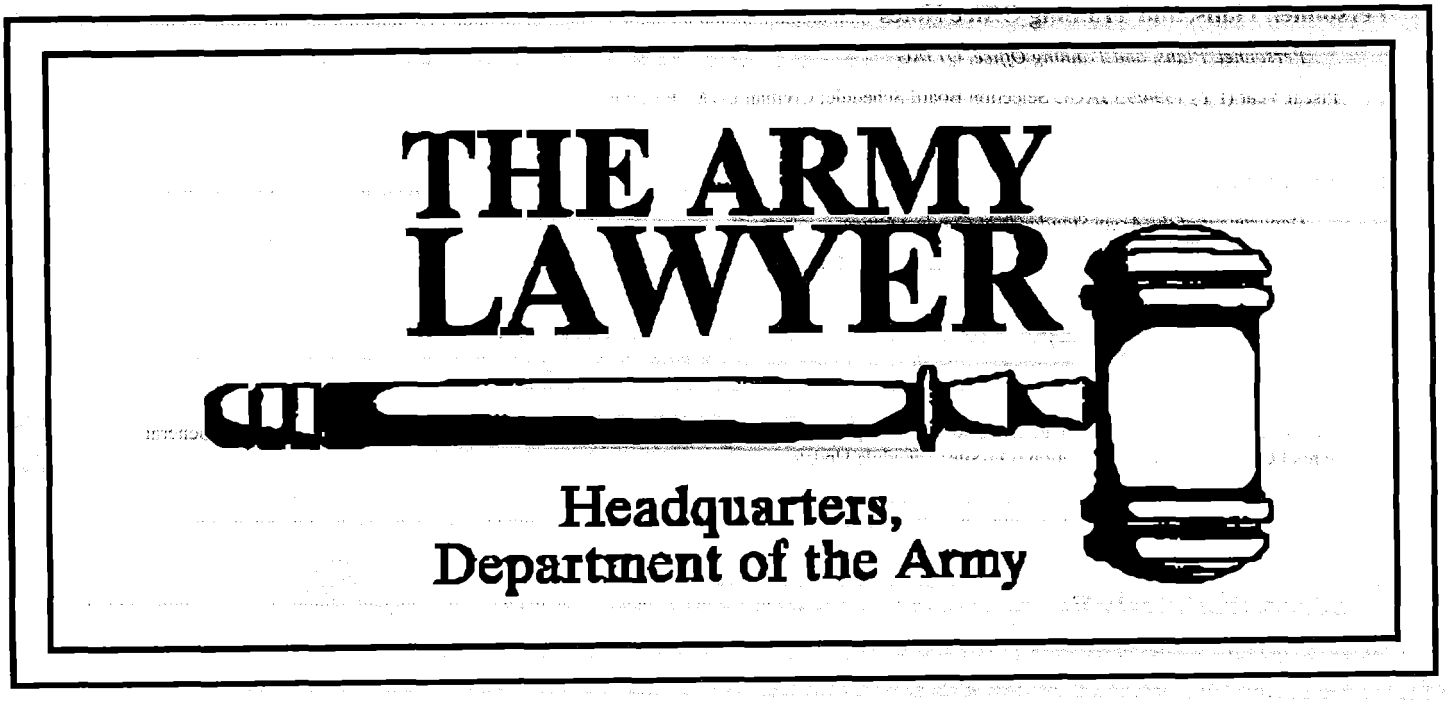

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Judicial Review of Military Administrative Decisions After *Darby v. Cisneros*

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Introduction

The doctrine of exhaustion of administrative remedies has been a part of the jurisprudence of administrative law for almost one century.[1] As early as 1938, the United States Supreme Court could unreservedly state that it was a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[2] However, over time, the exhaustion doctrine has become subject to an increasing number of exceptions.[3] Consequently, consistently determining whether or not individuals must exhaust their administrative remedies prior to seeking judicial review of agency action has become difficult for practitioners and the courts.

In *Darby v. Cisneros*,[4] the Supreme Court dispelled some of the confusion surrounding the exhaustion doctrine. In *Darby*, the Court virtually eliminated the requirement of administrative exhaustion for those individuals seeking judicial review of agency action under the Administrative Procedure Act.[5] Because *Darby* may have a significant impact on military practitioners involved in defensive federal litigation, examining the future of judicial review of military administrative decisions after *Darby* is appropriate as well as necessary.

This article will examine the jurisprudential values underlying the exhaustion doctrine and trace the doctrine's historical development through a review of selected Supreme Court decisions. The article will then explore the Court's decision in *Darby*, and propose several measures that the government can take to mitigate the effects of the decision on defensive federal litigation.

Discussion

The Jurisprudential Bases of the Exhaustion Doctrine

When discussing the exhaustion doctrine, courts frequently cite a variety of institutional values that are served by its application. These values fall primarily into two categories: those that protect agency autonomy, and those that promote judicial economy.[6]

Professor Louis Jaffe, in his classic text, *Judicial Control of Administrative Action*,[7] proposed that the exhaustion doctrine is "an expression of executive and administrative autonomy."[8] The Supreme Court echoed Professor Jaffe in declaring that "[t]he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence."[9] This concern for the independence of administrative agencies is rooted in the constitutional doctrine of separation of powers.[10] Administrative agencies are entitled to judicial deference because Congress has given primary responsibility for administering statutory programs to the agencies, and not the courts.[11] Additionally, the exhaustion requirement improves the efficiency of administrative functions by allowing "the administrative process to go forward without interruption . . . from the courts at various intermediate stages."[12] This better allows agencies to develop the facts in a given situation, apply their expertise to those facts, and exercise their statutory discretion.[13] The exhaustion doctrine

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[1] *See* Pittsburgh & C. Ry. v. Board of Public Works, 172 U.S. 32 (1898).

[2] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

[3] *See* McKart v. United States, 395 U.S. 185, 193 (1969); 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2, at 308 (3d ed. 1994).

[4] 113 S. Ct. 2539 (1993).

[5] *Id.* at 2548.

[6] McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992).

[7] LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

[8] *Id.* at 425.

[9] Parisi v. Davidson, 405 U.S. 34, 37 (1972). *Accord* McGee v. United States, 402 U.S. 479, 484 n.6 (1971) ("The whole rationale of the exhaustion doctrine . . . lies in purposes intimately related to the autonomy and proper functioning of the particular administrative system Congress has constructed.").

[10] *Cf.* Montgomery v. Rumsfield, 572 F.2d 250, 252-53 (9th Cir. 1978) (statutory exhaustion requirements implicate constitutional concerns of separation of powers).

[11] McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992); McKart v. United States, 395 U.S. 185, 193-94 (1969).

[12] *McKart*, 395 U.S. at 194.

[13] 2 DAVIS & PIERCE, *supra* note 3, § 15.2, at 309.

also protects agency authority by giving the agency the opportunity to discover and correct its own errors prior to judicial review.[14] Ultimately, the doctrine enhances agency effectiveness by encouraging adherence to agency appeal procedures.[15]

Applying the exhaustion doctrine also promotes judicial efficiency. Some courts even refer to judicial economy as "[t]he basic concept underlying the requirements of the exhaustion doctrine."[16] The doctrine promotes judicial economy in at least three ways. By requiring the exhaustion of administrative remedies, agencies will resolve a certain number of controversies without the need for judicial intervention, reducing the number of cases flowing to the courts for review.[17] The exhaustion doctrine also tends to reduce the likelihood of piecemeal appeals by delaying judicial review until the agency has taken final action on a given matter.[18] Finally, application of the doctrine facilitates judicial review by increasing the prospect that the record produced by the administrative process will be useful and complete.[19]

In this manner, the exhaustion doctrine furthers the twin purposes of protecting agency authority and promoting judicial efficiency. In turn, the interplay of these two values ensures that each petition for judicial review is heard only when the timing and procedural posture of the case are appropriate.[20] Therefore, the ultimate goal of the exhaustion doctrine—like the related doctrines of finality and ripeness—is to "avoid premature judicial involvement in the administrative decision making process."[21]

The Rise and Fall of the Exhaustion Doctrine

The exhaustion doctrine began as a discretionary rule applied in courts of equity.[22] To gain access to an equity court, a petitioner usually was required to establish in his or her pleadings that the courts of law were either unwilling or unable to give the requested relief.[23] The absence of either of these conditions would lead to the denial of the petitioner's request for equitable relief.[24] As early as 1898, the Supreme Court had applied this equitable doctrine to cases involving challenges to the actions of administrative agencies.[25]

In 1904, the Court delivered one of its earliest discussions of the exhaustion doctrine in *United States v. Sing Tuck*.[26] Sing Tuck had been denied admission to the United States by an immigration inspector and was being detained, along with thirty-one others, pending his deportation to China. He sought a writ of habeas corpus directing his release, but had not exhausted his administrative appeals prior to filing suit.[27] Justice Holmes, writing for the Court, reasoned that "before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with."[28] He concluded that "the attempt to disregard and override the provisions of the statutes and the rules of the Department, and to swamp the courts by a resort to them in the first instance, must fail."[29] The Court denied Sing Tuck's petition.[30]

The Court's decision in *Sing Tuck* formulated the general rule that "failure to appeal an administrative decision to higher administrative authority precludes judicial review."[31] By

[14] *McCarthy*, 112 S. Ct. at 1086; *McKart*, 395 U.S. at 195.

[15] *See McKart*, 395 U.S. at 195 ("[F]requent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.").

[16] *See* Missouri v. Bowen, 813 F.2d 864, 871 (8th Cir. 1987).

[17] *See McCarthy*, 112 S. Ct. at 1086-87.

[18] *Id.*

[19] *See McKart*, 395 U.S. at 194.

[20] *See* 2 DAVIS & PIERCE, *supra* note 3, § 15.1, at 305.

[21] *Id.* § 15.17, at 395.

[22] JAFFE, *supra* note 7, at 425 (citing Smith v. United States, 199 F.2d 377, 381 (1st Cir. 1952)).

[23] LEWIS MAYERS, THE AMERICAN LEGAL SYSTEM 61-62 (1955).

[24] JAFFE, *supra* note 7, at 425.

[25] *See* Pittsburgh & C. Ry. v. Board of Pub. Works, 172 U.S. 32, 44-45 (1898).

[26] 194 U.S. 161 (1904).

[27] *Id.* at 166. The relevant statute allowed, but did not require, appeal from the decision of the immigration inspector to the Secretary of the Treasury. *Id.*

[28] *Id.* at 170.

[29] *Id.*

[30] *See id.*

[31] United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 439 (9th Cir. 1971).

1938, the Court could refer to the exhaustion doctrine as a "long-settled rule of judicial administration."[32] As time passed, however, the courts inconsistently applied the exhaustion doctrine.[33] The Supreme Court began to recognize an increasing number of exceptions to the general rule requiring administrative exhaustion before judicial review. In *Leedom v. Kyne*,[34] for example, the Court waived administrative exhaustion because it concluded that the agency in question had acted beyond its statutory jurisdiction.[35] Exceptions began to proliferate to the extent that a noted commentator remarked that in determining when administrative exhaustion was to be required, "[n]o simple principle governs, unless it is that judicial discretion governs."[36]

In *McKart v. United States*,[37] the Supreme Court continued dismantling the exhaustion doctrine. In *McKart*, the Court considered whether failure to administratively appeal a decision by the Selective Service System barred an individual from later raising the basis of the foregone appeal as a defense in a criminal proceeding.[38] The Court reaffirmed that the exhaustion doctrine was "well established in the jurisprudence of administrative law,"[39] and extensively discussed the institutional values that support the doctrine.[40] However, the Court also declared that "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved."[41] Writing for the Court, Justice Marshall announced a balancing test for use by a reviewing court in determining whether or not to require administrative exhaustion in a specific case; the governmental interests supporting the exhaustion requirement must be weighed against the burden on the individual if judicial review is not granted.[42] The Court held that administrative exhaustion was not required under the facts of the case and warned against blind application of the doctrine in the future.[43]

The Balancing Test Applied and Expanded

The Court recently reaffirmed the use of a balancing test to determine when administrative exhaustion is appropriately required. In *McCarthy v. Madigan*,[44] a prisoner in federal custody filed suit against prison staff members alleging various constitutional torts.[45] The Court analyzed the prisoner's failure to exhaust his administrative remedies by applying a restatement of the balancing test first announced in *McKart*. The Court compared "the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."[46] The Court then excused the prisoner's failure to exhaust his administrative remedies with the Bureau of Prisons.[47]

The most significant aspect of the Court's decision in *McCarthy* is not the holding, but rather the dicta regarding the application of the balancing test. The Court identified "three broad sets of circumstances" in which the individual's interest in retaining prompt access to a federal judicial forum is presumed to outweigh the countervailing institutional interests favoring exhaustion.[48] *McCarthy* is significant in that these "circumstances" amount to per se exceptions to the exhaustion requirement; by recognizing and systematically examining these exceptions, the Court is acknowledging the extent to which the exhaustion doctrine has eroded as a rule of law.

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[32] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

[33] 2 DAVIS & PIERCE, *supra* note 3, § 15.2, at 312.

[34] 358 U.S. 184 (1958).

[35] *Id.* at 188-89.

[36] KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE § 26.1, at 434 (1989).

[37] 395 U.S. 185 (1969).

[38] *Id.* at 186-87.

[39] *Id.* at 193.

[40] *Id.* at 192-95. Professors Davis and Pierce consider the Court's opinion in *McKart* to be "the Court's most comprehensive discussion of the exhaustion doctrine." 2 DAVIS & PIERCE, *supra* note 3, § 15.2, at 308.

[41] *McKart*, 395 U.S. at 193.

[42] *Id.* at 197.

[43] *Id.* at 200-01. The Court's decision in *McKart* captures the fundamental inconsistency in the judicial application of the exhaustion doctrine; the opinion begins by reaffirming the vitality of the doctrine but subsequently finds a basis for not applying it in this particular case. In *McKart*, the government sought to bar the petitioner from raising a defense to a criminal prosecution because he had failed to first raise the defense before the agency through the available administrative appeals process. The Court reasoned that "it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having judicial review of an assertedly invalid order." *Id.* at 197. The Court concluded that the exhaustion doctrine should not be applied in criminal cases unless a compelling governmental interest outweighs "the severe burden placed on [the criminal defendant]." *Id.*

[44] 112 S. Ct. 1081 (1992).

[45] *Id.* at 1085.

[46] *Id.* at 1087.

[47] *Id.* at 1088.

[48] *Id.* at 1087.

The first circumstance in which the individual's interest is presumed to prevail is when the delay necessary for exhaustion of administrative remedies would cause undue prejudice to the individual seeking judicial review.[49] *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*[50] is an interesting example of the Court's application of this exception to the exhaustion requirement. In *Coit*, the Court held that creditors did not have to exhaust administrative remedies for adjudication of claims against a failed savings and loan association under Federal Savings and Loan Insurance Corporation (FSLIC) receivership.[51] The Court did not require administrative exhaustion because the FSLIC had placed no reasonable time limit on their consideration of creditor claims; therefore, the FSLIC's claims procedure was inadequate and unduly prejudiced creditors.[52] In light of *Coit*, courts likely are to find that a system of sluggish administrative remedies may occasion undue prejudice to one seeking judicial review of an agency decision.[53]

Not all delay in obtaining administrative remedies will be found to irreparably harm or unduly prejudice a petitioner. In *Federal Trade Commission v. Standard Oil Co.*,[54] the Court held that the ordinary time and expense of defending oneself in an administrative procedure did not, in and of itself, amount to irreparable injury or undue prejudice.[55] Thus, the petitioner seeking to take advantage of this exception to the exhaustion requirement is likely to be required to demonstrate that any delay inherent in the agency procedures is either unreasonable or potentially indefinite.[56]

The second exception to the exhaustion requirement occurs when the agency is not empowered to adjudge the requested relief.[57] This situation commonly occurs when an individual challenges the constitutionality of some statutory provision related to the agency's decision-making process; agencies cannot hold statutory provisions unconstitutional.[58] A similar situation confronted the court in *McCarthy v. Madigan*. In *McCarthy*, the petitioner ultimately was seeking only money damages; the Bureau of Prisons could not, however, award money damages under their scheme of administrative remedies.[59] The majority opinion fully examined the exhaustion issue by balancing the equities of the situation; three concurring justices observed that because the administrative procedure in question could not provide the requested remedy, any exhaustion requirement could, and should, be excused on that basis alone.[60]

The third exception discussed by the Court in *McCarthy* excuses administrative exhaustion when the agency decision-makers are demonstrably biased or have otherwise predetermined the issue before them.[61] Courts sometimes apply this exception by determining whether further administrative proceedings would "merely be futile for the applicant."[62] The courts generally will not demand a futile act.[63]

The Court's opinion in *McCarthy* does not explicitly mention every exception ever applied to the exhaustion doctrine, either by itself or the lower federal courts.[64] However, *McCarthy* likely remains the most systematic discussion of

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[49] *Id.*

[50] 489 U.S. 561 (1989).

[51] *Id.* at 564.

[52] *Id.* at 587.

[53] 2 DAVIS & PIERCE, *supra* note 3, § 15.10, at 354. Professors Davis and Pierce also note that the majority's application of exhaustion law in *Coit* is "novel." *Id.* at 353. Nonetheless, the decision could have significant effects on the viability of the present procedures at the various boards for the correction of military records. For example, the Army regulation governing the Army Board for the Correction of Military Records imposes an administrative statute of limitations on applicants, but imposes no reasonable time limits on the Board's actions. *See generally* 32 C.F.R. § 581.3 (1993).

[54] 449 U.S. 232 (1980).

[55] *See id.* at 244-45.

[56] *See* McCarthy v. Madigan, 112 S. Ct. 1081, 1087 (1992).

[57] *Id.* at 1088.

[58] *See* Weinberger v. Salfi, 422 U.S. 749, 764 (1975). An agency can, however, examine the constitutionality of its own regulations and procedures. *See* 4 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.6, at 434 (2d ed. 1983).

[59] *McCarthy*, 112 S. Ct. at 1091.

[60] *Id.* at 1092-93. *But cf.* Guerra v. Scruggs, 942 F.2d 270, 277 (4th Cir. 1991) (inability to grant relief requested does not automatically excuse administrative exhaustion).

[61] *McCarthy*, 112 S. Ct. at 1088.

[62] *Weinberger*, 422 U.S. at 766. *Cf. Guerra*, 942 F.2d at 277 (mentioning, but not discussing, counsel's argument that exhaustion was futile because the agency appeals board recently had decided a case against a similarly situated petitioner).

[63] Houghton v. Shafer, 392 U.S. 639, 640 (1968).

[64] *See, e.g.*, Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975)(purely legal issues may excuse exhaustion); Walters v. Secretary of the Navy, 533 F. Supp. 1068 (D.D.C. 1982), *rev'd on other grounds*, 725 F.2d 107 (D.C. Cir. 1983)(avoidance of piecemeal relief may excuse exhaustion).

the exceptions that the Court has recognized in its precedents. Consequently, *McCarthy* is an invaluable guide to the exhaustion doctrine and its exceptions for both practitioners and jurists.

Statutory Exhaustion

The exhaustion doctrine is a judicial creation, and the common law reasoning described above[65] controls most applications of the doctrine.[66] Insistence on administrative exhaustion generally is in the reviewing court's discretion.[67] Congress can limit judicial discretion in this area, however, through statutes that address exhaustion.[68] Accordingly, any court facing an exhaustion issue first must determine whether "Congress has affirmatively requested or required exhaustion of administrative remedies prior to allowing judicial review."[69] If Congress has done so, then the reviewing court's actions "must be tailored to fit the peculiarities of the administrative system Congress has created."[70]

Nevertheless, the Supreme Court has identified limits to the extent that a statute may constrain judicial action. For example, an organic act that gives an agency the broad mandate to run the nation's federal prisons does not restrict judicial application of the exhaustion doctrine in cases originating in the agency.[71] Even a more detailed statute might not preclude the exercise of judicial discretion because anticipating the infinite variety of issues and procedural postures that may present themselves for judicial review is impossible.[72] A reviewing court must, therefore, closely examine the statutory environment prior to ruling on an exhaustion question.

Statutory provisions concerned with exhaustion generally fall into two categories: those that mandate exhaustion and others that describe the circumstances under which exhaustion may be excused. The Administrative Procedure Act (APA)[73] falls largely into the latter category because the central purpose of the act was to facilitate "a broad spectrum of judicial review of agency action."[74] In light of this unambiguous purpose, the Supreme Court has taken the position that the "APA's 'generous review provisions' must be given a 'hospitable' interpretation."[75]

Darby v. Cisneros and the Exhaustion Doctrine

In *Darby v. Cisneros*,[76] the Supreme Court examined the application of the exhaustion doctrine in light of the APA's "generous review provisions." Darby, the petitioner, was seeking judicial review of an adverse determination by a hearing officer of the federal Department of Housing and Urban Development (HUD).[77] While the HUD regulations allowed an administrative appeal of the hearing officer's decision, Darby failed to exhaust this administrative remedy prior to seeking judicial review.[78] The district court excused the exhaustion requirement on the grounds that "the administrative remedy was inadequate and resort to that remedy would have been futile."[79] The United States Court of Appeals for the Fourth Circuit reversed the district court because it found no evidence in the record that the available administrative remedy was either inadequate or futile.[80]

The Supreme Court held that exhaustion was not required under the facts of the case.[81] In reaching this conclusion, the Court relied heavily on the plain language of the APA's provi-

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[65] *See supra* notes 22-64 and accompanying text.

[66] 2 DAVIS & PIERCE, *supra* note 3, § 15.3, at 316.

[67] *E.g.*, Montgomery v. Rumsfield, 572 F.2d 250, 253 (9th Cir. 1978).

[68] 2 DAVIS & PIERCE, *supra* note 3, § 15.3, at 316. *See, e.g.*, McKart v. United States, 395 U.S. 185, 193 (1969).

[69] McCarthy v. Madigan, 112 S. Ct. 1081, 1089 (1992).

[70] *McKart*, 395 U.S. at 195.

[71] *Id.* at 1089.

[72] 2 DAVIS & PIERCE, *supra* note 3, § 15.3, at 318.

[73] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[74] Bowen v. Massachusetts, 487 U.S. 879, 903 (1988).

