the PRC opinion. Lieutenant Colonel Fegley.

Justice Department Rules: Communication with Represented Person

The cases of *In re John Doe*[4] and *United States v. Ferrara*[5] are discussed in the Professional Responsibility Notes sections of the November 1992 and November 1993 issues of *The Army Lawyer*.[6] Those cases arise out of the so-called "Thornburgh memorandum," which asserts that a federal prosecutor does not violate rules of professional conduct by maintaining contacts with a represented individual during law enforcement investigations and proceedings prior to initiation of formal criminal or civil proceedings. The cases address the assertion that Department of Justice rules, such as those set out in the "Thornburgh memorandum," are preeminent when in conflict with state bar ethics rules.

The November 1993 Professional Responsibility Notes also reported that on November 20, 1992, the Department of Justice issued for comment proposed rules that would codify the policy set out in the "Thornburgh memorandum." Two days after President Clinton's inauguration, a "final" version of the rule was withdrawn from publication. The proposed rules

---

[3] *See generally* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 343 (1977). The ABA Committee on Ethics and Professional Responsibility responded to questions propounded by the Standing Committee on Legal Assistance for Military Personnel (LAMP). One of the questions involved the possibility of an ethical breach caused by obeying a superior's order. The committee stated the issue and responded as follows:

> If a Legal Assistance Officer commits a breach of legal ethics by complying with the order of his lawyer or nonlawyer commanding officer, may he be disciplined by the bar? Does he have a preexisting duty to advise the commanding officer that the order will result in an unethical breach?
>
> This question raises the so-called "[Nuernberg]" issue which is an issue of law beyond our jurisdiction. Moreover, its answer obviously would require factual analysis of the particular matter. The *Legal Assistance Office should, however, notify the Staff Judge Advocate and the Commander that the order will result in a breach of ethics.*

(emphasis added).

[4] *In re* John Doe, No. Civ. 90-1020-JB (D.N.M. Aug. 4, 1992).

[5] United States v. Ferrara, No. Civ. 92-2869 (D.D.C. May 28, 1993).

[6] *See generally* Professional Responsibility Notes, ARMY LAW., Nov. 1992, at 51; Nov. 1993, at 37.

were reissued by Attorney General Janet Reno on July 14, 1993, and were published in the *Federal Register* on July 26, 1993.[7] A summary of the comments received on the prior issuance of the proposed rules was published with the reissued rules.

In a further development, in the March 3, 1994 edition of the *Federal Register*, the Department of Justice announced that it was issuing a third version of the rules for a thirty-day comment period.[8] The March 1994 announcement included an analysis of the comments received following publication of the second edition in July 1993. The most recent proposal would recognize that Justice Department lawyers are bound by their licensing jurisdictions' ethics rules and must abide by them except when they conflict with a federal rule calling for different conduct. The new proposal tracks more closely ABA Model Rule 4.2 which established the general prohibition against ex parte contact with represented parties. While it generally would allow ex parte contacts with represented persons prior to the initiation of litigation, the proposal would generally prohibit such contacts with persons who an attorney knows is the "target" of a federal criminal or civil enforcement investigation. Lieutenant Colonel Fegley.

[7] Communications with Represented Persons, 58 Fed. Reg. 39,976 (1993) (to be codified at 28 C.F.R. pt. 77) (proposed July 26, 1993).

[8] Communications with Represented Persons, 59 Fed. Reg. 10,086 (1994) (to be codified at 28 C.F.R. pt. 77) (proposed Mar. 3, 1994).

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Foreign Language Skills

An assignment consideration for some positions in overseas areas, or for certain international or operational law positions, is proficiency in a relevant foreign language. Judge advocates interested in such positions should ensure that their linguistic skills are documented properly in their personnel records.

Judge advocates who have an understanding of one or more foreign languages can document this skill by taking a language proficiency test at their local Army Education Center. Language skills in listening comprehension, reading comprehension, and speaking are measured by various evaluation techniques and reported on a *DA Form 330* (Language Proficiency Questionnaire). Six recognized levels of proficiency exist, ranging from an elementary knowledge of a foreign language to native fluency. The results of the language evaluation also will be annotated in section V of the Officer Record Brief (ORB).

Judge advocates who complete a language evaluation should forward a copy of their *DA Form 330* to PP&TO so that their Career Management Individual File (CMIF) can be updated. Additional information on this subject is available in *Army Regulation 611-6, Army Linguist Management.*

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1994

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

September 1994

6-9, ESI: Subcontracting, Washington, D.C.

9, GWU: Government Contract Compliance: Practical Strategies for Success, Washington, D.C.

12-13, ESI: Award-Fee Contracting: The Creative Use of Incentives, San Diego, CA.

12-14, GWU: ADP Contract Law, Washington, D.C.

16, ESI: Sole-Source Contracting, Washington, D.C.

18-22, NCDA: Government Civil Practice, Chicago, IL.

19-21, GWU: Schedule Contracting: Selling Commercial Products and Services, Washington, D.C.