[75] Abbot Laboratories v. Gardner, 387 U.S. 136, 138 (1967) (citations omitted). The APA's provisions on judicial review are codified at 5 U.S.C. §§ 701-06.

[76] 113 S. Ct. 2539 (1993).

[77] *Id.* at 2541-42.

[78] *Id.* at 2542.

[79] *Id.* (citations omitted).

[80] *Id.*

[81] *Id.* at 2548.

sions concerning judicial review.[82] Under the APA, any final agency action generally is subject to judicial review. A court reviewing an otherwise final agency action under the APA cannot require exhaustion of optional administrative remedies.[83] The only judicially enforceable exhaustion requirements are those mandated by statute or agency regulation.[84] If an agency regulation requires an appeal to a superior agency authority prior to seeking judicial review, then the regulation also must provide that for the duration of the appeal, the agency action is stayed or inoperative.[85] Under the facts of *Darby*, neither the relevant statute nor agency regulation required administrative exhaustion. Consequently, the Court held that a reviewing court could not then impose exhaustion as a jurisdictional requirement for the exercise of their judicial discretion.[86]

The Court's decision in *Darby* is surprising only in that it did not occur sooner. The APA became law in 1946,[87] but courts cited section 10(c) infrequently until 1993.[88] Reduced to its basics, the Court's holding in *Darby* is essentially that 5 U.S.C. § 704 means just what it says—no exhaustion requirement under the APA exists unless required by statute or agency rule. This seemingly innocuous decision may have significant ramifications for military practitioners in a number of ways.

Defensive Federal Litigation After *Darby*

At the outset, the limits of *Darby* should be discussed. As a threshold matter, the holding expressly applies only to cases that are brought under the provisions of the APA. The opinion unambiguously states, "Of course, the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA."[90] For example, the Court's relaxation of the exhaustion requirement in *Darby* generally would have no effect on cases brought against the United States under the Tucker Act[91] or the Federal Tort Claims Act.[92] *Darby's* primary effect will be limited to those cases that rely on the APA as a waiver of sovereign immunity.

The Court's decision in *Darby* is likely to have its greatest effect on those cases that are based on either federal question[93] or mandamus[94] jurisdiction, because those jurisdictional statutes contain no independent waiver of sovereign immunity. Because these statutes provide the jurisdictional bases for much of the litigation involving military personnel law[95] the potential effects of *Darby* on this area should not be underestimated.

For example, consider the possible effects of the *Darby* decision on the Department of the Army's intra-agency appeal system for military personnel actions. Under the current statutory and regulatory framework, the Army has three primary mechanisms for handling appeals of military personnel actions: the Army Board for the Correction of Military Records,[96] the Army Discharge Review Board,[97] and Article 138 of the Uniform Code of Military Justice.[98] No statute or agency regulation requires that an individual seeking to appeal an Army personnel action first apply to either board or use the procedures under Article 138 prior to seeking judicial review.[99] After *Darby*, a reviewing federal court could not require an individual to exhaust these administrative remedies

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[82] 5 U.S.C. § 704 (1988). *Final* action is, unfortunately, not defined by the statute.

[83] *See id.*

[84] *Id.*

[85] *See id.*

[86] *Darby*, 113 S. Ct. at 2548.

[87] Administrative Procedure Act, Pub. L. No. 79-404, § 10(c), 60 Stat. 243 (1946).

[88] 2 DAVIS & PIERCE, *supra* note 3, § 15.3, at 317.

[89] *Darby*, 113 S. Ct. at 2548.

[90] *Id.*

[91] 28 U.S.C. §§ 1346(a)(2), 1491 (1988).

[92] Ch. 743, 60 Stat. 842 (1946) (codified as amended in scattered provisions of 28 U.S.C.). For a brief examination of the statutory exhaustion requirements of the Federal Tort Claims Act, *see infra* note 116.

[93] 28 U.S.C. § 1331 (1988).

[94] *Id.* § 1361.

[95] *Cf.* 3 DAVIS & PIERCE, *supra* note 3, § 18.1, at 163 ("The most common remedy for unlawful federal agency action is a petition for review filed pursuant to the general statutory provisions conferring federal question jurisdiction on district courts.").

[96] *See generally* 32 C.F.R. § 581.3 (1993).

[97] *See generally id.* § 581.2 (1993).

[98] 10 U.S.C. § 938 (1988).

[99] *See supra* notes 96-98.

prior to seeking review under the APA of a final agency action.[100] That fewer individuals will choose to exhaust their administrative remedies before seeking judicial review of military personnel actions is likely. Absent the requirement of the exhaustion doctrine, little incentive exists for aggrieved individuals to seek administrative relief from an agency that they perceive as already having wronged. Over time, this may result in a decrease in the number of cases resolved by administrative procedures and an increase in the number reaching litigation.

The Military Response to *Darby*: Two Proposals

The Reviewability Response

The federal courts traditionally have been reluctant to review military activities.[101] This reluctance is based largely on judicial acceptance of the oft-cited proposition that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian."[102] Military decisions nonetheless, are subject to judicial review.[103] However, some courts have adopted somewhat stricter standards of reviewability for cases involving the military.[104] In *Mindes v. Seaman,* the Fifth Circuit Court of Appeals adopted a comprehensive framework for determining the reviewability of specific military cases.[105] The *Mindes* analysis has both a procedural and substantive component. As a procedural threshold, an individual seeking judicial review of internal military affairs must satisfy two requirements: the individual first must allege either a deprivation of a constitutional right or a violation by the military of relevant statutes or regulations, and then establish that he or she has exhausted "available intraservice corrective measures."[106]

This judicially created exhaustion requirement apparently is independent of the traditional exhaustion doctrine and may provide an alternative basis for requiring administrative exhaustion in cases governed by the APA. The APA does not purport to be the exclusive source of law for cases pursued under its waiver of sovereign immunity. To the contrary, section 10(a) of the APA expressly provides that "[n]othing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground."[107] Therefore, government counsel may rely on this statutory authorization to argue that *Mindes* imposes an independent exhaustion requirement when assessing the reviewability of a case involving the military.

The Statutory Response

Although a majority of federal circuit courts of appeal have adopted *Mindes* to determine the reviewability of cases seeking review of military actions,[108] not all of the circuits have done so.[109] Consequently, government counsel will not always be able to argue that the exhaustion requirement in *Mindes* survives the Supreme Court's decision in *Darby*. If the intrusive effects of *Darby* are to be minimized in all judicial circuits, another independent source mandating administrative exhaustion must be identified.

The armed forces could revise their regulations to require that individuals seeking judicial review of military administrative decisions first must exhaust their various intra-agency administrative remedies. Professors Davis and Pierce anticipated this response when they wrote that "[t]he opinion in *Darby* will have the salutary effect of forcing federal agencies to describe the nature and effect of available intra-agency appeals clearly and explicitly in their rules."[110] However, section 10(c) of the APA requires that if an agency regulation requires an appeal to superior agency authority prior to seeking judicial review of agency action, then the agency also must provide that the action in question is inoperative during the mandatory appeal process.[111] This would prove extremely unworkable in a military context, particularly when dealing with administrative appeals from involuntary discharges. If a service renders a discharge inoperative during the administrative appeal process, then the appellant presumably would remain on duty and continue to draw pay and allowances during the pendency of the appeal. Apart from the economic cost

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[100] *See* Darby v. Cisneros, 113 S. Ct. 2539, 2548 (1993).

[101] *E.g.*, Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).

[102] *Id.* at 94.

[103] *See* Harmon v. Brucker, 355 U.S. 579, 582 (1958) (per curiam).

[104] *E.g.*, Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

[105] *Id.* at 201-02.

[106] *Id.* at 201.

[107] 5 U.S.C. § 702 (1988); *see* Saad v. Dalton, 846 F. Supp. 889, 891 (S.D. Col. 1994) (review of military personnel actions is unique context with specialized rules limiting judicial review).

[108] For a comprehensive survey of the status of the *Mindes* doctrine in the federal circuits, *see* THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-200, DEFENSIVE FEDERAL LITIGATION 6-59 to 6-60 (Aug. 1993).

[109] *E.g.*, Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981); Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976).

[110] 2 DAVIS & PIERCE, *supra* note 3, § 15.3, at 317.

[111] 5 U.S.C. § 704 (1988). Professors Davis and Pierce comment on the situation before *Darby* where "some agencies attempted to have it both ways, *i.e.*, to describe an intra-agency review procedure as optional but then to seek dismissal of a petition for judicial review of an agency action if a party declined to avail itself of the putatively optional administrative appeal." 2 DAVIS & PIERCE, *supra* note 3, § 15.3, at 317. After *Darby*, this option no longer is available.

to the government, the presence of such an individual in a military organization likely will have an adverse effect on unit discipline and morale.[112]

The more appropriate response would be to statutorily require that individuals seeking judicial review of military administrative decisions first exhaust their various intra-agency administrative appeals. Section 10(c) of the APA provides that Congress may require by statute that, for an agency action to be final and thus susceptible of judicial review, an individual must first exhaust specific intra-agency administrative remedies.[113] Unlike the situation where agency regulation requires administrative exhaustion, the agency action in question need not be rendered inoperative during the appeals process if the statute mandates exhaustion.[114] The statutory response to *Darby* has the advantage of imposing an administrative exhaustion requirement on individuals seeking judicial review of agency action while allowing the agency to execute the action in question, even while the administrative appeal process is ongoing.

The statutory response is not without its own difficulties. First, the statutory response requires the armed forces to convince Congress of the necessity for a new statute that requires administrative exhaustion prior to seeking judicial review of military administrative decisions. Whether anyone could predict if or when such an effort would be successful is doubtful. Additionally, Professor Jaffe has observed that "[i]t is undesirable to read a statute as requiring exhaustion prior to judicial review."[115] This general disinclination from statutory exhaustion requirements will necessitate extremely careful drafting of the proposed statute. The statutory response remains problematic even if carefully drafted because, as Professors Davis and Pierce have noted, "Congress rarely anticipates, and provides for, the many different types of issues that can be raised by a petition for judicial review and the many different procedural postures in which these issues can arise."[116] What can be said of Congress in this instance also can be said of administrative agencies such as the Army. Nothing guarantees that the proposed statute would address every possible situation in which a petitioner might seek judicial review of a military administrative action. A statutory response would, nevertheless, reduce the number of cases that require the expense and effort of defensive litigation.

The statutory response can be made more effective by tailoring its scope to a particular class or classes of administrative decisions. By limiting the variety of actions that the statute purports to regulate, the requirements of the statute can be crafted to provide a better fit between the anticipated actions and the appropriate appeal process. In this manner, the statute will be less susceptible to misinterpretation or manipulation by any party.

A particularly appropriate administrative decision for statutory treatment is the appeal process following an individual's involuntary discharge from the armed forces. For this category of cases, the proposed statute should provide that an involuntary administrative discharge from the armed forces is not a final agency action for the purposes of judicial review until the individual discharged has appealed his discharge to the Board for the Correction of Military Records for his particular service.[117] Internal agency regulations could then be used to establish intermediate jurisdictional hurdles, such as application to a Discharge Review Board, as appropriate.[118]

The focused statutory response described above is the most appropriate military response to the Supreme Court's decision in *Darby*. It ensures that each individual seeking review of a military administrative decision has the opportunity for timely and multitiered review culminating, if necessary, with the federal court system. At the same time, the statutory response preserves the jurisprudential values traditionally associated with the exhaustion doctrine. The interests of both the individual and the institution are thereby satisfied.

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[112] William K. Suter, Judicial Review of Military Administrative Decisions 23 (1967) (unpublished thesis, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia).

[113] *See* 5 U.S.C. § 704 (1988).

[114] *See id.*

[115] JAFFE, *supra* note 7, at 426. This reluctance to imply an exhaustion requirement from the general terms of a relevant statute likely stems from the perceived inequity of barring a citizen from seeking judicial review of agency action in the absence of an express restriction on his or her right to do so.

[116] 2 DAVIS AND PIERCE, *supra* note 3, § 15.3, at 318. This is not to say that a comprehensive and effective administrative exhaustion requirement cannot be created by statute. For example, the Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.), provides, in pertinent part as follows:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a) (1988). The complexity of the quoted statutory provision gives some insight into the difficulty of constructing a statutory exhaustion requirement that will anticipate all potential sources of litigation.

[117] By structuring the statute as a definition of final agency action for the limited purpose of judicial review, the armed forces could effect an individual's discharge and issue appropriate documentation while the individual's appeal is pending.

[118] *See, e.g.*, 32 C.F.R. § 581.3(c)(3) (1993) (Army regulation requiring applicants to the Army Board for the Correction of Military Records to "exhaust all effective administrative remedies afforded him by existing law or regulations, and such legal remedies as the Board shall determine are practical and appropriately available to the applicant.").

Conclusion

The doctrine of exhaustion of administrative remedies has long been a part of the jurisprudence of administrative law.[119] Over time, the doctrine has become subject to an increasing number of exceptions that threaten to overtake the rule.[120] Professor Davis best described the current condition of the exhaustion doctrine when he concluded that "[e]xhaustion of administrative remedies is sometimes required and sometimes not."[121]

In *Darby v. Cisneros*,[122] the Supreme Court further eroded the exhaustion doctrine when it held that a court cannot require exhaustion of optional administrative remedies prior to judicial review of final agency action under the APA.[123] This decision may result in an increased amount of litigation seeking judicial review of military administrative decisions, as well as a decrease in the effectiveness of the armed forces' administrative appeal system.[124]

The service departments should seek the passage of legislation requiring the exhaustion of intra-agency administrative remedies before obtaining judicial review of military administrative decisions. As a prudential matter, the statute should be narrowly drawn and apply only to appeals stemming from involuntary discharge from the armed forces. In this manner, agency autonomy can be preserved, judicial efficiency will be enhanced, and the individual's interest in obtaining review of military administrative decisions ultimately will be protected.

[119] *See supra* notes 22-32 and accompanying text.

[120] *See* 2 DAVIS & PIERCE, *supra* note 3, § 15.2, at 308.

[121] DAVIS, *supra* note 36, § 26:1, at 434.

[122] 113 S. Ct. 2539 (1993).

[123] *Id.* at 2548.

[124] *See supra* notes 6-21 and accompanying text.

Asserting Government Control over Subcontractors

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Introduction

Clauses are the building blocks of every government contract. Congress directs the inclusion of certain contract clauses as a means of implementing public policy. Contract clauses define parties' rights and responsibilities and protect the government's interests in the transaction. For these and other reasons, standard government contract clauses[1] are included in every contract to permit the government to control contractor performance. The government also may control subcontractors by requiring a prime contractor to include certain clauses in its subcontracts. Contract clauses incorporated by reference and flowed down to subcontractors perform this function. This article explores these clauses, and explains when they are required and when they are advisable.

The Federal Acquisition Regulation (*FAR*) and the *Defense Federal Acquisition Regulation Supplement* (*DFARS*) mandate that certain clauses be included in subcontracts. Contract clauses on ethics and integrity, cost and accounting data, and quality control aid the government in its pursuit of a good product for a fair price. Other clauses effectuate socioeconomic, labor, environmental, data rights, and foreign trade policies. The article initially discusses the policies and procedures that apply when the government gains control over subcontractors through contract clauses. The article then examines the mandatory flow-down clauses and why flowing down optional clauses often are advisable. Finally, appendices A through E provide references for *FAR* and *DFARS* mandated flow-down clauses.

Policies and Procedures

The government asserts control over subcontractors by directing the prime contractor to incorporate by reference prime contract clauses into its subcontracts, or by otherwise flowing down prime contract clauses to its subcontractors. Flowing down a contract clause requires including either the exact wording or the substance of the clause in the subcontract. Incorporating a clause by reference does not require

[1] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 10.010 (1 Apr. 1984) [hereinafter FAR].

inclusion of the full wording of the clause in the subcontract, but reference to the clause in the subcontract gives the clause the same force and effect in the subcontract as if it actually has been included. Incorporating by reference and flowing down prime contract clauses are techniques that give the government control over subcontractors in spite of the lack of privity.

Incorporation by Reference

Incorporation by reference is a useful tool for minimizing the vast documentation that otherwise would be included in many government contracts. It also represents an effort to ensure consistency of obligations throughout the tiers of the contracting process.[2] The subcontractor must understand clearly what the prime contractor expects of it. Likewise, the prime contractor must understand what the government expects of it. Incorporating clauses by reference permits all parties to have a common understanding of what each requires and expects.

Incorporation of clauses by reference is a routine practice in government contracting that has been upheld consistently.[3] For example, subcontracts often incorporate by reference applicable technical sections of the prime contract such as plans and specifications. This ensures that the subcontractor knows precisely what both the prime contractor and the final customer, the government, expects of it. Subcontracts may incorporate indemnity provisions by reference[4] and by arbitration clauses and change order clauses.[5] By definition, incorporation by reference effectively makes the clause a part of the subcontract as if it had been fully set out in the subcontract.[6] The *FAR* delineates which of its clauses may be incorporated by reference into prime contracts and which must be incorporated in full text.[7] The *FAR* does not direct or prescribe incorporation by reference in subcontracts.

Flow-Down Clauses

A flow-down clause is a closely related concept to incorporation by reference. The flow-down clause provides that the subcontractor agrees to assume, as to the prime contractor, the same obligations and responsibilities that the prime contractor assumes toward the government.[8] A mandatory flow-down clause included in a government contract means that the prime contractor *must* require any subcontractor to comply with the provision as well. The clause effectively gains government control over a subcontractor even though privity is lacking. Government control of subcontractors furthers the goal of obtaining superior end products and quality services. For example, flowing down quality control, ethics and integrity, and accounting clauses ensures that the subcontractor provides a quality product at a fair price. Other clauses implement environmental, socioeconomic, labor, foreign trade, and other public policies, without the government dealing directly with the subcontractor. The *FAR* makes numerous flow-down clauses mandatory in subcontracts. Other clauses may be flowed down if they are in the government's best interest. Additionally, flow-down clauses may offer some degree of protection to a prime contractor. One writer advocates flowing down the "inspection clause" to protect a prime contractor against a possible government claim of latent defect.[9] The clause provides, in part, as follows:

> Inspections and tests by the government do not relieve the contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.[10]

State law normally governs disputes between prime and subcontractors. However, to the extent that a prime contractor has successfully flowed down the inspection clause, a state court may consider relevant board cases as persuasive authority in deciding whether a prime contractor has established a latent design defect claim against its subcontractor.[11] This provides the prime contractor with a broader remedy than available under the Uniform Commercial Code.[12] From the prime contractor's perspective, it pays to flow down any

[2] T. Bart Gary, *Incorporation by Reference and Flow-Down Clauses*, FORUM COMMITTEE ON THE CONSTRUCTION INDUSTRY OF THE ABA (Aug. 1990).

[3] American Elec. Contracting Corp. v. United States, 579 F.2d 602, 608 (1978); *see also* General Eng'g & Mach. Works v. O'Keefe, 991 F.2d 775 (Fed. Cir. 1993); Chemray Coatings Corp. v. United States, 29 Fed. Cl. 278 (1993); Propper Int'l Inc., ASBCA No. 46334, 94-2 BCA ¶ 26,748; Engineering Technology Consultants, S.A., ASBCA No. 44237, 94-2 BCA ¶ 26,754.

[4] Gary, *supra* note 2.

[5] United States Fid. & Guar. Co. v. West Point Constr. Co., 837 F.2d 1507 (11th Cir. 1988); Westinghouse Elec. Supply Co. v. Fidelity and Deposit Co. of Md., 560 F.2d 1109 (3rd Cir. 1977).

[6] BLACK'S LAW DICTIONARY 766 (6th ed. 1990). *See* DWS, Inc., Debtor-in-Possession, ASBCA No. 29744, 90-3 BCA ¶ 23,026.

[7] FAR 52.102.

[8] Gary, *supra* note 2.

[9] Mark S. Jaeger, *Contractor Liability for Design Defects Under the Inspection Clause: Latent Design Defects-A Sleeping Giant?*, 21 PUB. CONT. L.J. 331 (1991-92).

[10] FAR 52.246-2(k).

[11] Jaeger, *supra* note 9, at 351.

[12] *Id.* at 353.

clause in its prime contract which makes it liable to the government for deficient subcontractor performance. Although the prime contractor cannot flow down its responsibilities owed to the government, it may secure additional protection for itself by making its subcontractors accountable to the same extent that it is liable to the government. A subcontractor may reject this as a contract term, but it is to the prime contractor's advantage to include it if possible.[13]

Mechanics of Asserting Control

Successfully asserting control over subcontractors by incorporating clauses by reference and flowing down clauses requires careful draftsmanship. The parties' intentions regarding inclusion of prime contract terms in the subcontract must be abundantly clear. *Guerini Stone Co. v. P.J. Carlin Construction Co.*[14] is the leading case interpreting parties' intentions. The subcontract in *Guerini Stone* contained a clause which made the prime contractor liable to the subcontractor for any delay of work progress because of failure to furnish labor and materials.[15] Thereafter, the prime contractor impeded work progress due to the government's suspension of work. Government suspension of work was permissible under the terms of the prime contract.[16] The subcontractor ultimately brought suit against the prime for breach of contract. The prime contractor defended based on its contract with the government, insisting that the suspension of work clause be read into the subcontract. The Court found that although the subcontract contained a reference to prime contract specifications and drawings, the reference was "evidently for the mere purpose of indicating what work was to be done, and in what manner done, by the sub-contractor."[17] The Court found no clause incorporating into the subcontract the provisions of the prime contract regarding the suspension of work. The Court held

> In our opinion the true rule, based upon the sound reason and supported by the greater weight of authority, is that in the case of sub-contracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.[18]

The Court held that the prime contract was admissible in evidence against the subcontractor only as a reference for the work required by the specifications and plans.[19]

Guerini Stone demonstrates that for an incorporation by reference or flow-down clause to bind a subcontractor to specific terms of the prime contract, the intent to bind must be abundantly clear from the language of the clause. A few examples are illustrative. In *Smithson v. United States*,[20] a broadly worded contract clause did not incorporate by reference all of an agency's regulations. The contract stated, "This agreement is subject to the present regulations of the secured party [FmHA] and to its future regulations not inconsistent with the express provisions hereof."[21] The court analyzed this language stating, "This is hardly the type of clause that should be read as incorporating fully into the contract all the FmHA regulations . . . if that were the parties' purpose, they would have explicitly so provided."[22] In a General Services Board of Contract Appeals case, the board held that incorporation by reference of the National Standard Plumbing Code (Code) bound a subcontractor to comply with those provisions of the Code applicable to the work detailed in the contract specifications and plans.[23] The contract stated that the Code was incorporated "for the purpose of establishing requirements applicable to equipment, materials, or workmanship under this contract."[24] The board found that the Code was incorporated only to the extent that it was relevant, and that the contract provisions concerning caulking bathroom fixtures were relevant.[25] The board granted an appeal in another case where the government failed to adequately identify which version of a

[13] *See infra* notes 34-55 and accompanying text for significant *FAR* and *DFARS* clauses that typically are flowed down to subcontractors. The appendices contain a complete list of mandatory *FAR* and *DFARS* flow-down clauses. *See infra* Appendices A-E.

[14] 240 U.S. 264 (1916).

[15] *Id.* at 267.

[16] FAR 52.212-12.

[17] *Guerini Stone*, 240 U.S. at 277.

[18] *Id.*

[19] *Id.* at 278.

[20] 847 F.2d 791 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

[21] *Id.* at 794.

[22] *Id.*

[23] J.S. Alberici Constr. Co., Inc., GSBCA Nos. 10144, 10202, 10353, 10491, 91-1 BCA ¶ 23,418.

[24] *Id.* at 117,477.

[25] *Id.* at 117,480.

fire code it was incorporating by reference into the contract. Because the fire code was not described with enough specificity to put the contractor on notice as to the requirements intended, the incorporation by reference failed.[26] These cases demonstrate that incorporating language must be exceptionally clear.

As with clauses incorporated by reference, contract clauses flowed down must clearly express the parties' intention to bind the subcontractor. For a flow-down clause to effectively bind a subcontractor, as the prime contractor is bound to the government, the subcontractor must manifest an intent to be so bound.[27] In *Lenny Hoffman Excavating, Inc. v. Actus Corp./Sundt Corp. v. Safeco Ins. Co. of America*,[28] a subcontractor claimed the benefit of protections afforded the prime contractor under the "Default" clause. It based its claim on a vague reference in the subcontract to "applicable Federal Acquisition Regulations."[29] The prime contract also contained a flow-down clause reading "the Contractor binds itself to the Subcontractor under this Agreement in the same manner as the Owner is bound to the Contractor under the Contract documents."[30] However, the flow-down clause—while referencing a number of *FAR* clauses—did not reference the default clause which relieves the prime contractor from responsibility for delays caused by labor disputes beyond its control.[31] Because the default clause was not included in the list of regulations constituting terms and conditions of the subcontract, nothing indicated that the parties intended to apply that particular clause to the subcontract. The court held that the default clause protecting the prime contractor had not been flowed down to the subcontractor.

In *Planning Research Corp., Inc. v. Department of Commerce*,[32] a subcontractor claimed damages based on the government's failure to exercise equipment lease options. The government's motion for summary judgment was denied because of ambiguity in the provisions flowed down to the subcontractor. The flow-down clause covered disputes, termination for convenience, and various *FAR* clauses incorporated by reference. Paragraph nine in each lease stated that "the following contract clauses are based upon equivalent clauses contained in the User Contract."[33] But not all clauses listed in paragraph nine were included in the prime contract. Because the board was unable to ascertain what clauses the prime contractor intended to flow down to its subcontractor, material facts remained at issue. The government's motion for summary judgment was denied. For a flow-down clause to bind a subcontractor, the prime and subcontractors must clearly manifest their intention that the subcontractor be so bound. A carefully crafted flow-down clause will explicitly reference the desired clauses.

FAR and DFARS Clauses

Part 52 of the *FAR* contains solicitation provisions and contract clauses typically included in government contracts. Part 252 of the *DFARS* contains provisions and clauses included in defense contracts. Many of the clauses are required in the government's contract with the prime contractor. The prime contractor's subcontracts may require the clauses as well. This section will discuss *FAR* and *DFARS* mandatory and optional flow-down clauses. The clauses are discussed in five groups corresponding to *FAR* divisions. The groups reference attached appendices *A* through *E* which list all *FAR* and *DFARS* mandatory flow-down clauses. All *FAR* and *DFARS* references are current through *Federal Acquisition Circular 90-20*.

Ethics and Acquisition Planning

Appendix *A* contains *FAR* mandated flow-down clauses corresponding to *FAR* parts 1 through 12. Included are clauses addressing improper business practices, classified material, and required sources of supplies and services. The *FAR* directs that government business practices be conducted "in a manner beyond reproach."[34] Government employees are bound to an "impeccable standard of conduct" and must "avoid strictly any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships."[35] In addition to ethical business practices, the safeguarding of classified information within industry is addressed. The government's business transactions offer ample opportunity for security breaches. Contracting officers have a significant responsibility for handling such information. The flowed down security clause binds both the prime and the subcontractor to act accordingly. Furthering efficiency in the acquisition process is another use for flow-down clauses. A government-owned, contractor-managed plant produces jewel bearings.[36] A *FAR* clause requires these items to be purchased from the plant or other domestic sources.

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[26] Twelfth & L Streets Ltd. Partnership, GSBCA No. 7599, 88-1 BCA ¶ 20,519.

[27] United States v. Pearson's E.F. & C., Inc., 771 F. Supp. 810, 822 (S.D. Tex. 1990).

[28] No. 91-C-1571, 1992 U.S. Dist. LEXIS 13581, at *1 (N.D. Ill. Sept. 8, 1992).

[29] *Id.* at *3.

[30] *Id.* at *2.

[31] FAR 52.249-10.

[32] GSBCA Nos. 11286-COM, 11576-COM, Nov. 24, 1993, 1993 GSBCA LEXIS 578.

[33] *Id.* at *5.

[34] FAR 3.101-1.

[35] *Id.*

[36] *See id.* subpt. 8.2.

Requiring subcontractors to purchase bearings from a domestic source arguably furthers efficiency in maintaining a domestic supplier as well as social goals.

In addition to the cited mandatory clauses, contracting officers should consider flowing down any other clause which binds the subcontractor to a high performance standard. Because subcontractors are as much a part of the acquisition process as prime contractors, they should be bound similarly. For example, control of subcontractor responsibility has been successfully flowed down.[37] The solicitation referred to qualification/experience requirements in terms of the prime contractor. No specific flow-down language was included. However, the board imposed the qualification/experience requirement on the subcontractor that was actually to do the work

> Thus, we read this provision as inherently establishing a requirement that whichever contractor actually performs the prime contractor's interior coating responsibilities must meet the stated requirements. To hold otherwise would lead to an anomalous and unreasonable result, *i.e.*, the contractor would have to meet stringent qualification/experience requirements if it did the work itself but if it subcontracted the work it could use a totally unqualified firm.[38]

A clear expression of required subcontractor responsibility is most appropriate in any prime contract. Arguably, this decision permits subcontractor responsibility to flow down even in the absence of this language. However, contracting officers should not rely on an "imputed flow down." Whether the same result would attach in situations where the "anomalous and unreasonable result" is less apparent is unclear.

Contracting Methods and Contract Types

Appendix *B* lists mandatory flow-down clauses from *FAR* parts 13 through 18. These clauses concern procedures for sealed bidding, negotiated procurement, and contract types. The sealed bidding process accounts for the majority of government contracts. The *FAR* requires flowing down certain clauses concerning modifications of contracts awarded through sealed bidding. Mandatorily flowing down requirements for audits and submission of pricing data gives the government an opportunity to assure itself that the subcontractor can perform the work in a satisfactory and cost-effective manner. Without this opportunity, modification of sealed bid type contracts is subject to abuse by unscrupulous subcontractors. More complex government procurements usually are accomplished through negotiation. *Federal Acquisition* mandated flow-down clauses again deal with cost and pricing data and examination of subcontractor records. The government flows down these requirements for many of the same reasons that it does for modification of sealed bid procurements. The complex negotiated acquisitions offer many opportunities for contractors to profit unfairly by concealing information. Contracting officers should consider flowing down any other pricing clause that further reduces government risk at the subcontractor level. Although protection of the government's interests is paramount, prime contractors especially may be interested in voluntarily flowing down clauses that relieve them of liability for a subcontractor's submissions. Contract prices may be reduced based on defective cost or pricing data.[39] The prime contractor will be interested in insulating itself by similarly binding its subcontractor. Flowing down the clause to the subcontractor will make the subcontractor responsible for its own submissions. Another method of encouraging subcontractor responsibility is to flow down requirements for an audit. In *Appeal of Aerospatiale Helicopter Corporation*, an "Audit Clause" obligated the prime contractor to include the clause in its subcontracts.[40] The board found that the flow-down clause conferred legal and contractual rights on the government to conduct an audit of the subcontractor's books. This requirement is similar to the current *FAR* flow-down clause requiring submission of subcontractor cost or pricing data.[41]

For many contract types, the government normally must secure adequate data with which to evaluate a contractor's costs. Failure to monitor subcontractor performance only increases the risk for another well-publicized government procurement disaster. The government cannot afford the attendant negative publicity in these times of lean resources. Binding the subcontractor through flow-down clauses gives the government insight it might not otherwise have.

Socioeconomic Programs

Appendix *C* contains mandatory flow-down clauses addressing government socioeconomic programs. Included are clauses implementing policies on small business, labor, the environment, privacy, and foreign acquisition. For example, equal opportunity, affirmative action programs, and wage and hour regulations are all flowed through to subcontractors through government contract clauses. The government's labor policies are implemented comprehensively. Pollution control is the goal of several other clauses that implement clean air and water standards. One government contract may reach many subcontractors through flow-down requirements. Potential polluters are held contractually responsible for their own actions. A prime contractor may or may not otherwise have an incentive to pursue a remedy against its subcontrac-

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[37] Max Jordan Bauunternehmung-Constr. Enter., ASBCA No. 23055, 82-2 BCA ¶ 15,685, *appeal denied*, 10 Cl. Ct. 672 (1985), *aff'd*, 820 F.2d 1208 (Fed. Cir. 1987).

[38] *Id.* at 77,565.

[39] FAR 52.215-22.

[40] DOTBCA Nos. 1905, 1924, 1925, 1935, 1962, 1981, 1982, 89-1 BCA ¶ 21,559.

[41] FAR 52.215-24. *See* The Dewey Elecs. Corp., ASBCA No. 17696, 76-2 BCA ¶ 12,146.

tor. In addition to environmental concerns, political policy is implemented through clauses restricting foreign acquisitions.[42] Prohibiting trade with the United States or permitting it to flow without restriction has powerful impacts on foreign economies. Restricting trade with another country may serve national, military, social, or economic goals. Flowing down public policy to subcontractors in effect makes them a tool for implementing a wide array of public policies. Any contract clause which furthers the implementation of public policy may be considered for flow down to the subcontract level.

General Contracting Requirements and Special Categories of Contracting

Appendix *D* lists flow-down clauses implementing many special contractual requirements. Patents, insurance, taxes, accounting standards and principles are a few of the issues addressed. The government flows down numerous requirements concerning patents and other technical data rights. These flow-down clauses offer assurance to owners of technical data rights that release to the government will not compromise their integrity.[43] Prime contractors will want to flow down these provisions to their subcontractors to bind them as well. If not, the prime contractor may be solely responsible to the government for any compromise. The other mandatory clauses in this section set the government's ground rules for doing business. The requirements for insurance, taxes, and accounting bind the contractor to operate responsibly, ethically, and consistently with accepted accounting practices. To the extent these requirements are flowed down to the subcontractors, they are bound as well. If the government has any particular concern about a subcontractor conforming to these standards, it should consider the option of flowing down the requirement to the subcontractor.

Contract Management

Appendix *E* contains flow-down clauses that permit the government to manage not only the prime contractor—with whom it has privity—but subcontractors as well. The clauses on special tooling, limitation of liability, preference for domestic carriers, and value engineering permit the government to hold the subcontractor responsible for its performance as if it had contracted with each of them individually.

This section of the *FAR* also contains three prime contract clauses that traditionally are flowed down to the subcontractor, although they are not mandatory clauses. The "Changes" clause is normally flowed down to a subcontractor to ensure that it will follow this unique concept of government contracting.[44] Although the prime contractor ultimately is responsible, the changes clause gives the prime contractor legal rights to enforce contract changes against the subcontractor. Inclusion of this clause gives the government additional assurance that it will receive the end product in a satisfactory and timely manner. The government contract drafter must consider flowing down the contract "Inspection" clause as well.[45] Again, although not required, flowing down the inspection clause gives the government an opportunity to inspect work in the early stages, before a major problem can develop. A satisfactory product or service promptly delivered remains the government's ultimate goal. The final clause not required for flowing down, but traditionally included in subcontracts, is the "Termination" clause.[46] The prime contractor wants to protect itself from a breach of contract claim if the government terminates its contract. Including the termination clause in its subcontract binds the subcontractor to accept the government's accounting for settlement costs. The government benefits by not being drawn into possibly protracted litigation between the prime and subcontractors.

Flow-down clauses can benefit the government in terms of regulating subcontractor quality control. In *Environmental Technologies Group, Inc.*, a contract solicitation required the manufacturer of circuit card assemblies to adhere to specified quality control measures.[47] The protester planned to subcontract the work and argued that imposing these restrictions on its subcontractors would preclude reasonably priced offers. The contracting officer rejected the protester's bid for failing to flow down these provisions to its subcontractors. The Comptroller General held that the government reasonably interpreted the requirement as applying to the subcontractor. In addition to the clause, the protester had been advised orally that the quality assurance standards were to flow down to any subcontractors used by the offeror. The government thus assured that proper quality control standards applied to the manufacturing subcontractors.

In a factually similar case, a contract quality control clause provided, "The Contractor shall provide and maintain a quality program acceptable to the government for supplies and services covered by this contract. The quality program shall be in accordance with the edition of Military Specification MIL-Q-9858 in effect on the date of this contract."[48] Offerors on the solicitation were informed that the requirements of the quality control specification "flow down to subcontractors," and that proposed quality programs "will not be acceptable to the government unless the prime contractor requires of its subcontractors a quality effort which will achieve control of the supplies and services provided."[49] The board rejected the

[42] Whitsell-Green, Inc., ASBCA No. 26695, 85-1 BCA ¶ 17,934.

[43] FAR 27.104.

[44] *See id.* 52.243.

[45] *See id.* 52.246-1 to .246-14.

[46] *See id.* 52.249.

[47] B-237325, Jan. 24, 1990, 90-1 CPD ¶ 101.

[48] Consolidated Diesel Elec. Co., ASBCA No. 16826, 74-2 BCA ¶ 10,735, at 51,073, *rev'd on other grounds*, 209 Ct. Cl. 521 (1976).

[49] *Id.* at 51,070.

appellant's allegation that administering the contract from a quality point of view was impossible because its subcontractor was unwilling to accept the specified quality control program. The board denied the appeal, upholding the flowed down restriction,[50] because flow-down clauses ensure subcontractors provide quality products to the government.

In addition to quality control, other contract management clauses flowed down to subcontractors include progress payment provisions and government-furnished property clauses. In *United Drill Bushing Corp.*, the government was authorized to withhold progress payments to the prime contractor until the subcontractor agreed to a flow-down provision.[51] The flow-down provision protected the government's interest in materials in the subcontractor's possession. The board upheld termination of the prime contract, based in part on nonperformance of the subcontractor. The subcontractor quit performing because of nonpayment from the prime contractor. The termination demonstrates that a flowed down provision has the same force and effect in the subcontract as in the prime contract. While normally used as a means of controlling a subcontractor, a clause may flow down for the benefit of the subcontractor as well. In at least one case, an appeals board opined that a subcontractor may be relieved from the risk of loss of government property in its possession.[52] The board concluded that the government could authorize the flow down of a prime contract clause relieving the risk of loss associated with possession of government property. Thus, the subcontractor in possession of the government property is relieved of the risk as well.

Although flowing down *FAR* clauses to the subcontractor often is a good idea—even though not technically required—the contract drafter must ensure that requirements are not flowed down which may have unintended consequences. Contracting officer approval of subcontracts containing a disputes clause may be prohibited. A subcontract may not provide a right of direct appeal to the contracting officer or a board of contract appeals.[53] The Department of Energy Board of Contract Appeals considered a number of contracts containing flowed-down disputes clauses.[54] Predating the *FAR*, these cases held that if a flow-down disputes clause was included in a subcontract, it was a factor in finding privity of contract between the government and the subcontractor. Privity gave the Board jurisdiction to hear the case. Precedent also exists for the Armed Services Board of Contract Appeals to take jurisdiction over disputes between a prime contractor and its subcontractor.[55] Given the current *FAR* guidance, and the precedent set by the boards, government agencies should under no circumstances flow down a disputes clause giving a direct appeal to the contracting officer or a contract appeals board. These cases illustrate why careful selection of prime contract clauses for flowing down to subcontracts is most important.

Conclusion

Incorporating clauses by reference and flowing down prime contract requirements to subcontractors offers the government a means of asserting control over subcontractors. Although the government has no privity of contract with a subcontractor, it does have a legitimate interest in how the subcontractor performs. The incorporation and flowing down of contract requirements give the government leverage in contract performance at all levels. This leverage helps achieve the government's ultimate goal, a satisfactory product or service. Additionally, incorporation by reference and flow-down clauses are tools for implementing public policy. Through the procurement process, the government controls contractor standards and policies, and implements important federal programs. Flow-down clauses and incorporation by reference are valuable tools that government contracting officers and prime contractors should use wisely to control subcontractor performance.

Appendix A

Ethics and Acquisition Planning

Federal Acquisition Regulation clauses:

1. FAR 52.203-7: Anti-Kickback Procedures; paragraph (c)(5) requires inclusion of the substance of this clause in all subcontracts.

2. FAR 52.203-11: Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions; paragraph (b)(3) requires inclusion of this certification in all subcontract awards at any tier.

3. FAR 52.204-2: Security Requirements; requires that contractor insert terms that conform substantially to the language of the clause, except regarding the changes clause, in all subcontracts involving access to classified information.

[50] *Id.* at 51,077.

[51] ASBCA Nos. 30402, 30996, 89-1 BCA ¶ 21,476.

[52] ILC Dover, Inc., ASBCA No. 41878, 93-1 BCA ¶ 25,331.

[53] FAR 44.203(c). Contracting officer approval is required for certain types of subcontracts listed in *FAR* subpart 44.2. An indirect right of appeal for a subcontractor affected by a dispute between the government and the prime contractor is permissible.

[54] L.O. Warner, Inc., EBCA Nos. 351-2-86, 359-6-86, 86-3 BCA ¶ 19,207; McMillin Bros. Constructors, Inc., EBCA No. 328-10-84, 86-3 BCA ¶ 19,179; Wellco Chem. Co., Inc., EBCA No. 298-10-83, 85-2 BCA ¶ 18,036; A & B Foundry, Inc., EBCA No. 118-4-80, 81-1 BCA ¶ 15,161; Biggers Constr. Co., EBCA No. 46-4-79, 81-1 BCA ¶ 14,848; C. Overaa & Co., EBCA No. 123-6-80, 80-2 BCA ¶ 14,716. Apparently the Atomic Energy Commission, precursor of the Department of Energy, established the tradition of allowing subcontractors under cost-type contracts direct access to the government for resolution of claims and disputes where a flow-down "Disputes" clause allowing such right had been authorized by the agency and included in the subcontract.

[55] Richmond Steel Co., Inc., ASBCA No. 3051, 56-2 BCA ¶ 1151; Jordan Contracting Co., ASBCA No. 23027, 79-1 BCA ¶ 13681.

4. FAR 52.206-6: Restrictions on Subcontractor Sales to the government; paragraph (c) requires incorporation of the substance of the clause in all subcontracts.

5. FAR 52.208-1: Required Sources for Jewel Bearings and Related Items; requires insertion of the clause and the prime contract number in every subcontract unless the contractor has positive knowledge that the subassembly, component, or part being purchased does not contain jewel bearings or related items.[56]

Defense Federal Acquisition Regulation Supplement clauses:

6. DFARS 252.203-7001: Special Prohibition on Employment; paragraph (g) requires inclusion of the substance of the clause in all first-tier subcontracts exceeding $25,000.

7. DFARS 252.204-7000: Disclosure of Information; paragraph (c) requires inclusion of a similar clause in each subcontract.

8. DFARS 252.208-7000: Intent to Furnish Precious Metals as government-furnished Material; paragraph (d) requires inclusion of the clause in all subcontracts unless the contractor knows the item being purchased contains no precious metals.

9. DFARS 252.210-7003: Acquisition Streamlining; paragraph (d) requires insertion of this clause in all subcontracts over $1,000,000.

10. DFARS 252.211-7011: Audit of Contract Modifications-Commercial Items; paragraph (c) requires insertion of a clause containing all the provisions of this clause in all subcontracts over $500,000.

11. DFARS 252.211-7021: Clauses to be Included in Contracts with Subcontractors and Suppliers-Commercial Items; this clause lists a number of *FAR* and *DFARS* clauses affecting all areas of contracting which must be included in subcontracts at a number of different tiers; see the clause for the complete list.

Appendix B

Contracting Methods and Contract Types

Federal Acquisition Regulation clauses:

1. FAR 52.214-26: Audit-Sealed Bidding; paragraph (c) requires insertion of a clause containing all the provisions of the clause in all subcontracts over $10,000.

2. FAR 52.214-28: Subcontractor Cost or Pricing Data-Modifications-Sealed Bidding; paragraph (d) requires insertion of the substance of the clause in each subcontract that exceeds $100,000, or $500,000 for the Department of Defense (DOD), NASA, or the Coast Guard, at the time of award.

3. FAR 52.215-1: Examination of Records by Comptroller General; paragraph (c) requires inclusion in first-tier subcontracts, excluding purchase orders not exceeding the *FAR* part 13 small purchase limitation ($25,000 or less) and some public utility services subcontracts.[57]

4. FAR 52.215-2: Audit-Negotiation; paragraph (f) requires insertion of a clause containing all the terms of this clause in all subcontracts that are over the small purchase limitation in *FAR* part 13.