19-23, GWU: Formation of Government Contracts, Washington, D.C.

19-23, ESI: Federal Contracting Basics, Washington, D.C.

19-23, ESI: Operating Practices in Contract Administration, Washington, D.C.

20-23, ESI: Negotiation Strategies and Techniques, San Diego, CA.

22-23, GWU: Government Contract Claims, Washington, D.C.

25-29, NCDA: Special Prosecutions, Reno, NV.

26-29, ESI: Managing Cost-Reimbursement Contracts, Washington, D.C.

26-30, GWU: Government Contract Law, Washington, D.C.

27-29, ESI: Contracting for Project Managers, Dallas, TX.

27-30, ESI: Contract Pricing, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1994 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially

Jurisdiction	Reporting Month
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the January 1994 issue of *The Army Lawyer.*

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.* The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755	Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).
AD A265756	Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).
AD A265777	Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/ JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A266351 Office Administration Guide/JA 271(93) (230 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A270397 Consumer Law Guide/JA 265(93) (634 pgs).

AD A274370 Tax Information Series/JA 269(94) (129 pgs).

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

AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A269515 Federal Tort Claims Act/JA 241(93) (167 pgs).

*AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A268410 Defensive Federal Litigation/JA-200(93) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A269036 Government Information Practices/JA-235 (93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A273376 The Law of Federal Employment/JA-210(93) (262 pgs).

AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

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

International Law

AD A262925 Operational Law Handbook (Draft)/JA 422 (93) (180 pgs).

Reserve Affairs

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

The following CID publication also is available through DTIC:

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

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

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

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

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

(*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

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

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

If your unit does not have a copy of *DA Pam. 25-33,* you may request one by calling the Baltimore USAPDC at (410) 671-4335.

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

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA*

Form 4569. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed fulltime by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and the pending RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve or NG enlisted personnel (MOS 71D/71E);

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

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

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

Requests for exceptions to the access policy should be submitted to:

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

(2) DOD-wide access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10

key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

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

FILE NAME	*UPLOADED*	*DESCRIPTION*
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instruc-

FILE NAME	UPLOADED	DESCRIPTION
		tions presented at the school and video productions, November 1993.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1993	Defensive Federal Litigation—Part A, June 1993.
JA200B.ZIP	August 1993	Defensive Federal Litigation—Part B, June 1993.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	November 1993	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, 28 Feburary 1994.
JA235.ZIP	August 1993	Government Information Practices.
NA241.ZIP	August 1993	Federal Tort Claims Act.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	March 1993	Legal Assistance Real Property Guide.
JA262.ZIP	June 1993	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. Updated 31 August 1993.
JA265A.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part A, September 1993.
JA265B.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part B, September 1993
JA267.ZIP	January 1993	Legal Assistance Office Directory.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	June 1993	Legal Assistance Office Administration Guide.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	January 1993	Preventive Law Series.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officer's Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993 version.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993 version.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993 version.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993 version.

FILE NAME	*UPLOADED*	*DESCRIPTION*
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993 version.
JA501-1.ZIP	June 1993T	JAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, February 1994.
JA505-12.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, February 1994.
JA505-13.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, February 1994.
JA505-14.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, February 1994.
JA505-21.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, February 1994.
JA505-22.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, February 1994.
JA505-23.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, February 1994.
JA505-24.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, Feburary 1994.
JA506.ZIP	February 1994	Fiscal Law Course Deskbook, May 1993.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509-1.ZIP	March 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International Law, or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SFC Tim Nugent, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)h, above.

4. 1994 Contract Law Video Teleconferences (VTC)

June VTC Topic (to be determined)

15 Jun, 1400-1600: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

17 Jun, 1330-1530: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

July VTC Topic (to be determined)

18 Jul, 1530-1730: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

19 Jul, 1530-1730: TRADOC installations, ISC, DESCOM, ARL, MICOM

October VTC Topic (to be determined)

5 Oct, 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Oct, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

November VTC Topic (to be determined)

8 Nov, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

9 Nov, 1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

December VTC Topic (to be determined)

5 Dec, 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Dec, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

NOTE: Mr. Moreau, Contract Law Division, OTJAG, is the VTC coordinator. If you have any questions on the VTCs or scheduling, contact Mr. Moreau at commercial: (703) 695-6209 or DSN: 225-6209. Topics for 1994 VTCs will appear in future issues of *The Army Lawyer.*

5. Articles

The following civilian law review article may be of use to judge advocates in performing their duties:

Gordon J. MacDonald, Note, *Stray* Katz: *Is Shredded Trash Private?*, 79 CORNELL L. REV. 452 (1994).

6. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

7. The Army Law Library System

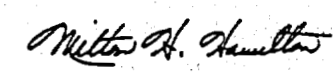
With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

U.S. Government Printing Office: 1994 — 300-675/00003

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
06728

Distribution: Special

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

SECOND CLASS MAIL

PIN: 072637-000