5. FAR 52.215-24: Subcontractor Cost or Pricing Data; paragraph (c) requires inclusion of the substance of this clause in each subcontract exceeding $100,000, or $500,000 for the DOD, NASA, or the Coast Guard, at the time of award, when submission of cost or pricing data for the subcontractor is required by paragraph (a).

6. FAR 52.215-25: Subcontractor Cost or Pricing Data-Modifications; same dollar limitations as 52.215-24, but applies to all subcontracts exceeding those amounts at time of award.

7. FAR 52.215-26: Integrity of Unit Prices; paragraph (d) requires the majority of the substance of the clause to be included in all subcontracts.

8. FAR 52.215-27: Termination of Defined Benefit Pension Plans; requires inclusion of the substance of the clause in all subcontracts for which it is anticipated that certified cost or pricing data will be required *and* for which any preaward or postaward cost determinations will be subject to subpart 31.2 (Contracts with Commercial Organizations).

9. FAR 52.215-39: Reversion or Adjustment of Plans for Postretirement Benefits Other Than Pensions (PRB); requires inclusion of the substance of the clause in all subcontracts for which it is anticipated that certified cost or pricing data will be required *or* for which any preaward or postaward cost determinations will be subject to subpart 31.2.

10. FAR 52.216-5: Price Redetermination-Prospective; paragraph (i) requires portions of the clause regarding submission of cost data included in each price redetermination or incentive price revision subcontract; paragraph (i) also directs that each cost-reimbursement subcontract must include a requirement that each lower-tier price redetermination or incentive price revision subcontract contain portions of the clause.

11. FAR 52.216-6: Price Redetermination-Retroactive; paragraph (h) imposes a similar requirement as in FAR 52.216-5.

12. FAR 52.216-16: Incentive Price Revision-Firm Target; paragraph (h) imposes a similar requirement as in FAR 52.216-5.

13. FAR 52.216-17: Incentive Price Revision-Successive Targets; paragraph (j) imposes a similar requirement as in FAR 52.216-5.

[56] FAR Subpart 8.2 requires purchasing jewel bearings from a government-owned plant in North Dakota.

[57] Subcontracts for public utility services at rates established to apply uniformly to the public, plus any applicable reasonable connection charge, are excluded.

Defense Federal Acquisition Regulation Supplement clauses:

14. DFARS 252.217-7012: Liability and Insurance; paragraph (d) requires the contractor ensure all subcontractors obtain and maintain the insurance specified.

Appendix C

Socioeconomic Programs

Federal Acquisition Regulation clauses:

1. FAR 52.219-9: Small Business and Small Disadvantaged Business Subcontracting Plan; paragraph (d)(9) requires that an offeror requested by the contracting officer to submit a subcontracting plan must include the clause in FAR 52.219-8, "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns," in all subcontracts that offer further subcontracting opportunities; the offeror must also require all subcontractors (except small business concerns) who receive subcontracts in excess of $500,000 ($1,000,000 for construction of any public facility) adopt a plan similar to the plan agreed to by the offeror.

2. FAR 52.220-4: Labor Surplus Area Subcontracting Program; requires contractor insert clause substantially similar to the terms of this clause in any related subcontract that may exceed $500,000 and that contains the "Utilization of Labor Surplus Area Concerns" clause at 52.220-3.

3. FAR 52.222-1: Notice to the government of Labor Disputes; substance of clause required in all subcontracts to which a labor dispute may delay the timely performance of the contract.

4. FAR 52.222-4: Contract Work Hours and Safety Standards Act-Overtime Compensation; paragraph (c) requires insertion of provisions of this clause in any subcontracts as well as a clause requiring the subcontractors to include these provisions in any lower tier subcontracts.[58]

5. FAR 52.222-18: Notification of Employee Rights Concerning Payment of Union Dues or Fees; paragraph (d) requires portions of clause required in every subcontract or purchase order entered into in connection with the prime contract unless exempted by the Department of Labor (DOL).

6. FAR 52.222-26: Equal Opportunity; paragraph (b)(10) requires inclusion of the terms and conditions of this clause in every subcontract or purchase order unless exempted by the DOL.

7. FAR 52.222-27: Affirmative Action Compliance Requirements for Construction; paragraph (b) requires inclusion in all subcontracts of a portion of the work involving any construction trade which exceed $10,000; also must include the notice containing the goals for minority and female participation stated in the solicitation for the contract.

8. FAR 52.222-35: Affirmative Action for Special Disabled and Vietnam Era Veterans; paragraph (g) requires inclusion in every subcontract or purchase order of $10,000 or more unless exempted by the DOL.

9. FAR 52.222-36: Affirmative Action for Handicapped Workers; paragraph (d) requires inclusion in every subcontract or purchase order in excess of $2500 unless exempted by the DOL.

10. FAR 52.222-37: Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era; paragraph (f) requires inclusion in every subcontract or purchase of $10,000 or more unless exempted by the DOL.

11. FAR 52.222-41: Service Contract Act of 1965, as Amended; paragraph (l) requires insertion of clause in all subcontracts subject to this Act.[59]

12. FAR 52.223-1: Clean Air and Water Certification; paragraph (c) requires insertion of a substantially similar certification in every nonexempt subcontract.

13. FAR 52.223-2: Clean Air and Water; paragraph (b)(4) requires insertion of the substance of this clause into any nonexempt subcontract.

14. FAR 52.223-3: Hazardous Material Identification and Material Safety Data; paragraph (b) requires a listing of *any* defined hazardous material to be delivered under the contract. This direction covers any subcontract deliveries as well.

15. FAR 52.223-7: Notice of radioactive materials; paragraph (d) requires insertion of the clause in all subcontracts for radioactive materials meeting the stated criteria.

16. FAR 52.224-2: Privacy Act; paragraph (a)(3) requires inclusion of the clause in all subcontracts for the design, development, or operation of a system of records on individuals which is required to accomplish an agency function.[60]

17. FAR 52.225-10: Duty-Free Entry; paragraph (i) requires insertion of the clause in any subcontract (1) under which there will be imported into the customs territory of the United States supplies identified in the Schedule as supplies to be accorded duty-free entry; or (2) importing other foreign supplies in excess of $10,000.[61]

18. FAR 52.225-11: Restrictions on Certain Foreign Purchases; paragraph (c) requires insertion of the provisions of the clause in all subcontracts.

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[58] Contract Work Hours and Safety Standards Act 40 U.S.C. §§ 327-333 (1988).

[59] Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1988).

[60] Privacy Act of 1974, 5 U.S.C. § 552a (1988).

[61] Tariff Schedules of the United States, 19 U.S.C. § 1202 (1988).

Defense Federal Acquisition Regulation Supplement clauses:

19. DFARS 252.222-7000: Restrictions on Employment of Personnel; paragraph (b) requires insertion of the substance of the clause in each subcontract.

20. DFARS 252.223-7002: Safety Precautions for Ammunition and Explosives; paragraph (g) requires insertion of this clause in every subcontract that involves ammunition or explosives.

21. DFARS 252.223-7005: Hazardous Waste Liability; paragraph (e) requires inclusion of this clause in each subcontract under which the subcontractor receives hazardous waste from a defense facility.

22. DFARS 252.225-7009: Duty-free Entry-Qualifying Country End Products and Supplies; paragraph (k) requires insertion of the substance of this clause in all subcontracts for supplies.

23. DFARS 252.225-7010: Duty-free Entry-Additional Provisions; paragraph (d) requires incorporation of the substance of this clause in any subcontract in accordance with paragraph (i) of the Duty-free Entry clause of this contract.[62]

24. DFARS 252.225-7014: Preference for Domestic Specialty Metals; paragraph (d) of Alternate I requires inclusion of this clause in every subcontract exceeding the small purchase limitation of *FAR* part 13 requiring delivery of one of the following articles containing a specialty metal: (1) aircraft; (2) missile and space systems; (3) ships; (4) tank-automotive; (5) weapons; or (6) ammunition.

25. DFARS 252.225-7019: Restriction on Acquisition of Foreign Anchor and Mooring Chain; DFARS 252.225-7020: Restriction on Acquisition of Foreign Anchor and Mooring Chain (Fiscal Years 1989 and 1990); DFARS 252.225-7021: Restriction on Acquisition of Foreign Anchor and Mooring Chain (Fiscal Year 1988); paragraphs (c), (b), and (c) respectively require inclusion of the clause in all subcontracts, unless the items acquired contain none of the restricted welded shipboard anchor and mooring chain.

26. DFARS 252.225-7025: Foreign Source Restrictions; paragraph (f) requires insertion of this clause in every subcontract, unless the items purchased contain none of the specified restricted items.

27. DFARS 252.225-7026: Reporting of Contract Performance Outside the United States; all first-tier contracts exceeding $100,000 must include a clause substantially the same as this one, except subcontracts for commercial items as defined in DFARS 211.7001, construction, ores, natural gases, utilities, petroleum products and crudes, timber, or subsistence.

Appendix D

General Contracting Requirements and Special Categories

Federal Acquisition Regulation clauses:

1. FAR 52.227-1: Authorization and Consent; paragraph (b) requires inclusion of this clause in all subcontracts at any tier for supplies or services and in construction subcontracts expected to exceed $25,000.

2. FAR 52.227-2: Notice and Assistance Regarding Patent and Copyright Infringement; paragraph (c) requires inclusion in all subcontracts at any tier for supplies, services, or construction expected to exceed the small purchase limitation in *FAR* part 13 ($25,000).

3. FAR 52.227-9: Refund of Royalties; paragraph (f) requires substance of clause be included in any subcontract in which the amount of royalties reported during negotiation of the subcontract exceeds $250.

4. FAR 52.227-10: Filing of Patent Applications-Classified Subject Matter; paragraph (e) requires inclusion in any subcontracts at any tier that cover or are likely to cover classified subject matter.

5. FAR 52.227-11: Patent Rights-Retention by the Contractor (Short Form); FAR 52.227-12: Patent Rights-Retention by the Contractor (Long Form): Both these clauses at their respective paragraphs (g) require inclusion of one or the other in all subcontracts at any tier for experimental, developmental, or research work; which clause to use depends on the nature of the subcontractor's business.

6. FAR 52.227-13: Patent Rights-Acquisition by the government; paragraph (h) requires inclusion of this clause in all subcontracts at any tier for experimental, developmental, or research work.

7. FAR 52.228-3: Workers' Compensation Insurance (Defense Base Act); clause similar to this clause must be included in all subcontracts to which the Defense Base Act applies.[63]

8. FAR 52.228-4: Workers' Compensation and War-Hazard Insurance Overseas; paragraph (a) requires insertion of a similar clause in all subcontracts to which the Defense Base Act applies unless waived by the DOL.

9. FAR 52.228-5: Insurance-Work on a government Installation; paragraph (c) requires insertion of the substance of the clause in subcontracts that require work on a government installation.[64]

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[62] This clause is probably referring to DFARS 252.225-7009.

[63] Defense Base Act, 42 U.S.C. §§ 1651-1654 (1988).

[64] This clause requires subcontractors to maintain insurance while working on a government installation.

10. FAR 52.229-2: North Carolina State and Local Sales and Use Tax; paragraph (c) requires subcontractors provide certified statements described in the clause for construction performed in North Carolina.

11. FAR 52.229-10: State of New Mexico Gross Receipts and Compensating Tax; paragraph (h) requires insertion of the substance of the clause in each subcontract which meets the criteria in FAR 29.401-6(b)(1) through (3).[65]

12. FAR 52.230-2: Cost Accounting Standards; paragraph (d) requires inclusion of the substance of the clause in all subcontracts at any tier, except the requirement shall apply only to negotiated subcontracts in excess of $500,000 where the negotiated price is not based upon (1) established catalog or market prices, or (2) prices set by law or regulation; negotiated subcontracts in excess of $500,000 exempt from cost accounting standards (CAS) requirements are exempt from this clause as well.

13. FAR 52.230-3: Disclosure and Consistency of Cost Accounting Practices; paragraph (d) requires inclusion of this clause to the same extent as required in FAR 52.230-2 except if the subcontractor is required to follow all CAS, the clause at FAR 52.230-2 will be inserted in lieu of this clause.

14. FAR 52.230-5: Administration of Cost Accounting Standards; paragraph (e) requires inclusion of this clause in all negotiated subcontracts; subcontracts subject to either the CAS clause or to the Disclosure and Consistency of Cost Accounting Practices clause must so state in the body of the contract, in the letter of award, or in both.

15. FAR 52.232-12: Advance Payment; paragraph (a) requires contractors to apply terms similar to this clause to any advance payments made to subcontractors.

16. FAR 52.232-16: Progress Payments; paragraph (j) requires inclusion of the substance of this clause in all subcontracts allowing any progress payments to subcontractors.

17. FAR 52.236-13: Accident Prevention; paragraph (e) requires insertion of the clause in all subcontracts.

18. FAR 52.236-21: Specifications and Drawings for Construction; paragraph (h) requires inclusion of this clause in all subcontracts at any tier.

19. FAR 52.237-7: Indemnification and Medical Liability Insurance; paragraph (f) requires insertion of the substance of the clause in all subcontracts for health care services.[66]

20. FAR 52.237-27: Prompt payment for construction contracts; paragraph (c) requires a contractor include in all subcontracts for property or services at any tier payment and penalty provisions for work performed; a written notice of withholding is prescribed by paragraph (g).

Defense Federal Acquisition Regulation Supplement clauses:

21. DFARS 252.227-7013: Rights in Technical Data and Computer Software; paragraph (i)(2) requires whenever any technical data or computer software is to be obtained from a subcontractor under this contract, the contractor must use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the government's or the contractor's rights in the subcontractor data or computer software.

22. DFARS 252.227-7018: Restrictive Markings on Technical Data; paragraph (f) requires inclusion of this clause in each subcontract requiring delivery of technical data.

23. DFARS 252.227-7033: Rights in Shop Drawings; paragraph (b) requires inclusion of the clause in all subcontracts at any tier.

24. DFARS 252.227-7034: Patents-Subcontracts; clause requires inclusion of FAR 52.227-12, Patent Rights-Retention by the Contractor (Long Form), in all subcontracts at any tier for experimental, developmental, or research work performed by other than a small business firm or nonprofit organization.

25. DFARS 252.227-7037: Validation of Restrictive Markings on Technical Data; paragraph (j) requires insertion of the clause in subcontracts at any tier requiring the delivery of technical data.

26. DFARS 252.228-7005: Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles; paragraph (c) requires inclusion of a clause in all subcontracts requiring subcontractor cooperation and assistance in accident investigations.

27. DFARS 252.232-7005: Reimbursement of Subcontractor Advance Payments-DOD Pilot Mentor-Protege Program; paragraph (a) requires the subcontract with the protege firm include a provision substantially the same as FAR 52.232-12, Advance Payments.

28. DFARS 252.234-7000: Notice of Cost/Schedule Control Systems; paragraph (e) *appears* to flow down the cost/schedule control systems criteria of DODI 5000.2, Defense Acquisition Management Policies and Procedures.

29. DFARS 252.234-7001: Cost/Schedule Control Systems; paragraph (h) requires all subcontracts shall have provisions for demonstration, review, acceptance, and surveillance of systems.

30. DFARS 252.235-7000: Indemnification Under 10 U.S.C. § 2354-Fixed Price; DFARS 252.235-7001: Indemnification Under 10 U.S.C. § 2354-Cost Reimbursement; paragraphs (h) and (i) provide that the government will indemnify the contractor if the contractor has an obligation to indemnify a sub-

[65] FAR 29.401-6(b)(1) through (3) requires inclusion of the clause when all three of the following conditions exist: (1) The contractor will be performing a cost-reimbursement contract; (2) The contract directs or authorizes the contractor to acquire tangible personal property as a direct cost under a contract and title to such property passes directly to and vests in the United States upon delivery; and (3) The contract will be for services to be performed in whole or in part within the state of New Mexico.

[66] This clause also requires subcontractors provide evidence and maintenance of insurance in accordance with paragraph (a).

contractor at any tier for the unusually hazardous risk identified in the contract; stated criteria must be met.

31. DFARS 252.235-7002: Animal Welfare; paragraph (f) requires inclusion of this clause in all subcontracts involving research of live vertebrate animals.

32. DFARS 252.235-7003: Frequency Authorization; paragraph (d) requires inclusion of this clause in all subcontracts requiring the development, production, construction, testing, or operation of a device for which a radio frequency authorization is required.

33. DFARS 252.239-7010: Audit and Records-Common Carriers; paragraph (c) requires insertion of the substance of this clause in subcontracts which furnish the basis for charges referred to in paragraph (a) of the clause unless the contracting officer authorizes its omission.[67]

34. DFARS 252.239-7016: Telecommunications Security Equipment, Devices, Techniques, and Services; paragraph (e) requires inclusion of this clause in all subcontracts which require securing telecommunications.

Appendix E
Contract Management

Federal Acquisition Regulation clauses:

1. FAR 52.245-17: Special Tooling; paragraph (n) requires if the full cost of tooling is charged to subcontracts, the contractor must include in the subcontract appropriate provisions to obtain government rights and data comparable to the rights of the government under the prime contract clause.

2. FAR 52.245-18: Special Test Equipment; paragraph (d) requires the contractor, in any subcontract that provides that special test equipment or components may be acquired or fabricated for the government, insert provisions substantially similar to this clause.

3. FAR 52.246-23: Limitation of Liability; paragraph (d) requires inclusion of this clause in all subcontracts.

4. FAR 52.246-24: Limitation of Liability—High-Value Items; either paragraph (f) or (g) is required in all subcontracts when the prime contract meets the criteria of the preamble to the clause.[68]

5. FAR 52.246-25: Limitation of Liability-Services; paragraph (d) requires inclusion of this clause in all subcontracts over $25,000.

6. FAR 52.247-63: Preference for U.S.-Flag Air Carriers; paragraph (e) requires inclusion of the substance of this clause in subcontracts that may involve international air transportation.

7. FAR 52.247-64: Preference for Privately Owned U.S.-Flag Commercial Vessels; paragraph (d) requires insertion of the substance of the clause in all subcontracts except those for small purchases.

8. FAR 52.248-1: Value Engineering; paragraph (l) requires inclusion of an appropriate value engineering clause in any subcontract of $100,000 or more; *may* be included in subcontracts of lesser value. FAR 52.248-3: Value Engineering-Construction; paragraph (h) requires inclusion of an appropriate value engineering clause in any subcontract of $50,000 or more; *may* be included in subcontracts of lesser value.

Defense Federal Acquisition Regulation Supplement clauses:

9. DFARS 252.242-7005: Cost/Schedule Status Report; paragraph (g) requires the contractor to require a subcontractor to furnish a cost/schedule status report in each case where the subcontract is other than firm fixed-price, is twelve months or more in duration, and has critical or significant tasks related to the prime contract.[69]

10. DFARS 252.247-7023: Transportation of Supplies by Sea; paragraph (g) requires inclusion of this clause in all subcontracts which exceed the small purchase limitation in FAR Part 13 ($25,000).

11. DFARS 252.247-7024: Notification of Transportation of Supplies by Sea; paragraph (b) requires inclusion of this clause in all subcontracts.

12. DFARS 252.249-7001: Notification of Substantial Impact on Employment; paragraph (d) requires inclusion of the substance of this clause in all subcontracts of $500,000 or more.

[67] Paragraph (a) discusses cost or pricing data which form the basis for charges under the contract.

[68] This clause applies to all prime contracts: (1) expected to exceed $25,000; (2) subject to the requirements of Subpart 46.8 (contractor liability for loss or damage to government furnished property); and (3) requiring delivery of end items that are not high-value items.

[69] Critical or significant tasks shall be defined by mutual agreement between the government and the contractor.

The Amended Rule 11 Sanctions: New and Improved, or Just New?

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United States Army Litigation Division

Introduction

You are a having a great day. You are the legal advisor for the local Army hospital and are finally finishing the horrendous discovery request that was faxed to you last week from the Army Litigation Division. The local doctors allegedly botched an operation and the plaintiff's attorney sought discovery of all records relating to the operation. You have spent several days in the bowels of the hospital and are certain that you have found everything responsive to the request. As you sign the certification, by which you swear that you have found all documents meeting the request, you are thinking about tomorrow's golf game.

Fast forward two years. You are on the telephone with the Army Litigation Division attorney who is handling the same case that you dealt with two years ago. She tells you that the plaintiff's attorney deposed one of the hospital records clerks a week ago. During the deposition, the plaintiff's attorney had the records clerk go through your assembled discovery response. The clerk, when questioned by the plaintiff's attorney, stated that the records with which the government responded to the request are not all the relevant records contained in the hospital. The Litigation Division attorney continues, "Plaintiff's attorney has filed for sanctions, under Federal Rule of Civil Procedure 11, against me, the Assistant United States Attorney handling the case, and you." Are you having a great day now?

Effective December 1, 1993 the Federal Rules of Civil Procedure were amended.[1] Part of the 1993 amendments included changes to the controversial Federal Rule of Civil Procedure 11 (Rule 11), relating to attorney sanctions.[2] As the above scenario demonstrates, sanctions under Rule 11 are not just relevant for attorneys at the United States Army Legal Services Agency. Rule 11 sanctions are important for any attorney who is responsible for submissions to a federal court.

The amendments to Rule 11 broaden the scope of the attorney's duty to conduct reasonable inquiry into the factual and legal bases of a suit, place greater constraints on the imposition of sanctions, and attempt to reduce the number of Rule 11 motions.[3] Changes from the previous Rule 11 include: (1) codifying the objective standard[4]; (2) establishing a continuing responsibility to review documents[5]; (3) making imposition of sanctions discretionary[6]; (4) expanding the potential responsible parties to include law firms[7]; (5) clarifying the scope of appropriate sanctions, including providing important guidance regarding the use of compensatory damages[8]; and (6) providing due process provisions, namely a "safe harbor" for party generated Rule 11 motions and show cause procedures for judge generated Rule 11 inquiries.[9]

This article examines the 1993 amendments to Rule 11. The article first considers the history of Rule 11, discusses the 1983 amendments to Rule 11 and their rationale, and provides a chronology of events leading to the 1993 amendments. The article then examines empirical data from several studies con-

[1] 28 U.S.C.A. §§ 2071-2077 (West 1993) provide the procedure for proposing and promulgating new rules for federal courts. Under 28 U.S.C.A. § 2074 (West 1993), the United States Supreme Court must transmit proposed rules to Congress not later than May 1 of the year that the rules will become effective. The proposed rules can become effective no earlier than December 1 of the same year. Congress has the authority to modify any proposed rule. The Supreme Court transmitted amendments to the Federal Rules of Civil Procedure and Forms on April 22, 1993. Congress failed to act decisively on the proposed amendments. The amendments, therefore, became effective December 1, 1993, consistent with 28 U.S.C.A. § 2074 (West 1993).

[2] One commentator has called the 1983 Rule 11 amendment "the most controversial amendment in the half-century of the Federal Rules." Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 4, 496 (1992); *see also* T.E. WILLGING, THE RULE 11 SANCTIONING PROCESS 58 (1988). Dr. Willging undertook a study for the Federal Judicial Center resulting in the cited work. The findings presented in the report were based on interviews with 36 judges and 60 lawyers, and an analysis of a 25% sample of all published district and appellate opinions from August 1983 to April 1987 involving Rule 11. He stated that the volume of academic writing on Rule 11 in law journals is remarkable and that Rule 11 has generated a massive educational effort to inform lawyers of their obligations under the Rule.

[3] FED. R. CIV. P. 11 advisory committee notes.

[4] *See infra* notes 129-34 and accompanying text.

[5] *See infra* notes 87-92 and accompanying text.

[6] *See infra* notes 96-101 and accompanying text.

[7] *See infra* notes 125-28 and accompanying text.

[8] *See infra* notes 93-95, 102-11 and accompanying text.

[9] *See infra* notes 112-24 and accompanying text.

ducted on the application of the 1983 Rule 11 amendments. Finally, the article analyzes the rationale and value of the major 1993 changes.[10]

Development of the 1993 Amendments

Original Rule 11

Prior to the 1983 amendment, Rule 11 was titled "Signing of Pleading"; an attorney's signature certified that the attorney had "read the pleading," and had a subjective belief that "there is good ground to support it, and that it is not interposed for purposes of delay."[11] A "wilful violation" of Rule 11 could result in "appropriate disciplinary action."[12] Thus, if litigation was brought or maintained in bad faith, then sanctions might be ordered.[13] However, the 1939 Rule did not mention sanctions.[14] Accordingly, some question existed as to whether courts had the power to impose sanctions, and if so, what kind of sanctions.[15] If the attorney had a "pure heart and empty head," the good-faith test was satisfied and the court could not impose sanctions.[16]

Experience demonstrated that the 1939 Rule 11 was not effective in deterring attorney abuses.[17] From 1939 to 1976 only nineteen cases involving allegations of Rule 11 violations were reported.[18] The 1983 amendments were intended to reduce the reluctance of courts to impose sanctions.[19] More frequent imposition of sanctions would provide a greater deterrent to attorney abuse.[20] The primary goal for imposing sanctions was to deter attorney abuses, including frivolous claims and meritless legal maneuvers.[21] Ultimately, the amendments were enacted to require an attorney to reconsider before submitting a document to the court.

Substance of the 1983 Changes

The 1983 Rule 11 amendments made several important changes. Signalling these substantive changes, the title of the amended Rule now included the word "sanctions."[22] In addition to pleadings, the amended rule referred to "motions and other papers," clarifying that Rule 11 applied to other matters beyond the initial pleadings.[23]

The amended Rule made the imposition of sanctions mandatory. Once a violation of Rule 11 was established on motion or sua sponte, the judge had to impose sanctions.[24] Offsetting the requirement for sanctions, the trial judge was given "the necessary flexibility" to deal appropriately with rule violations and to tailor sanctions to the particular facts of the case.[25] The amended Rule expressly stated that an appro-

[10] This article does not discuss any issues resulting from changes in the Rule 11 appellate review process. Additionally, Federal Rules of Civil Procedure 26 through 37 establish certification standards and sanctions that apply to the discovery process. Accordingly, Rule 11 does not govern discovery. FED. R. CIV. P. 11(d).

[11] 308 U.S. 676 (1939) (publishing Federal Rule of Civil Procedure 11).

[12] *Id.*

[13] *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

[14] 308 U.S. 676 (1939) (publishing Federal Rule of Civil Procedure 11).

[15] *See, e.g.*, Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) ("Assuming, arguendo, that an award of attorneys' fees is a permissible sanction under Rule 11. . . .").

[16] WILLGING, *supra* note 2, at 36. That is, under the 1939 Rule, courts had held that an attorney claiming that he or she had acted in good faith, or was personally unaware of the groundless nature of an argument or claim, was sufficient to avoid Rule 11 sanctions. *See, e.g.*, Eastway Const. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985).

[17] FED. R. CIV. P. 11 Advisory Committee Notes (1983) (amended 1993).

[18] WILLGING, *supra* note 2, at 19.

[19] FED. R. CIV. P. 11 Advisory Committee Notes (1983) (amended 1993).

[20] *Id.*

[21] STEPHEN B. BURBANK, RULE 11 IN TRANSITION THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 11, 12 (1989). This report was the compilation of the findings and recommendations of the Third Circuit Task Force on Federal Rule of Civil Procedure 11. In March 1987, the task force was appointed by the Chief Judge of the United States District Court for the Third Circuit to conduct a thorough study of Rule 11 implementation, prepare a report of the study's findings, and submit recommendations. The report collected information using several methods, including: (1) collecting from every federal district court clerk in the Third Circuit every motion for and every sua sponte consideration of sanctions under Rule 11 from July 1, 1987 through June 31, 1988; (2) twice sending questionnaires to every federal district judge and magistrate in the Third Circuit in the same one-year period; (3) conducting telephone interviews with 142 lawyers practicing before federal district courts in the Third Circuit; (4) sending questionnaires to 1270 lawyers and compiling the results of 426 responses; and (5) speaking with bar discipline authorities. *See also* WILLGING, *supra* note 2, at 24; Cooter & Gell v. Hartmann Corp., 496 U.S. 384, 393 (1990).

[22] FED. R. CIV. P. 11 (1983) (amended 1993).

[23] *Id.*

[24] Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 876 (5th Cir. 1988).

[25] FED. R. CIV. P. 11 advisory committee notes (1983) (amended 1993).

priate sanction might be an order to pay the other party's reasonable expenses, including attorneys' fees.[26] Neither the Rule or the Advisory Committee Notes provided any guidance on the types of sanctions available. The Rule also provided that sanctions against the attorney, the party represented, or both were permitted.[27]

Prior to filing any document covered by the Rule, the attorney had to certify, and thereby affirm, that the attorney had conducted a reasonable legal and factual inquiry and that the attorney was not submitting the document for any improper purpose. Improper purposes included harassment, causing unnecessary delay, or needless increase in the costs of the litigation.[28] To satisfy the certification requirement, an attorney was expected to make a prefiling inquiry, reasonable under the circumstances, into both the facts and the law.[29] What constituted a reasonable inquiry "under the circumstances" depended on such factors as the time available for investigation, whether only the client possessed the information necessary for drafting a submission, or whether the submission was a plausible view of the law.[30] The reasonable prefiling inquiry requirement was more stringent than the original Rule's requirements and significantly expanded the circumstances that would trigger a violation.[31] Despite the language of the amended Rule, considerable controversy initially existed whether the 1983 amendments retained the earlier, subjective bad-faith test or whether the Rule created a strictly objective test of reasonableness.[32] By the end of 1986, however, a consensus arose that the objective test was proper.[33] Finally, the text of the advisory committee notes provided a brief description of the procedures envisioned when sanctions were sought and noted that "the procedure obviously must comport with due process requirements."[34]

Example of a Case Decided Under the 1983 Rule

Illustrative of the many cases decided under the 1983 Rule is *Keener v. Department of the Army*.[35] The case arose from Ms. Keener's employment discrimination claim, which the Army subsequently settled, and her contested petition for attorneys' fees.[36] After a United States Army Civilian Appellate Review Agency (USACARA) investigator issued a finding of discrimination, the Army entered into a settlement agreement with Keener.[37] Under the agreement, the Army agreed to pay Keener $24,820.08 in back pay and her reasonable attorneys' fees.[38] Keener's attorney submitted to the Army a fee petition for approximately $93,066.11, totalling 898.5 hours of work. After the Army offered $12,159.97, Keener filed suit.[39]

The court found the fee petition "grossly and intolerably exaggerated."[40] The court found that Keener's counsel had "exaggerated his hourly rate by twenty-five percent, that he went to great lengths to double-bill the government, billed at his attorney work-hour rate for his travel time, spent over 100 hours on unnecessary or irrelevant research and drafting, and billed the government for work unrelated to Keener's claim.[41] The court held that, measured objectively, Keener's counsel

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] WILLGING, *supra* note 2, at 39. Courts applying a bad faith test continued to follow case law from before the 1983 amendments and required a showing of malice or bad faith in the attorney's conduct before imposing sanctions. Adoption of a strictly objective test did not begin until 1985 in Eastway Const. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985) ("[T]he new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did."). Several other circuits quickly followed suit and adopted objective tests; *see* Albright v. Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Rogers v. Lincoln Towing Serv., 771 F. 2d 194, 205 (7th Cir. 1985).

[33] WILLGING, *supra* note 2, at 40.

[34] FED. R. CIV. P. 11 advisory committee notes (1983) (amended 1993).

[35] 136 F.R.D. 140 (M.D. Tenn. 1991).

[36] *Id.* at 142.

[37] *Id.* Keener submitted to the Army in September 1983 a formal administrative complaint alleging sexual harassment by her Army supervisors. The Army dismissed the administrative complaint. Keener appealed to the Equal Employment Opportunity Commission, which reversed the Army's decision and remanded the case to the Army for an investigation. The USACARA investigation resulted.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 149.

[41] *Id.* at 149-50. Regarding double-billing, for example, Keener's counsel billed the government—that is, the Department of Army and Department of Labor—for 99 hours of work on Keener's case in a 96 hour time period.

submitted a fee petition that was outrageously inflated, and contained unnecessary and double-billed hours of work—clear violations of Rule 11.[42] Accordingly, the court denied all of Keener's requests for attorneys' fees, referred the case to the appropriate state bar disciplinary authority, and ordered the offending counsel to complete a legal education program in legal ethics.[43]

Enactment of the New Amendments

As the result of the substantial controversy concerning the effect and effectiveness of the amended Rule 11,[44] in July 1990, the Advisory Committee on the Civil Rules (Advisory Committee) initiated a study of Rule 11 and issued a public call for comments due on November 1, 1990.[45] More than 125 individuals and organizations submitted comments.[46] The overwhelming majority of comments criticized the Rule and its application.[47] The Advisory Committee held a public hearing on the Rule in February, 1991.[48] The Advisory Committee reviewed the information gained from the hearing and written comments and made a draft of proposed changes.[49] It then forwarded the draft proposal to the Committee on Rules of Practice and Procedure of the Judicial Conference (Standing Committee).[50] The Standing Committee met from 18 through 20 June, 1992.[51] It made one significant change to the Advisory Committee's proposal, making discretionary the imposition of sanctions.[52] The Standing Committee then forwarded the proposed changes to the Judicial Conference of the United States, which reviewed the changes on September 22, 1992.[53] After review with no modifications, the proposed amendments were forwarded to the United States Supreme Court.[54] On April 22, 1993, the Supreme Court transmitted to the United States Congress a package of proposed procedural changes, including the changes to Rule 11.[55] Justice Antonin Scalia, joined by Justice Clarence Thomas, dissented to the proposed changes to Rule 11, saying that the proposed changes would render it "toothless."[56] Without change, the amendments to Rule 11 became effective December 1, 1993.[57]

Empirical Data

Several studies on the 1983 version of Rule 11 were conducted in the late 1980s. Many of the studies focused on reported cases, mostly cases from federal district court and circuit courts of appeal.[58] These studies were problematic because of under-inclusiveness, double-counting, possible biases in reporting practices and possibly inaccurate classification of appellate cases.[59] Nonetheless, as a result of these

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[42] *Id.* at 150.

[43] *Id.* at 151.

[44] *See infra* notes 58-86 and accompanying text for a description of the bases of the controversy.

[45] The Advisory Committee is a 12-member organization composed of federal judges, law professors, and practicing lawyers. Congress has authorized the organization to study the Federal Rules and make proposals for changes. Tobias, *supra* note 2, at 856.

[46] *Id.* at 862.

[47] *Id.*

[48] Carl Tobias, *Congress and the 1993 Civil Rules Proposals*, 148 F.R.D. 383, 386 (1993).

[49] *Id.* at 387.

[50] The Standing Committee is an organization authorized by Congress to review and approve all Advisory Committee rules change proposals. Tobias, *supra* note 2, at 856.

[51] Henry J. Reske, *Tinkering with Procedure*, A.B.A. J. Sept. 1992, at 14.

[52] Tobias, *supra* note 48, at 387.

[53] Reske, *supra* note 51, at 14.

[54] Henry J. Reske, *Gentler Sanctions*, A.B.A. J. Sept. 1993, at 29.

[55] *See supra* note 1.

[56] Amendments to the Federal Rules of Civil Procedure and Forms (Apr. 22, 1993), *reprinted in* 146 F.R.D. 401, 507 (1993). Specifically, Justice Scalia stated

> [T]he proposed revision would render the Rule toothless, by allowing judges to dispense with sanctions, by disfavoring compensation for litigation expenses, and by providing a 21-day "safe harbor" within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.

Id. at 507. Justice Scalia believes individuals who file frivolous suits should get no "second chance" through a safe harbor provision. He also believes that discretionary sanctions will be imposed less often than mandatory sanctions. Finally, he believes the shift from sanctions compensating the moving party to being paid into the court will diminish the aggrieved party's incentive to make Rule 11 motions, which will lessen the Rule's effectiveness.

[57] *See supra* note 1.

[58] *See, e.g.*, Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988).

[59] BURBANK, *supra* note 21, at 56.

studies, as well as much anecdotal information, by the end of the 1980s significant impetus to amend Rule 11 existed.

Several criticisms formed the bases for amending the Rule. The leading criticism was that because "civil rights plaintiffs had sanctions motions filed and granted against them more often than any other type of federal litigant," Rule 11 had a "chilling effect" against such plaintiffs.[60] Secondly, the courts inconsistently interpreted and applied Rule 11.[61] Most notably, the courts were split on whether the Rule imposed a one-time or continuing obligation to certify the legal and factual bases of a submission.[62] Additionally, the lack of specific procedures in either the Rule or the Advisory Committee Notes for imposing sanctions created inconsistent procedures, perceived injustice, and sometimes fierce attack by legal commentators.[63]

The legal community perceived that Rule 11 motions were filed routinely and frequently.[64] As a corollary, the legal community perceived a great increase in satellite litigation involving Rule 11.[65] These perceptions often rested, however, on counts of published opinions, a few examples of reported decisions, and speculation.[66] At least one survey, for example, showed that Rule 11 satellite litigation had not drastically increased, contrary to the findings of many legal commentators.[67]

Many lawyers believed that Rule 11 was aggravating relations among counsel, between counsel and judges, and generally increasing the incivility of the bar.[68] The 1988 Third Circuit Task Force study found that forty percent of attorneys polled believed that Rule 11 had "aggravated attorney-attorney relations."[69] The same survey found, however, that only sixteen percent of the judges believed that Rule 11 had aggravated relations between bench and bar.[70]

However, several studies—using more data, more accurate indicators, and more precise techniques—indicate that much of the concern about the Rule 11 implementation was unfounded. For example, the 1988 Third Circuit Task Force study focused on large sample populations and all cases, instead of only reported cases.[71] According to its data, Rule 11 motions were made in only 114 cases from July 1, 1987 through June 30, 1988. During the same time period, however, 23,184 civil cases were commenced and 21,351 civil cases were terminated in the Third Circuit. Thus, recognizing that substantial informal Rule 11 activity exists, roughly less than one-half of one percent of all civil cases in the Third Circuit had formal Rule 11 activity.[72] Sanctions were imposed in 13.6% (18 out of 132) of Rule 11 motions.[73] Plaintiffs were the target of 66.7% (88 out of 132) of the motions; plaintiffs were sanctioned in 15.9% (14 out of 88) of the motions against them; defendants were sanctioned in 9.1% (4 out of 44) of the motions against them.[74] Civil rights and employment discrimination cases accounted for 18.2% (24 out of 132) of the Rule 11 motions in the survey; plaintiffs were the targets in 70.8% (17 out of 24) of such cases and were sanctioned pursuant to 47.1% (8 out of 17) of such motions.[75] As the result of further statistics, the Task Force concluded that Rule 11 had positively affected a substantial number of attorneys in their prefiling factual inquiry, prefiling legal inquiry, or in reviewing cocounsel's papers.[76]

[60] Tobias, *supra* note 2, at 859 (citing Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986)).

[61] *Id.* at 860; *see also* George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5 (1991).

[62] Tobias, *supra* note 2, at 867 n.67.

[63] WILLGING, *supra* note 2, at 84.

[64] BURBANK, *supra* note 21, at 60.

[65] WILLGING, *supra* note 2, at 108. Satellite litigation is that which is essentially a suit within a suit that does not relate to the merits of the case but instead arises out of a collateral issue or matter, such as a Rule 11 motion for sanctions.

[66] *Id.* at 109.

[67] *Id.* at 112.

[68] FEDERAL JUDICIAL CENTER, RULE 11: FINAL REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1-2 (1991) (50% of judges polled believed that Rule 11 had "exacerbated contentious behavior" between lawyers).

[69] BURBANK, *supra* note 21, at 86.

[70] *Id.* at 85.

[71] *See supra* note 21 for a more detailed description of the Task Force's methods.

[72] BURBANK, *supra* note 21, at 60.

[73] *Id.* at 57.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 75.

The 1991 Federal Judicial Center study used computerized docket data from five districts and responses from a survey of all federal trial judges.[77] This study found that civil rights plaintiffs were no more likely to be sanctioned under Rule 11 than other litigants in other types of cases with high rates of Rule 11 activity.[78]

Two other significant issues arose concerning the implementation of the 1983 Rule during its first years of use. First, nonmonetary sanctions were found to be rarely used. For example, the 1988 Federal Judicial Center study determined that in eighty-five published opinions, nonmonetary sanctions were imposed only twice.[79] Additionally, monetary sanctions normally took the form of payment to the opposing party. For example, the Third Circuit Task Force study determined that twenty-one of twenty-seven sanctions were monetary and eighteen of those were payable to the other party.[80] Thus, considerable evidence existed that judges were using Rule 11 as a form of a "fee-shifting" statute when faced with attorney abuse.

The second significant issue concerned whether attorneys were sanctioned as the result of their conduct or their work product.[81] That is, under the 1983 Rule, was an attorney safe from sanctions as long as the attorney made a reasonable inquiry into the facts and law and had a subjective belief that the submission was well grounded in fact?[82] Alternatively, was the focus of the Rule on the attorney's work-product? That is, did the Rule impose a requirement that if a competent attorney would not conclude after a reasonable inquiry that the submission was "well-grounded" in fact and law, could it not be submitted?[83] This distinction is significant. Assume an attorney conducts an objectively reasonable amount of legal and factual research and, as a result, makes an argument before a court that the attorney honestly believes is warranted by the existing law. A trial court following the product approach to sanctions is free to determine that the attorney's conclusion is objectively unreasonable and may—under the 1983 Rule, must—impose sanctions.[84] However, if the trial court follows the conduct approach, the attorney would be safe from sanctions.[85]

Based on continued criticism of the Rule, in July 1990, the Advisory Committee reexamined the rule and the possibility of promulgating changes.[86] In light of the 1988 Third Circuit Task Force study and the 1991 Federal Judicial Center study, many of the concerns that generated the 1993 amendments to Rule 11 were, if not unfounded, not as serious as they were perceived to be. At the same time, two significant concerns, fee-shifting and the conduct-product approach to Rule 11 sanctions, did not receive much attention. Regardless of these analytical failures, the criticisms of Rule 11 generated enough momentum to ensure the enactment of the amendments.

The 1993 Amendments

Continuing Duty

Under the amended Rule, an attorney is responsible for any document presented to a court, whether by signing, submitting, or later advocating.[87] Previously, the language of Rule 11 did not explicitly impose any continuing duty on an attorney.[88] The courts and legal commentators differed as to whether Rule 11 imposed a continuing duty.[89] The 1993 amendments attempt to clarify the extent of an attorney's continuing duty. Rule 11 does not simply state that the attorney's duty is continuing for all of Rule 11's requirements. Instead, the 1993 amendments include the language "later advocating" which exposes attorneys to sanctions if they continue to insist on a position that no longer is tenable.[90] Additionally, the language "later advocating" requires that an attorney's obligation be measured when the attorney later advocates a position taken in a document previously filed.[91] Apparently, however, if the Rule 11 test is otherwise met at the time of submis-

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[77] FEDERAL JUDICIAL CENTER, *supra* note 68, at 1-8.

[78] *Id.*

[79] WILLGING, *supra* note 2, at 5.

[80] BURBANK, *supra* note 21, at 36.

[81] *Id.* at 15-23.

[82] *Id.* at 15.

[83] *Id.*

[84] *Id.* at 18-19.

[85] *Id.*

[86] *See supra* notes 44-57 and accompanying text for a full description of the development of the 1993 amendments.

[87] FED. R. CIV. P. 11(b).

[88] FED. R. CIV. P. 11(b) (1983) (amended 1993).

[89] *Compare* Tobias, *supra* note 2, at 867 ("a clear majority of the circuits have refused to recognize a continuing duty") *with* WILLGING, *supra* note 2, at 41 ("[t]hese decisions do not mean that there is no continuing obligation").

[90] FED. R. CIV. P. advisory committee notes.

[91] *Id.*

sion—but the submission is later found to be defective—the attorney has no affirmative duty to remove the offending document.[92] An attorney, however, could not make any further argument or presentation from the improper document.

Deterrence Philosophy

That deterrence is the primary goal of Rule 11 has long been recognized.[93] The amended Rule 11 emphasizes this philosophy in stating that "[a] sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[94] This emphasis is repeated in the Advisory Committee Notes' listing of the factors that a court should consider in determining appropriate sanctions. The Notes state that courts should consider the amount of sanctions necessary to deter the specific person from similar activity and the amount of sanctions necessary to deter similar activity by other litigants.[95] Thus, both the specific deterrence of the offending attorney and the general deterrence of persons similarly situated with the offending attorney are recognized bases for imposing sanctions.

Discretionary Sanctions

Another major change in Rule 11 is that imposition of sanctions is no longer mandatory.[96] The 1983 Rule was based on the theory that, among other things, by requiring sanctions, the former reluctance of courts to impose sanctions would be reduced.[97] The Advisory Committee's proposed amendments retained the mandatory standard and the Standing Committee revised the Rule to contain a discretionary standard.[98] Without any discussion for the change from mandatory to discretionary, the Advisory Committee Notes list several factors that courts should consider in determining whether to sanction and, if so, in what fashion.[99] The factors include a determination of whether: (1) the improper conduct was willful or negligent; (2) the conduct was part of a pattern of activity or only an isolated event; (3) the conduct infected the entire pleading or only one count or defense; (4) the person engaged in similar conduct in other litigation; (5) the conduct was intended to injure; (6) the responsible person is trained in the law; or (7) the conduct had an effect on the litigation process in time or expense.[100] Thus, courts have significant discretion in deciding whether to impose sanctions and, if so, to what extent. Additionally, some judges believed that imposition of sanctions was discretionary, despite the 1983 Rule's language.[101] Therefore, by making the imposition of sanctions discretionary, the drafters of the Rule have codified the past practice of some courts.

Limitation on Monetary Damages

The previous Rule's only explicit description of an "appropriate sanction" was a monetary penalty imposed on the delinquent party, including reasonable attorneys' fees and expenses.[102] However, the new Rule lists the following sanction possibilities: "directives of a nonmonetary nature"; an "order to pay a penalty into court"; and "if warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."[103] Additionally, the Advisory Committee Notes provide a variety of other possible sanctions. The suggestions include: (1) striking the offending document; (2) issuing an admonition or reprimand; (3) requiring participation in educational programs; (4) ordering a fine payable to court; and (5) referring the matter to disciplinary authorities.[104]

The Advisory Committee Notes observe that because the Rule is intended to deter, not compensate, a monetary penalty, if assessed, normally should be paid into the court.[105] Only "under unusual circumstances" when deterrence would be ineffective unless monetary sanctions are assessed and paid to

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[92] *Id.* ("formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b)"; "[s]ubdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses").

[93] *See supra* note 21 and accompanying text.

[94] FED. R. CIV. P. 11(c)(2).

[95] *Id.* advisory committee notes.

[96] *Id.* 11(c) ("If . . . the court determines that [there has been a violation], the court may, . . . impose an appropriate sanction. . . .").

[97] *Id.* advisory committee notes (1983) (amended 1993).

[98] *See supra* note 52 and accompanying text.

[99] FED. R. CIV. P. 11 advisory committee notes.

[100] *Id.*

[101] CARL B. HILLIARD & MICHAEL E. CHISHOLM, REPORT TO THE FEDERAL BAR ASSOCIATION RULE 11 SURVEY 12 (1992) (10% of judges surveyed indicated that they would not impose sanctions even after finding that Rule 11 had been violated).

[102] FED. R. CIV. P. 11 (1983) (amended 1993).

[103] *Id.* 11(c)(2).

[104] *Id.* advisory committee notes.

[105] *Id.*

the opposing party are attorneys' fees and costs appropriate.[106] These circumstances are more likely to occur, however, when the violating party's court presentation is for an improper purpose, such as harassment, unnecessary delay, or needless increase in the cost of litigation.[107] The Notes further observe that in these cases the sanction award should not exceed those fees and costs "directly and unavoidably caused by the violation of the certification requirement."[108] Finally, the new Rule further limits the imposition of monetary sanctions. A court may not award monetary sanctions against a represented party if the basis for the sanction is legal frivolousness.[109] In the case of a legally frivolous argument or submission, the monetary sanctions are more appropriately limited to the attorneys responsible.[110]

These changes represent a significant attempt to move away from the predominantly monetary and often fee-shifting nature of sanctions under the old Rule.[111] The drafters of the new Rule listened to the comments and studies that demonstrated that monetary sanctions—specifically, fee-shifting—were the most common sanctions imposed. The new Rule's language and accompanying Advisory Committee Notes are a clarion call for the use of more imaginative sanction solutions. Whether judges will change, or continue to do business the old way, remains to be seen. In predicting their behavior, however, one must consider that change to more imaginative sanctions will require more time and deliberative effort from an already over-worked judiciary.

Due Process Changes

Safe Harbor

A well-publicized and criticized change of the new Rule lies under the rubric of providing greater due process.[112] The new Rule requires that a moving party, before filing or presenting a motion for sanctions under Rule 11, must first serve the motion on the challenged party.[113] Only if the challenged document is not withdrawn or the alleged violation corrected within twenty-one days of service may the moving party proceed by filing with the court its Rule 11 motion.[114] This so-called "safe harbor" provision gives a party notice and an opportunity to react before being brought before a court on an alleged violation. The Advisory Committee Notes state that the safe harbor provision will encourage parties to voluntarily withdraw sanctionable material.[115] Thus, the ability of parties to police themselves is increased. The drafters reasoned that under the 1983 Rule 11, parties were reluctant to withdraw questionable material because doing so might have been viewed as evidence of a Rule 11 violation.[116] Additionally, to the extent that the safe harbor provision encourages the resolution of potential motions outside the purview of the court, it also addresses concerns about satellite litigation.

In analyzing the safe harbor provision, one must perceive the drafters of the amendment as optimists. The safe harbor provision makes sense in a bar whose members are civil and are appreciative of an opponent bringing to their attention a potentially defective submission. Alternatively, a pessimistic analysis would determine that the safe harbor provision is likely to engender tactical use and abuse.[117] When a party receives notice of a Rule 11 violation, it will have to review the allegation, the material concerned, and formulate responses. Thus, the safe harbor provision may only accentuate one of the worst aspects of Rule 11 in practice; attorneys may gain a tactical advantage by abusing the Rule in the manner of "threat and retreat."[118]

Show Cause

Less controversial is the second significant due process addition in the new Rule. The old Rule only mentioned due process for the offending party in the Advisory Committee Notes, stating that procedures to impose Rule 11 sanctions had to "comport with due process requirements."[119] The new Rule provides that a court may sua sponte impose possible

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[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* 11(c)(2)(A).

[110] *Id.* Advisory Committee Notes.

[111] *See supra* notes 79-80 and accompanying text.

[112] As an example of this change's publicity, in the three articles from September 1992 to July 1993 in the *ABA Journal* discussing the Rule 11 amendments, every article mentioned the notification procedure. In each article, the provision was described as "key."

[113] FED. R. CIV. P. 11(c)(1)(A).

[114] *Id.*

[115] *Id.* advisory committee notes.

[116] *Id.*

[117] Tobias, *supra* note 2, at 876.

[118] *Id.* at 877.

[119] FED. R. CIV. P. 11 advisory committee notes (1983) (amended 1993).

sanctions only if it allows a party to show cause why it has not violated a provision of the Rule.[120] Thus, before any sanctions are imposed, the court must give the challenged party notice and an opportunity to respond.[121] Considerable discretion remains with the court to determine what procedures are appropriate in determining whether a violation has occurred.[122] The Advisory Committee Notes recognize written submissions, oral argument, or even evidentiary hearings as possible solutions.[123] The courts' wide latitude on what procedures to use is certain to create inconsistency in application. Nonetheless, the explicit recognition that notice and opportunity to respond are necessary before imposition of sanctions is a significant and positive amendment of the 1983 Rule.[124]

Responsible Parties Expanded

Under the old Rule 11, only the attorney or party signing the offending document could be held responsible. In *Pavelic & LeFlore v. Marvel Entertainment Group*, the United States Supreme Court held that the old Rule did not permit sanctions against the law firm of the attorney signing the groundless complaint.[125] The new Rule reverses this holding. A court now may impose sanctions on law firms.[126] The new Rule provides that absent exceptional circumstances, the law firm *shall* also be held responsible when one of its partners, associates, or employees violates the Rule.[127] This amendment is useful because it allows the court to move beyond junior attorneys in large firms or in government agencies—who only may be following directives of supervisory attorneys—to impact on those attorneys who have supervisory responsibility. Senior attorneys will be unable to force junior attorneys to submit matters in violation of the Rule and then hide behind their lack of signing the matter. Because of the shared liability, this provision encourages senior attorneys to supervise their juniors to ensure that the junior attorney has not become the proverbial "loose cannon on deck."[128]

Certification Requirement

The certification requirement of the old Rule stated that the matters submitted were "well-grounded in fact and [were] warranted by existing law or a good faith argument."[129] The new Rule states that the attorney must certify that the matters have "evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation" and are "warranted by existing law or by a non-frivolous argument."[130] These changes accomplish two objectives. First, the change codifies the accepted position that the standard under the Rule 11 test is an objective one.[131] Thus, the change eliminates once and for all the "empty-head pure-heart" argument.[132] Second, the amendment provides parties who suspect facts—but are unable to produce those facts without the power of the discovery tool in civil litigation—the ability to pursue litigation.

These changes create some problems. To obtain the protection provided when further investigation is required, the party must identify that it presently lacks evidentiary support for its position. Thus, to obtain the protection, the party must reveal its inadequacies. Additionally, parties may not be able to identify, in advance of litigation, matters that are likely to have evidentiary support after reasonable opportunities for investigation.[133] Regarding the standard for legal argument, "frivolous" is an ambiguous term. Admittedly, so is "good faith." However, ten years of litigation defining "good faith" exist. Additionally, examination of good faith tends to focus on the attorney's conduct. Examination of frivolousness, however, can easily focus on the attorney's product.[134] A court should not inquire into an attorney's competence in a Rule 11 proceeding; other mechanisms for such an inquiry exist. Accordingly, that the new Rule does not shed light on the product conduct debate is unfortunate. To the extent that the new Rule speaks to this issue at all, it promotes the inquiry into attorney product, not attorney conduct.

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[120] *Id.* 11(c)(1)(B).

[121] *Id.* advisory committee notes.

[122] *Id.*

[123] *Id.*

[124] *See supra* note 34 and accompanying text.

[125] 493 U.S. 120, 125 (1989).

[126] FED. R. CIV. P. 11(c).

[127] *Id.* advisory committee notes.

[128] However, the Supreme Court specifically disallowed this reasoning when analyzing the old Rule in *Pavelic*. "The message . . . conveyed to the attorney, that this is not a "team effort" but in the last analysis *yours alone*, is precisely the point of Rule 11." *Pavelic*, 493 U.S. at 127.

[129] FED. R. CIV. P. 11 (1983) (amended 1993).

[130] *Id.* 11(b)(3).

[131] *See supra* notes 32-33 and accompanying text.

[132] FED. R. CIV. P. 11 advisory committee notes.

[133] Tobias, *supra* note 2, at 874.

[134] *See supra* notes 81-85 and accompanying text for an examination of the conduct product dichotomy.

Further Clarifications

The new Rule makes several minor clarifications and additions that are worthy of brief mention. Attorneys now must make Rule 11 motions separately from other motions or requests of the court.[135] This change is consistent with the drafters' intent to "reduce the number of motions for sanctions."[136] Simply put, by requiring that the Rule 11 motion be made separately, the drafters have increased the administrative burden of making this motion. No longer can a party tack the Rule 11 motion onto some other motion as an additional prayer for relief.

The new Rule also prohibits the imposition of monetary sanctions on the court's initiative after a voluntary dismissal or settlement of the suit unless the Rule 11 show cause order was issued prior to dismissal or settlement.[137] This change was made to protect parties who settle from later being faced with a court's order that might lead to sanctions which, if they had known that it was coming, might have affected their willingness to settle.[138] This is a useful change. It generally will encourage settlement because it will provide finality in the settlement process.

Conclusion

The 1983 amendment to Rule 11 generated substantial controversy, litigation, and legal analysis. Among other things, the Rule was criticized for creating satellite litigation, exacerbating a deteriorating civility among the bar, and chilling meritorious claims, particularly in the civil rights arena. Much of this criticism was without significant support, but some of the criticisms had a kernel of truth. Moreover, the perceptions of the bar echoed the legal commentators' concerns. On the positive side, the 1983 Rule fostered prefiling inquiry, generated significant publicity in the bar on issues of attorney competence and sharp practices, and may have deterred frivolous or improper litigation.

The 1993 amendments to Rule 11, on the whole, are positive changes to the law. They establish minimum due process for sanctioned attorneys, draw the focus of sanctions away from monetary sanctions and fee-shifting, put some responsibility on the bar to police itself through the safe-harbor provision, reemphasize the deterrent purpose of the Rule, broaden the range of responsible parties, and clarify several points of confusion that have led to considerable litigation. Unfortunately, the 1993 amendments fail to focus the attention of courts on attorney conduct, not product, and probably will foster more, not less, litigation in the near future. Taken together, however, the amended Rule 11 is an improvement and will continue to positively influence litigation in federal courts.

[135] FED. R. CIV. P. 11(c)(1)(A).

[136] *Id.* advisory committee notes.

[137] *Id.* 11(c)(2)(B).

[138] *Id.* advisory committee notes.

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 10) is reproduced below:

National Environmental Policy Act (NEPA)

Council on Environmental Quality (CEQ)

The CEQ indicated that it will begin to study Environmental Impact Assessment (EIA) effectiveness, floodplain management, environmental justice, comprehensive ecosystem management, and the application of the National Environmental Policy Act (NEPA) abroad. In an attempt to determine whether the EIA process can be more effective, the CEQ will hold several NEPA liaison meetings. In response to the floods

in the midwestern United States last summer, the White House Office on Environmental Policy has created a floodplain management task force. The CEQ is a member of that task force. The presidential memorandum accompanying Executive Order No. 12898 on Environmental Justice requires federal agencies to use the NEPA process to determine whether a proposed action disproportionately affects disadvantaged communities. The CEQ actively participated in developing this order and is closely monitoring this issue. The CEQ also is developing guidance to stress viewing environmental impacts comprehensively, rather than by specific media or specific projects. Finally, in accordance with Presidential Review Directive 23, the CEQ is studying the possibility of extending the application of the NEPA abroad. Major Corbin.

Clean Air Act (CAA)

Army Guidance on the General Conformity Rule

The Army Environmental Center has issued guidance for preparing and processing conformity determinations within the Army. The EPA promulgated the General Conformity Rule on 30 November 1993, which took effect on 31 January 1994.[1] The guidance is being disseminated through MACOM channels.

The Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health) must sign and approve conformity determinations for Army activities. They must be stand-alone documents, separate from NEPA documentation. Environmental law specialists anticipating the need for a conformity determination should coordinate with the ELD early in the planning stage for an action.

Under the General Conformity Rule, actions with air emissions below specified threshold levels (de minimis emissions) are exempt and do not require a conformity determination. The Army guidance calls for installation commanders to sign a Record of Nonapplicability documenting that the emissions from the action will be de minimis.

Asbestos Removal

On 17 June 1994, the Environmental Protection Agency (EPA) issued an interpretive rule on roof removal operations under the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Asbestos.[2] This rule is designed to clarify the application of the Asbestos NESHAP to roof removals. The rule specifies which roof removal operations are covered by the NESHAP and the required work practices. The rule will be set forth in 40 C.F.R. part 61, appendix A, subpart M.

CAA Title V Permit Program: Eleventh-Hour Reminder

Most major Army installations, in both National Ambient Air Quality Standards (NAAQS) attainment and nonattainment areas, will have to file an application for a Title V operating permit no later than 15 November 1995. A few states are requiring an application much earlier. Installations should allow at least one year to adequately prepare for and submit a Title V application. In the absence of a "permit shield," which arises only from a timely and complete Title V application, the CAA prohibits major sources from operating until an operating permit is issued, which could take several years. Consequently, installations that fail to meet the Title V application deadline will face a major crisis. Environmental law specialists should make certain of the following:

(1) the state's application deadline is known;

(2) an accurate and complete inventory of "potential emissions" is available for the installation;

(3) installation planners have fully evaluated the applicability of Title V requirements to the installation and developed an effective compliance plan;

(4) a contract mechanism is in place to obtain contractor support in preparing the Title V application;

(5) the installation is in compliance, or will be before the application deadline, with all applicable CAA requirements—such as, Prevention of Significant Deterioration (PSD) and New Source Review (NSR) permit requirements; and

(6) the installation has programmed the funds and resources needed to meet Title V requirements on an ongoing basis.

Applicability of the Title V Operating Permit Requirement

Under Title V of the CAA, "major sources" of air pollutants will have to obtain a federally enforceable operating permit issued by the state under an EPA-approved program (CAA § 502).[3] Considering the costs and loss of operational flexibility associated with obtaining a Title V permit, classification of an installation as a "major source" will have significant consequences.

The EPA issued a memorandum to its regional offices on 8 March 1994, Consideration of Fugitive Emissions in Major Source Determinations, which may allow some installations to avoid "major source" classification. Despite the language in 40 C.F.R. § 70.2 (definition of "major source"), the memorandum provides that states need not consider certain fugitive emissions in "major source" determinations. "Fugitive emissions" are those emissions that do not pass through a stack,

[1] 58 Fed. Reg. 63,214-59 (1993) (amending 40 C.F.R. parts 51 and 93).

[2] 59 Fed. Reg. 31,157 (1994).

[3] 42 U.S.C.A. 7661a (West 1994); 40 C.F.R. pt. 70 (1993).

vent, or defined opening, such as dust from military training exercises or smoke from prescribed burning. Of particular importance to some Army installations, the EPA's new guidance provides that states do not have to count fugitive emissions of particulate matter (PM-10)—such as, dust from military training—in determining if an installation in a PM-10 nonattainment area is a "major source." Environmental law specialists should alert their installations' air quality personnel to this significant change in policy. The EPA's memorandum should be available through its regional offices. Major Teller.

Endangered Species

Army Red-Cockaded Woodpecker (RCW) Management Guidelines

The Assistant Chief of Staff for Installation Management approved new RCW management guidelines on 22 June 1994. These guidelines supersede the guidelines contained in Technical Note 420-74-1, Management of the Red-Cockaded Woodpecker on Army Installations (21 August 1989). The new guidelines—which apply to all Army installations that manage RCW habitat—impose major new requirements, such as preparation of an installation RCW management plan and RCW surveys.

In implementing the RCW guidelines, installations must follow the procedures prescribed in the Army's Endangered/Threatened Species Guidance.[4] The latter guidance will be published as chapter 11 of the new *Army Regulation (AR) 200-3, Natural Resources: Land, Forest and Wildlife Management*, which will replace *AR 420-74*.[5] Effective implementation of the RCW guidelines will require active involvement by environmental law specialists.

The RCW Management Guidelines currently are available for downloading on the LAAWS BBS, Environmental Law Conference. Major Teller.

DDN Addresses

For those wishing to communicate with attorneys in the ELD's Compliance and Policy Branch through the Defense Data Network, the following addresses are provided:

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If you experience any problems, contact Ms. Athey in the Environmental Law Division. Mr. Nixon.

[4] *See* Memorandum, DAIM-ED-N, subject: Endangered Species Guidance (15 Feb. 1994).

[5] DEP'T OF ARMY, REG. 420-74, FACILITIES ENGINEERING: NATURAL RESOURCES—LAND, FOREST AND WILDLIFE MANAGEMENT (25 Feb. 1986).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Contract Law Notes

Funding of Service Contracts: The GAO Clarifies the Rules

A common problem facing fiscal law practitioners is the proper application of what is commonly known as the "bona fide need" rule.[1] Over the years, the General Accounting Office (GAO) has developed rules through its case law that define when a "bona fide need" exists based on the type of funds and the type of contract involved.[2]

Recently, the GAO clarified previous guidance concerning the proper funding of service contracts.[3] This note will exam-

[1] The rule is based on 31 U.S.C. § 1502(a), which states as follows:

> The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title [the Purpose statute]. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

[2] *See* Chairman, United States Atomic Energy Comm., B-130815, 37 Comp. Gen. 155 (1957) (general rule on supply contracts); Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965) (stock level exception in supply contracts); Defense Technical Information Center—Availability of Two-Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989) (use of multiyear appropriations); Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992) (service contract rules); Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991) (training contracts); Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64 (construction contracts).

[3] Incremental Funding of U.S. Fish and Wildlife Serv. Research Work Orders, B-240264, Feb. 7, 1994, 1994 U.S. Comp. Gen. LEXIS 198.

ine the impact of the new GAO guidance against the backdrop of the GAO's previous pronouncements on service contract funding.

The GAO's Previous Guidance

The GAO has declared for many years that services are a bona fide need of the fiscal year in which the contractor performs the service.[4] However, in 1943, the GAO carved a large exception for so-called "nonseverable" service contracts.[5] In declaring that the production of a crop whose growing season crossed fiscal years[6] was nonseverable, the GAO stated:

> The services contracted for under operation (2) were to be performed during the 1943 crop year—in the instant case, extending from . . . April 15 to August 5, 1943—and, therefore, of necessity, covered a portion of two fiscal years. The fact that a contract covers a part of two fiscal years does not necessarily mean that payments thereunder are for splitting between the two fiscal years involved upon the basis of services actually performed during each fiscal year . . . . It is true, of course, that under certain conditions, such as where a contract calls for performance of purely personal services with compensation therefore fixed in proportion to the amount of work performed, the fiscal year appropriation properly for charging is that current at the time the personal services are rendered. . . . Such a contract is termed severable as distinguished from entire . . . However, that is not the situation here. The instant contract provides—in addition to the "ground preparation"— for the cultivation of certain acreage for a definite price per acre, payment to be made upon the completion thereof. Thus, there is involved one undertaking, which although extending over a part of two fiscal years, nevertheless was determinable both as to the services needed and the price to be paid therefor at the time the contract was entered into. Such being the case, the fiscal year appropriation current at the time the contract was made was obligated for payments to be made thereunder . . . .[7]

Since 1943, government agencies and the GAO have wrestled with defining whether a service contract was severable or nonseverable in a variety of contexts. For example, the GAO has held that contracts for trucking services[8] and maintenance services[9] were severable. On the other hand, the GAO has held that contracts for a study and report on Vietnam veterans[10] and for training courses beginning on the first day of the fiscal year[11] were nonseverable.

More recently, the GAO has held that the Agriculture Department's Food and Nutrition Service improperly used annual appropriations to "incrementally" fund contracts for consultant services. In *Matter of Incremental Funding of Multiyear Contracts*,[12] the GAO stated that the multiyear contracting provisions of the *Federal Acquisition Regulation*[13] did not convert a nonseverable contract into a severable contract that the agency could fund with annual appropriations of different years.

Until recently, the guidance for determining whether a contract was severable or nonseverable was confusing at best. Fortunately, in *Incremental Funding of U.S. Fish and Wildlife Service Research Orders*,[14] the GAO replaced its 1943 guidance with a simpler test.

The Facts of Fish and Wildlife Service Research Orders

Under statutory authority,[15] the Secretary of the Interior enters into cooperative agreements with colleges and universities to conduct fish and wildlife research. As part of the cooperative agreement, the Fish and Wildlife Service (FWS) issued cost-reimbursement research work orders to the colleges and universities to fund research services spanning several years.[16] The FWS, however, funded the work orders on an incremental

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[4] *See* To the Chairman, Atomic Energy Comm., B-116427, Aug. 20, 1953, 33 Comp. Gen. 90 (1953) (and decisions cited therein); Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992).

[5] To H.B. Herms, Dep't of Agriculture, B-37929, 23 Comp. Gen. 370 (1943) (production of rubber-bearing plants where growing season crossed fiscal years).

[6] In 1943, the federal government's fiscal year ran from 1 July to 30 June.

[7] *To H.B. Herms, Dep't of Agriculture*, 23 Comp Gen. at 371.

[8] To the Chairman, Atomic Energy Comm., B-116427, 32 Comp. Gen. 90 (1953).

[9] To the Sec'y of State, B-125444, 35 Comp. Gen. 319 (1955).

[10] Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase, B-219829, 65 Comp. Gen. 741 (1986).

[11] Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991).

[12] B-241415, 71 Comp. Gen. 428 (1992).

[13] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 32.703-3 (1 Apr. 1984) [hereinafter FAR].

[14] B-240264, Feb. 7, 1994, 1994 U.S. Comp. Gen. LEXIS 198.

[15] 16 U.S.C. § 753 (1988).

[16] *Incremental Funding of U.S. Fish and Wildlife Serv. Research Orders*, 1994 U.S. Comp. Gen. LEXIS at *2-3.

basis using annual appropriations.[17] Based on a critical Interior Department Inspector General report of the practice,[18] the FWS requested an advisory opinion from the GAO.[19]

The GAO's Clarified Guidance

In its opinion, the GAO briefly reviewed its findings on the Food and Nutrition Service[20] and announced that, although the FWS operated under a cooperative agreement rather than a contract, the same *bona fide* need analysis applied.[21] The GAO then set out its current guidance on the severability of contracts:

> Whether an agency should charge the full cost of contract services to the appropriation available on the date a contract for services is made or to the appropriation current at the time services are rendered depends upon whether the services are severable or entire. A task is severable if it can be separated into components that independently meet a separate need of the government . . . Thus, to the extent a need for a specific portion of continuing or recurring services arises in a subsequent fiscal year, that portion is severable and chargeable to appropriations available in the subsequent year. . . . On the other hand, where the services provided constitute a specific, entire job with a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year, the task should be financed entirely out of the appropriation current at the time of award, notwithstanding that performance may extend into future fiscal years.[22]

The GAO then examined the research work orders involved and found that they committed the universities to completing the research involved and producing a final publishable report. Consequently, the GAO determined that the tasks required by these research work orders were nonseverable and that the FWS should have obligated the full estimated cost of the orders at the time of award.[23]

Conclusion

As the GAO previously has stated, absent special statutory authority, agencies must fund severable contracts with funds current at the time services are rendered.[24] Conversely, GAO has now stated on two occasions that agencies must fully fund nonseverable contracts with current funds available at time of contract award.[25] The new GAO guidance should provide fiscal law practitioners with clearer guidance on determining the proper funding of multiyear service contracts and similar agreements, thereby assisting fiscal law practitioners in avoiding unintentional violations of the Anti-Deficiency Act.[26]

Major Hughes.

Criminal Law Notes

***United States v. Drayton*: Limiting the Application of UCMJ Article 37**

The command-centered nature of the military justice system assures a continuing possibility of tension between proper command guidance and unlawful command influence. The United States Court of Military Appeals (COMA) has observed that the line "between legitimate concern for the military function of command and the improper interference with the judicial process may on occasion be a hazy one to discern."[27] The tension between the proper and improper exercise of superior authority is noteworthy where senior and subordinate leaders discuss the disposition of particular military justice actions.

The "black letter rule" is simply that a senior commander may not preclude a subordinate commander from exercising

[17] With the exception of certain specified projects, the FWS receives only annual appropriations. *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1382 (1993).

[18] *Incremental Funding of U.S. Fish and Wildlife Serv. Research Work Orders*, 1994 U.S. Comp. Gen. LEXIS at *4.

[19] Under 31 U.S.C. § 3529, agencies may request the GAO to render advisory opinions concerning the propriety of a disbursement. *See also* DEP'T OF DEFENSE REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, "Disbursing Policies and Procedures," vol. 5, para. 250102 (Dec. 16, 1993) (Department of Defense procedural guidance).

[20] *See supra* note 12 and accompanying text.

[21] *Incremental Funding of U.S. Fish and Wildlife Serv. Research Work Orders*, 1994 U.S. Comp. Gen. LEXIS at *5.

[22] *Id.* at *6-7.

[23] *Id.* at *7-8.

[24] *See supra* note 4 and accompanying text. However, 10 U.S.C. § 2410a (1988 & Supp. IV 1992) allows the Department of Defense to treat severable service contracts for (1) maintenance of tools, equipment, and facilities, (2) leasing real and personal property, including maintenance as part of the lease, (3) depot maintenance, and (4) operation of equipment for funding purposes as nonseverable or entire, so long as the contract term does not exceed 12 months. *See also* DEP'T OF DEFENSE, DEFENSE FED. ACQUISITION REG. SUPP. 237.106 (1 Dec. 1991) (providing list of contracts subject to 10 U.S.C. § 2410a).

[25] *See supra* notes 12, 14 and accompanying text.

[26] 31 U.S.C. § 1341 (1988). The Act prohibits agencies from making obligations in excess of amounts appropriated by Congress. An agency would violate the Act by violating the bona fide need rule and then, when the agency discovered the violation, not having sufficient proper funds to correct the violation.

[27] United States v. Hardy, 4 M.J. 20, 24 (C.M.A. 1977) (treated negatively and implicitly overruled in part by United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983)).

his or her independent judgment, although the commander may express his or her opinion and provide guidance to the subordinate commander. *United States v. Rivera* states this principle best:

> The fine line between lawful command guidance and unlawful command control is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them. If all viable alternatives are foreclosed as a practical matter, the superior commander has unlawfully fettered the discretion placed with the subordinate commander.[28]

While the *Rivera* "rule" is easy to articulate, its application is less simple. In many areas of routine concern, a subordinate commander is not free to ignore a senior commander's guidance or suggestions. Whatever may be the subordinate's rationale, if he or she comports his or her behavior with the implicit or explicit suggestion of a superior concerning a military justice action, it may appear that the senior leader has "unlawfully fettered" the subordinate's discretion. For that reason, cases involving this particular issue, as discussed below, frequently seem to occur. A recent and very interesting example is the decision of the Army Court of Military Review (ACMR) in *United States v. Drayton*.[29]

In *Drayton*, a three-judge panel of the ACMR held that Article 37(a)[30] of the Uniform Code of Military Justice (UCMJ) applies only to the "adjudicative" processes of courts-martial, and not to what the ACMR described as the "accusatorial" process. Based on that distinction, the ACMR found no improper command influence where a battalion commander allegedly directed a company commander to recommend disposition by court-martial. *Drayton* is contrary to many relevant precedents in the area of pretrial command influence. For that reason, *Drayton* merits careful review by judge advocates practicing in the military justice arena. To assist in that review, this note briefly will discuss some of the case law in the area of improper command control in pretrial dispositions.

The principal decision by the COMA is *United States v. Hawthorne*.[31] In *Hawthorne*, the Fourth Army Commander issued a "policy directive" that included a provision that new charges against any Regular Army soldier with "two admissible previous convictions" should be referred to a general court-martial.[32] Predictably, Hawthorne was a Regular Army soldier with *three* previous summary court-martial convictions. The accused's commanding officer preferred charges against him for being drunk on duty, operating a military truck while drunk, and misappropriating a government vehicle. The commander's transmittal letter for the charges recommended trial by general court-martial "[i]n view of the Fourth Army Policy" concerning personnel with previous convictions.[33] The appellant ultimately was convicted of the misappropriation offense, but was acquitted of the alcohol-related offenses.

On appeal, the appellant attacked the apparently mandatory character of the policy directive. The Army Board of Review initially affirmed by a divided vote. The COMA granted review to determine whether the Commanding General had exercised "improper control" over the proceedings. The COMA reversed the Board's decision, setting aside the findings and sentence. In doing so, the COMA stated that "*any circumstance* which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned."[34]

The COMA agreed with the appellant that the policy directive was "inviolable."[35] Consequently, the COMA concluded that the appellant's company commander may have given no attention "to the other factors which are enumerated in the Manual and which would normally be important in reaching a decision as to the disposition of the charges" or determining the level of court-martial to which referral might be appropri-

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[28] 45 C.M.R. 582, 584 (A.C.M.R. 1972).

[29] 39 M.J. 871 (A.C.M.R. 1994).

[30] UCMJ art. 37(a) (1988) provides, in pertinent part, as follows:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

[31] 22 C.M.R. 83 (C.M.A. 1956).

[32] *Id.* at 87. The directive noted that 38% of the Fourth Army's troop strength accounted for 64% of the courts-martial, and stressed the need to give vigilant attention to Regular Army personnel (as opposed to inductees) who had "demonstrated by repeated misconduct a weakness of character which renders them unfit to serve." Finally, the "state of discipline within the Command" was to be brought to the attention of every member of every general court-martial thereafter appointed. *Id.*

[33] *Id.* at 86-87. Apparently, all the intervening commanders concurred in the initial recommendation for trial by general court-martial. *Id.* at 87.

[34] *Id.* at 87 (emphasis added). For support for this proposition, the COMA alluded to some of its pretrial and postconviction precedents. The pretrial precedents included United States v. Greenwalt, 20 C.M.R. 285 (C.M.A. 1955) (setting aside a conviction because of a staff judge advocate's misdescription of a UCMJ article 32 investigating officer's recommendation in his pretrial advice to the convening authority); United States v. Littrice, 13 C.M.R. 43 (C.M.A. 1955) (reversing a conviction because of "pernicious suggestions" made by the convening authority to members of a court-martial in a pretrial conference).

[35] *Hawthorne*, 22 C.M.R. at 89.

ate.[36] The COMA found that the directive ignored the normal procedure for disposing of offenses at the lowest appropriate level, and that the initial commander's discretion was removed because "any charge" would be referred to the highest court-martial, no matter how trivial the offense.[37] Stated differently, the COMA observed that the policy "directly tended to control the judicial processes rather than merely attempting to improve the discipline of the command. It was, therefore, illegal."[38]

The COMA also rejected the government's waiver argument, based on the appellant's failure to interpose a motion for appropriate relief. The COMA observed that although a good argument existed that improper command control could not be waived,[39] the COMA did not find it necessary to decide the issue on that ground.[40] The facts of the case did not indicate that the defense counsel was aware of the policy directive or the transmittal letter, and the COMA declined to impute such awareness to the counsel.[41]

Shortly after *Hawthorne*, in *United States v. Sims*,[42] the Army Board of Review found error with a different policy statement. In *Sims*, a division commander stated that in *all* cases where an individual previously had been convicted two times of unauthorized absence (AWOL), that service member would be tried by general court-martial for a third offense.[43] The policy directive was promulgated on 13 August 1956, but followed an earlier commander's conference at which the division commander had observed that repeated AWOL offenders could be court-martialed and punitively discharged from the Army.

Before that conference, the accused's company commander had recommended that he be administratively discharged ("boarded"), and tried by summary-court-martial for repeated AWOL offenses. The appellant's battalion commander had concurred in his first indorsement, but indicated that he was referring the matter to a special court-martial.[44] By a second indorsement—dated the same day as the aforementioned conference—the next higher commander directed trial by general court-martial in view of the appellant's two prior AWOL convictions. Subsequently, the battalion commander withdrew the charges from the special court-martial, and referred the matter for investigation pursuant to UCMJ Article 32, and the company commander signed a transmittal letter recommending trial by general court-martial.[45]

The Board of Review found that both the company and battalion commanders had been required to change their initial recommendations as a result of the views expressed by the division commander. No matter how that change was precipitated, the overall result was to make a free and impartial pretrial procedure impossible.[46] Relying on *Hawthorne*, the board observed that an accused has "an inviolable right" to a proper pretrial procedure, a right which was overcome, in this case, by the control or influence of superior authorities.[47] Because the accused pleaded guilty to the offense, the remedy in this case was limited to a reassessment of the sentence to punishment consistent with trial by special court-martial.[48]

In *United States v. Rivera*,[49] the accused's company commander initially recommended a field grade Article 15 for possession of heroin. The battalion commander returned the case file to the company commander with the comment, "Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge." The next day, the company commander forwarded the file to the battalion with a charge sheet.[50] On appeal, the ACMR began by expressing its agreement with language found in *United States v. Wharton*: "An accused has a right to proper pretrial procedure, including the exercise of discretion by inferior commanders in disposing of charges administratively or by trial by the lowest court that

[36] *Id.* at 88.

[37] *Id.*

[38] *Id.*

[39] *Id.* (citation omitted).

[40] Subsequently, the COMA has held that the failure to raise command influence at trial will not result in waiver of the issue on appeal. United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983).

[41] *Id.* at 89-90.

[42] 22 C.M.R. 591 (A.B.R. 1956).

[43] *Id.* at 594.

[44] *Id.* at 593, 595.

[45] *Id.* at 596.

[46] *Id.* at 596-97.

[47] *Id.* at 597.

[48] *Id.*

[49] 45 C.M.R. 582 (A.C.M.R. 1972).

[50] *Id.* at 583.

has power to adjudge an appropriate and adequate punishment."[51] The ACMR observed that a superior commander might lawfully control his or her subordinate's disposition of disciplinary problems in a number of legitimate means. For example, a superior commander requiring that subordinates seek permission before referring certain cases to special courts-martial would be proper.[52] However, in *Rivera*, none of those methods were used. Instead, the ACMR concluded that discretion as to disposition—placed by the *Manual for Courts-Martial* with the accused's immediate commander—had been usurped by his superior commander.[53] Finally, the ACMR held that the failure to raise the issue before the trial court did not constitute waiver, and set aside the findings and sentence.[54]

In *United States v. Hinton*,[55] the ACMR found that the accused's company commander wanted to recommend a summary court-martial for the accused. He believed that he had been directed or "required" by his battalion commander to recommend a special court-martial empowered to adjudge a bad conduct discharge.[56] In the ACMR's view, this belief in, or "persuasion of coercion" by the superior commander, was error that necessitated remedial measures.[57] The remedy adopted by the ACMR was to put the accused where he would have been absent the error. Because the company commander had favored a summary court-martial, and the ACMR concluded that a summary court-martial was the least severe punishment that he would have received, the punishment ultimately approved by the ACMR was consistent with that disposition: forfeiture of $240 pay, reduction to the grade of E-1, and confinement at hard labor for thirty days.[58]

In *United States v. Davis*,[59] the COMA concluded that nothing in the record of trial suggested that improper influence by a brigade commander was responsible for a subordinate's court-martial recommendation. The subordinate recommended general court-martial, as opposed to nonjudicial punishment, because the charges were too serious for a lesser disposition.[60] In support of its conclusion, the COMA cited *United States v. Hawthorne*,[61] demonstrating the continuing vitality of that decision.

Most recently, in *United States v. Wallace*,[62] the appellant alleged that his conviction was affected by unlawful command influence because his commander—who originally had imposed UCMJ Article 15 punishment—was influenced by his next superior commander to withdraw the nonjudicial punishment and prefer court-martial charges instead.[63] The superior commander had learned of possible additional misconduct by the accused from a judge advocate. Based on that information, he told the accused's company commander that he might want to reconsider the Article 15 and consider setting it aside based on additional charges.[64] The military judge found that although the subordinate commander "felt" influenced to reconsider his decision to offer an Article 15 for two uses of cocaine, no evidence indicated that he was unlawfully influenced by his superior's recommendation.[65] Based on the well-developed record,[66] the COMA affirmed. As in *Davis*, the COMA concluded that the military judge was in the best position to evaluate the sincerity and credibility of the two commanders. The judge found, and the record supported his finding, that the subordinate commander "exercised his own

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[51] *Id.* at 583-84 (quoting United States v. Wharton, 33 C.M.R. 729, 732-33 (A.F.B.R. 1963) (citation omitted).

[52] *Id.* at 584.

[53] *See supra* note 30 and accompanying text.

[54] *Rivers*, 45 C.M.R. at 584.

[55] 2 M.J. 564 (A.C.M.R. 1976) (per curiam).

[56] *Id.* at 565.

[57] *Id.* at 566.

[58] *Id.*

[59] 37 M.J. 152 (C.M.A. 1993).

[60] *Id.* at 155-56.

[61] *Id.* at 156. The COMA noted, "[A]fter a review of the facts, the military judge concluded that Major Anderson independently arrived at his decision to recommend a general court-martial and that he was not unlawfully influenced by superior authority in arriving at his decision. *Id. Cf.* United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956). There is nothing in the record of this case to persuade us to the contrary."

[62] CM 9102519 (A.C.M.R. 11 Aug. 1992) (unpub.), *aff'd*, 39 M.J. 284 (C.M.A. 1994).

[63] *Wallace*, 39 M.J. at 284.

[64] The subordinate commander testified that his superior had told him three things: to "reconsider the Article 15 [he] did on Wallace; . . . consider setting aside the Article 15; and . . . to make [his] own decision." *Id.* at 285-86.

[65] *Id.* at 286.

[66] The issue of unlawful command influence was raised by motion to dismiss prior to the entry of pleas. *Id.* at 285.

independent judgement" in preferring charges and recommending disposition by court-martial.[67]

The Case of United States v. Drayton

Drayton arose out of the accused's guilty plea to larceny from the post exchange. The approved sentence included a bad-conduct discharge, forfeitures, and reduction to Private E-1.[68] The ACMR first considered the case in 1992. Pursuant to *United States v. Grostefon*,[69] the appellant asserted for the first time on appeal that his battalion commander unlawfully influenced his company commander to recommend a specific court-martial action against him.[70] The ACMR initially affirmed the conviction without opinion,[71] but the COMA, noting that the ACMR opinion did not address the issue of whether the company commander had been unlawfully influenced by his battalion commander, set aside the decision and remanded the case to the ACMR for specific findings on the issue of unlawful command influence.[72] The ACMR's recent decision—based on new pleadings and additional affidavits—resulted from that remand.[73]

The appellant contended that his company commander agreed with him that recommending a special court-martial empowered to adjudge a bad conduct discharge was a harsh disposition for the larceny offense with which the accused was charged. The company commander supposedly added, however, that the recommendation had been decided "at the Battalion" and that it was "out of his hands."[74] In contrast, the company commander's posttrial affidavit stated that he had never agreed with the appellant that a special court-martial empowered to adjudge a bad conduct discharge was too harsh a disposition. Rather, while he had discussed all levels of possible disciplinary action with the battalion commander, it was his decision to recommend a discharge level court because of the appellant's status as a senior (E-6) noncommissioned officer, and his belief that the appellant's shoplifting was not "a one-time incident."[75] Although its analysis made such factfinding unnecessary, the ACMR observed that "if [it] had to resolve the issue," it would find the company commander's affidavit to be more credible than that of the appellant.[76] Having otherwise resolved the issues on the basis of the record, the ACMR did not choose to order an evidentiary hearing.[77]

The ACMR's analysis of the principal issue began with consideration of *United States v. Bramel*[78] and UCMJ Article 37(a). In *Bramel*, a panel of the ACMR determined that UCMJ Article 37(a) proscribed unlawful command influence over the adjudicative processes of courts-martial. *Bramel* more specifically held that an investigation pursuant to UCMJ Article 32 was *not* subject to UCMJ Article 37(a), as the purpose of that proceeding was to gather evidence on which a recommendation as to disposition of charges could be made.[79] This process was, in the ACMR's view, accusatorial rather than adjudicative, and therefore outside the scope of the plain language of UCMJ Article 37(a).[80] The *Bramel* decision

[67] *Id.* at 286-87. Chief Judge Sullivan dissented, voicing concern about the behavior of the trial counsel. The Chief Judge saw the trial counsel's actions—that is, of advising the superior commander of the additional misconduct—as having "deprived appellant of a favorable independent judgment by his commanding officer and in [the Chief Judge's] mind violated Article 37, UCMJ, 10 U.S.C. § 837." *Id.* at 287 (citations omitted).

[68] United States v. Drayton, 39 M.J. 871, 872 (A.C.M.R. 1994).

[69] 12 M.J. 431 (C.M.A. 1982).

[70] *See Drayton*, 39 M.J. at 872.

[71] United States v. Drayton, ACMR 9201149 (A.C.M.R. 3 Dec. 1992) (unpub).

[72] United States v. Drayton, 38 M.J. 310 (C.M.A. 1993) (summary disposition).

[73] The appellant claimed that two separate instances of unlawful command influence affected his trial. The first allegation, that his commanding officer's recommendation as to disposition was directed by superior authority, is the subject of this note and is discussed *infra*. The second allegation involved the accused's battalion command sergeant major holding a shoplifting briefing by post exchange security personnel prior to the trial. The appellant alleged that after the briefing, senior noncommissioned officers who would have spoken favorably on his behalf, told him that they would have to think about it before they would so testify. *Drayton*, 39 M.J. at 872. While acknowledging that if true the second allegation would amount to unlawful command influence, the ACMR held that no denial of favorable extenuation and mitigation witnesses occurred during the sentencing phase of trial. *Id.* at 875.

[74] *Id.* at 872 n.2.

[75] *Id.* at 872-73 n.4.

[76] *Id.* at 875. The courts of review have a unique fact-finding power and responsibility. The courts of review "may affirm only such findings of guilty and sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." UCMJ art. 66(c) (1988).

[77] If posttrial affidavits do not compellingly demonstrate the invalidity of "collateral claims" of unlawful command influence, and provide a basis to reject beyond a reasonable doubt the unlawful command influence claims, affirmance would be inappropriate. *See* United States v. Dykes, 38 M.J. 270, 273 (C.M.A. 1993). A hearing before a military judge at the trial level would be appropriate. *See generally* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967). In *Drayton*, the ACMR observed that the appellant's affidavit was not sufficient "to shift the burden of disproving its content to the Government beyond the point of equipoise or inconclusiveness." *Drayton*, 39 M.J. at 875 (citation omitted).

[78] 29 M.J. 959 (A.C.M.R.), *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition).

[79] In *Bramel*, the summary court-martial convening authority ordered a UCMJ Article 32 investigating officer to use a partition for a young victim of forcible sodomy. The court found that the order did not amount to unlawful command influence, nor did it affect the impartiality of the investigating officer. *Id.* at 967.

[80] *Drayton*, 39 M.J. at 873 (citing *Bramel*, 29 M.J. at 967).

observed that a cursory reading of UCMJ Article 37(a) revealed that the article "proscribes unlawful command influence over the adjudicative process of courts-martial and other military tribunals empowered to determine guilt of an offense and to impose punishment for its commission."[81] In the ACMR's view, the alleged corruption in the recommendation process did not affect the conduct of the trial. Thus, the alleged impropriety was "accusatorial" in nature rather than adjudicative. Accordingly, the ACMR held that *as a matter of law*, the alleged directive to the company commander did not constitute unlawful command influence.

The court stated that deficiencies in the "accusatorial" process, if not waived,[82] can be challenged by one of two methods. First, the accused may invoke the "de facto accuser" doctrine.[83] Because the battalion commander in *Drayton* was not a convening authority for the level of court involved, the "de facto accuser" concept was not applicable.[84] The second method for challenging defects involves invocation of Rule 401(c)(2)(A) of the Rules for Courts-Martial.[85] The ACMR observed that if the battalion commander had overcome the company commander's independent discretion, the remedy would be to return the case for reconsideration by the convening authority, this time with the company commander's "unfettered" recommendation.[86]

Several points about *Drayton* merit discussion and suggest caution in its application. *Drayton* observed "that while not so stating, *Bramel* in effect repudiates the broad sweep of the unlawful command control language in *United States v. Hawthorne*."[87] The ACMR observed that *Hawthorne* suffered from two infirmities: a failure to distinguish between pretrial and trial processes, and that the decision never cited UCMJ Article 37 in its discussion of "command control."[88] Moreover, *Drayton* deemed the authority cited by *Hawthorne* to show improper command influence in the pretrial phase, *United States v. Greenwalt*,[89] to have been inapposite.[90] Finally, the ACMR noted that the analytical model set forth in *Bramel*, and adhered to in *Drayton*, was consistent with the "philosophy" expressed by the COMA's decision in *United States v. Blaylock*.[91] Both *Bramel's* "repudiation" of *Hawthorne*, and its purported philosophical consistency with *Blaylock* are questionable.

First, nowhere in *Bramel* does the ACMR cite *Hawthorne*, a development probably attributable to *Bramel* and *Hawthorne* being factually distinguishable. Moreover, in light of the COMA's more recent citation of *Hawthorne* for the apparent proposition "repudiated" by *Bramel*,[92] the *Drayton* pronouncement concerning *Hawthorne* may be premature. Put simply, the trial practitioner can take more weighty coun-

[81] *Bramel*, 29 M.J. at 967.

[82] The ACMR observed that "failure to assert errors in the accusatorial process at trial constitutes waiver." *Drayton*, 39 M.J. at 874 (citation omitted).

[83] UCMJ art. 1(9) (1988) provides, "Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

[84] *Drayton*, 39 M.J. at 874. *See also* United States v. Nix, 36 M.J. 660, 663-64 (N.M.C.M.R. 1992) (rejecting argument that anyone with an other than professional interest in a case should be prohibited from making a discretionary decision on behalf of the United States).

[85] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 401(c)(2)(A) (1984) [hereinafter MCM] provides that "[w]hen charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition." The discussion to that rule provides further that "[a] commander's recommendation is within that commander's sole discretion. No authority may direct a commander to make a specific recommendation as to disposition." *See also id.* R.C.M. 306(a) ("A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.").

[86] *Drayton*, 39 M.J. at 874.

[87] *Id.* at 873.

[88] *Id.* at 874.

[89] 20 C.M.R. 285 (C.M.A. 1955).

[90] The ACMR reasoned that *Greenwalt* did not rest on UCMJ Article 37 at all, but rather held that the staff judge advocate, by misstating the recommendations of the investigator, failed in the execution of his UCMJ Article 34 obligation. *Drayton*, 39 M.J. at 874.

[91] *Id.* at 874 n.6 (quoting United States v. Blaylock, 15 M.J. 190, 194 (C.M.A. 1983)), in which the COMA had observed

> If we interpret Article 37 as prohibiting an officer exercising general court-martial jurisdiction from intervening when he concludes that charges should be withdrawn [from an inferior court], the resulting situation would be inconsistent with the military command structure, whereunder a superior commander can direct the actions of a subordinate.
>
> Under the law of war, commanders may be held responsible for failure to control their troops and to maintain discipline. *Cf. In re Yamashita*, 327 U.S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946). Therefore, we should hesitate to infer from the general language of Article 37 the existence of such limitations on the commander's power to assure that crimes are referred to tribunals that can mete out adequate punishment.

[92] *See* United States v. Davis, 37 M.J. 152, 156 (C.M.A. 1993).

sel from the COMA's treatment of *Hawthorne* than it can from treatment of that case by a court of review.

Second, and perhaps more fundamentally, while the COMA summarily affirmed *Bramel*, neither of the issues granted for review and affirmed[93] expressly involved unlawful command influence. Its summary disposition certainly does not compel a conclusion that the COMA embraced the *Bramel* distinction between the "adjudicative" and "accusatorial" phases of trial, and the closely-related limitation on the applicability of UCMJ Article 37. Moreover, the summary disposition does not necessarily suggest any desire by the COMA to extend the *Bramel* analysis to the court-martial recommendation process.

Third, *Blaylock* also arose in a factually distinguishable setting. The granted issue in *Blaylock* was whether the appellant's court-martial lacked jurisdiction because a previous referral to a lower level court-martial never was properly withdrawn.[94] One of the questions posed by the COMA was whether UCMJ Article 37 "precludes a superior commander from overriding the decision of a subordinate convening authority by withdrawing charges from the court-martial to which they have already been referred and rereferring them to a different court-martial."[95] Finding no codal support for such a conclusion, the COMA refused to interpret UCMJ Article 37 to prohibit a general court-martial convening authority from intervening after he had concluded that charges should be withdrawn from a summary or special court-martial and referred to a higher level of court-martial. This interpretation would enable subordinate commanders to deprive superiors of powers expressly granted by UCMJ Article 22,[96] and the COMA was leery of inferring from UCMJ Article 37 a limitation on the commander's power to assure that crimes are referred to tribunals that can mete out adequate punishment.[97]

In that context, the COMA noted that the interpretation proposed by the appellant "would be inconsistent with the military command structure, whereunder a superior commander can direct the actions of a subordinate."[98] *Blaylock* did not state, nor did it reasonably infer, that a superior commander could direct a subordinate commander to dispose of a case in a particular way, such as to refer a case to a lower level court-martial.[99] In other words, *Blaylock* did not involve any arguable improper influence on, or "usurpation" of, a subordinate's discretion, as could have been the case in *Drayton*. Rather, it focused on the propriety of a superior officer's exercise of his discretion.

Drayton contains a very interesting analytical approach to an old problem, but it is an approach which is not readily reconciled with the precedents discussed above. Cases like *Hawthorne*, *Rivera*, *Hinton*,[100] and *Wallace* demonstrate a consistent sensitivity to the need for a tailored remedy when a "usurpation" or "improper" or "unlawful" influence in the recommendation process has occurred, whether called unlawful command influence or some other name. The cases invariably have treated such interference by senior leaders as a very serious matter, as demonstrated by the consistent refusal to impose the waiver doctrine. Against these precedents, *Drayton* is unique. Accordingly, practitioners should not lightly invoke *Drayton*, at least until the COMA explicitly adopts it.

Major O'Hare.

Trial Counsel Must Review Law Enforcement Files for Evidence Favorable to the Defense

In *United States v. Simmons*,[101] the COMA found that the trial counsel erred when he failed to *discover and disclose* to the defense the rape victim's contradictory statements to a government polygrapher prior to trial. The accused was

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[93] The COMA granted review on two issues as follows:

> I. The military judge committed prejudicial error by refusing to order a new article 32 investigation because appellant was denied his constitutional rights to confront the primary witness against him and to represent himself and was deprived of his codal right to a fair and impartial investigation.
>
> II. Appellant was denied a fundamentally fair trial as guaranteed by the Fifth and Sixth Amendments where the findings of guilty were announced by less than a unanimous verdict of eight members.

United States v. Bramel, 32 M.J. 3 (C.M.A. 1990).

[94] *Blaylock*, 15 M.J. at 191.

[95] *Id.* at 193.

[96] UCMJ art. 22 (1988) defines who may convene general courts-martial.

[97] *Blaylock*, 15 M.J. at 194.

[98] *Id. cited in* United States v. Drayton, 39 M.J. 871, 874 n.6 (A.C.M.R. 1994).

[99] Such a disposition would be unnecessary in light of a general court-martial convening authority's ability to convene special courts-martial. *See* UCMJ art. 23(a)(1) (1988).

[100] *Drayton* suggests a distinction between its facts and those of *Hinton* on the ground that the court in *Hinton* found a "usurpation" of the subordinate's discretion rather than unlawful command influence, and a denial of due process. *See* United States v. Drayton, 39 M.J. 871, 873 n.3 (A.C.M.R. 1994).

[101] 38 M.J. 376 (C.M.A. 1993).

charged with and convicted of, among other offenses, rape.[102] The accused and another sergeant allegedly had sexual intercourse with two female trainees who were drunk and passed out in the accused's apartment. One of the trainees[103] was the victim in the rape charge.

Prior to the Article 32 investigation, the Criminal Investigation Division (CID) administered polygraphs to the female trainees. The polygraph results indicated deception by both trainees. In a postpolygraph statement to the polygrapher, one of the trainees said "she did not feel she was a victim of rape as she enjoyed sex with [the accused] and she felt she could have done something to prevent their actions 'if she would have wanted to.'"[104] Both counsel were aware that deception had been indicated by the trainees during the polygraph but neither counsel were aware of the contradictory statements made to the CID polygrapher by one of the trainees during the postpolygraph interview. Neither the trial counsel nor the defense counsel interviewed the polygrapher or reviewed the polygraph results prior to the accused's court-martial.

Prior to trial, the defense counsel served the government with a discovery request for "any and all information in the government's possession *or in the possession of government agents, informants, or police officials* that may be favorable to the defense."[105] The defense counsel also requested all law enforcement reports regarding witness interviews and all laboratory and field tests. The defense counsel did not specifically request, however, the polygraph report on the trainees. The trial counsel responded that there was no known information favorable to the defense that had not been previously served on the defense.[106] Additionally, the trial counsel offered for inspection all information he had in "his custody and control."[107] Approximately one and one-half months after the trial, defense counsel discovered the postpolygraph statements to the polygrapher and requested a new trial. That request was denied.

In *Simmons*, the COMA first recognized "the generous pretrial discovery provided in the military justice system."[108] Congress, through Article 46 of the UCMJ, and the President, through the Rules for Courts-Martial (R.C.M.),[109] have mandated liberal discovery in the military justice system. The COMA concluded that the broad discovery rules in the military provided a sufficient basis to decide the outcome of the case. The COMA felt that examining this case in light of *Brady v. Maryland*,[110] which requires the government to disclose favorable defense evidence, was unnecessary. Applying the R.C.M., the COMA determined that the trial counsel's failure to *discover and disclose* the contradictory statements made by the victim and recorded in the CID polygrapher's official report was reversible error.

Rule for Courts-Martial 701(a)(2)(B) requires the trial counsel, on request of the defense counsel, to permit the defense to inspect[111]

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[102] Contrary to his pleas, the accused was found guilty of four specifications of failure to obey a lawful order of a superior commissioned officer by having "non-professional" relationships with four different trainees, rape of one of these trainees, indecent assault of another and false swearing, in violation of Articles 92, 120, and 134 Uniform Code of Military Justice. *See* UCMJ arts. 92, 120, 134 (1988). The accused was sentenced to a dishonorable discharge, confinement for 10 years, forfeiture of $700 pay per month for 10 years, and reduction to Private E1. The convening authority reduced the confinement to six years and the forfeitures to $500 pay per month for six years, but otherwise approved the sentence. The ACMR affirmed the findings and the sentence, except for modifying the forfeiture to $500 pay per month for 72 months. *Simmons*, 38 M.J. at 377.

[103] With regard to the second trainee, the trial court found the accused guilty of indecent assault.

[104] *Simmons*, 38 M.J. at 378 (quoting United States v. Simmons, 33 M.J. 883, 884-85 (A.C.M.R. 1991)).

[105] *Id.* at 377. The defense counsel submitted the "standard" discovery request to the government which included the following:

> 4. *All reports of CID, MP or other law enforcement investigators who spoke to witnesses or otherwise participated in the investigation of this case, whether such reports or statements are included in any formal report or not.* This request specifically includes any photographs, slides, diagrams, sketches, drawings, electronic recordings, handwritten notes, or any other documentation made by such investigators pertaining to this case.
>
> 5. *Copies of all laboratory tests, field tests, and reports* thereof, to include relevant chain of custody documents from the time of seizure to the present, including any attempts to obtain fingerprints, regardless of the degree of success of such attempts.

Id. at 381 n.1.

[106] The trial counsel provided the following in a written response:

> 4. *An opportunity will be made to review or reproduce discoverable investigative reports within the possession, custody or control of Trial Counsel.* All of the aforestated information has previously been served on the defense in the preferral packet.
>
> 5. An opportunity will be made to review or reproduce any discoverable laboratory test results, filed [sic] test results, reports thereto, and chain of custody documents.

Id. at 381 n.4.

[107] *Id.* at 378.

[108] *Id.* at 379-80.

[109] MCM, *supra* note 85, R.C.M. 701.

[110] 373 U.S. 83 (1963).

[111] "'Inspect' includes the right to copy." MCM, *supra* note 85, R.C.M. 701(a) analysis, app. 21, at A21-30.

> Any results or reports of physical or mental examinations, and of scientific tests or experiments or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known, or *by the exercise of due diligence may become known*, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.[112]

A trial counsel cannot satisfy the disclosure requirement of the rule by providing the requested results or reports that are solely "*within the possession, custody, or control of trial counsel.*"[113] In addition to reviewing his or her files, the trial counsel must exercise due diligence in discovering any reports or results that may be in "the possession, control or custody of other 'military authorities.'"[114] Thus, in *Simmons*, the trial counsel had a duty to seek out and examine the polygraph reports in the possession of military investigative authorities.[115]

The COMA also examined the trial counsel's duty to disclose the contradictory statements under R.C.M. 701(a)(6). That rule requires the trial counsel to disclose evidence favorable to the defense the existence of which is "known to the trial counsel."[116] In a posttrial affidavit, Simmon's defense counsel stated that he believed that the trial counsel was unaware of the contradictory statements by the victim. The COMA found, however, that the undisclosed evidence was "known" to the trial counsel. The COMA, considering the "broad mandate of military discovery rules," the drafters' intent to codify *Brady v. Maryland* in R.C.M. 701(a)(6), and the duty of the trial counsel to "discover" scientific reports or test results under R.C.M. 701(a)(2)(B), concluded that the contradictory statements of the victim were "known" to the trial counsel within the meaning of the rule.[117] Thus, the trial counsel's failure to disclose the evidence violated R.C.M. 701(a)(6) as well as R.C.M. 701(a)(2)(B).

In the lead opinion, Chief Judge Sullivan considered, but did not decide, whether the defense counsel was required to exercise reasonable diligence to discover the evidence.[118] Chief Judge Sullivan focused on the affirmative duty that R.C.M. 701(a)(2) places on trial counsel to make available to defense reports that "may become known by the exercise of due diligence" to the trial counsel."[119] Trial counsel are not required, however, to "search for the proverbial needle in a haystack" but "need only exercise due diligence in searching [their] own files and those police files readily available to [them]."[120]

Having determined that the trial counsel erred by failing to discover and disclose the rape victim's postpolygraph statement to the defense, the COMA turned to the issue of determining whether the accused was prejudiced. The COMA found that the victim's statements may have affected the credibility of the victim as to her inability to resist the rape because of her drunken and partially conscious state as well as to whether sexual intercourse occurred.[121] The COMA also considered whether the failure to disclose the statements mis-

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[112] *Id.* at 701(a)(2)(B) (emphasis added).

[113] United States v. Simmons, 38 M.J. 376, 381 (C.M.A. 1993).

[114] *Id.*

[115] *Id.*

[116] MCM, *supra* note 85, R.C.M. 701(a)(6) provides the following:

> Evidence favorable to the defense. The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:
>
> (A) Negate the guilt of the accused of an offense charged;
>
> (B) Reduce the degree of guilt of the accused of an offense charged; or
>
> (C) Reduce the punishment.

[117] *Simmons*, 38 M.J. at 381.

[118] *Id.* at 382. Chief Judge Sullivan wrote the lead opinion in which Judge Wiss concurred. Judge Gierke wrote a separate concurring opinion. Judges Crawford and Cox wrote separate dissenting opinions.

[119] *Id.*

[120] *Id.* n.4. The COMA discussed the need for the trial counsel to exercise due diligence in seeking out and examining "police files" or "evidence in the possession of military investigative authorities." However, R.C.M. 701 refers to evidence in the "possession, custody, or control of *military authorities*." MCM, *supra* note 85, R.C.M. 701(a)(2)(B). The phrase "military authorities" is not defined in the rule. The COMA appears to be requiring the trial counsel to exercise "due diligence" in searching for defense requested evidence only in the files of "law enforcement" agencies. "Military authorities," however, could possibly encompass other entities such as medical or mental health authorities. Other "military authorities" may possess, control, or have custody of "results or reports of physical or mental examinations, and of scientific tests or experiments" which may be "material to the preparation of the defense" and thus, requested by the defense.

[121] *Simmons*, 38 M.J. at 382.

led the defense from pursuing alternative defenses[122] in deciding that the accused was prejudiced. The rape charge and the sentence were set aside.

Although the defense counsel was aware that deception had been indicated during the polygraph of the victims, he never interviewed the polygrapher or reviewed the polygrapher's report. In a posttrial affidavit, the defense counsel admitted that he did not examine the CID case file or talk to the CID agent who conducted the polygraph. He reasoned that polygraphs were not admissible at court and he had "other pressing matters" at his duty station as well as at another installation.[123] The COMA noted that the defense counsel's "reasons" for not pursuing the polygraph report raised a question about his effectiveness as the accused's counsel.[124] Judge Crawford, in a dissenting opinion, felt that the resolution of this case should turn on the action or inaction of the trial defense counsel and not on the inaction of the trial counsel.[125] Defense counsel was aware that deception had been indicated by the victims during the polygraph but failed to pursue the issue further, even though through reasonable diligence he could have uncovered the postpolygraph statements.

As Judge Gierke stated in his concurring opinion, neither counsel was diligent in this case, but regardless of who was to blame, the accused was the loser.[126] "[B]road discovery contributes substantially to the truthfinding process."[127] If the results of this case would have been different had the evidence of the contradictory statements been before the fact finder, the principles behind the military justice system's broad discovery rules were violated. The victim's contradictory statements were before the court in the coaccused's case and the coaccused was acquitted of rape.[128]

When a defense counsel requests reports or test results pursuant to R.C.M. 701(a)(2), the burden is on the trial counsel to "exercise due diligence in searching his own files and those police files readily available to him"[129] for the evidence requested. Additionally, in accordance with R.C.M. 701(a)(6), trial counsel must disclose evidence favorable or "exculpatory"[130] to the accused. The rule applies to evidence in the trial counsel's files or that in the files of law enforcement agents. This requirement exists whether or not a defense request exists.

Appellate courts are not willing to tolerate a lackadaisical approach to discovery by trial counsel. In *United States v. Kinzer*,[131] the ACMR found that the trial counsel's failure to disclose to the defense two statements by the government's key witness was "especially careless" and "an example not to be followed by other trial counsel."[132] In a posttrial Article 39(a) UCMJ session, the trial counsel asserted that he could not be held to a duty to disclose evidence he did not have knowledge of, even if the evidence was in the CID files.[133] The trial counsel also testified that when he responded to the defense discovery request that the requested documents had been "previously provided," he meant that he had provided everything in *his possession* at the time.[134]

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[122] At trial, the defense argued that the sexual intercourse did not occur. The government's position on appeal was that the victim's pretrial statements were inconsistent with the defense trial strategy of no sexual intercourse. The COMA concluded that the statements would not have undermined the defense case as suggested by the government, however, recognized that alternative defenses are permitted, and that the defense may have been precluded from pursuing alternative defenses because of failure to disclose the statements. *Id.*

[123] *Id.* at 379.

[124] *Id.* at 382 n.3.

[125] *Id.* at 383 (Crawford J., dissenting).

[126] *Id.* (Gierke J., concurring).

[127] MCM, *supra* note 85, R.C.M. 701 analysis, app. 21, at A21-29.

[128] *Simmons*, 38 M.J. at 379.

[129] *Id.* at 382 n.4.

[130] In his dissenting opinion, Judge Cox suggested that the majority opinion used R.C.M. 701(a)(2)(B) to impose an "'affirmative duty' on trial counsel 'to seek out' . . . CID report[s] and *examine* [them] for exculpatory evidence for the defense." *Id.* at 386 (Cox, J., dissent). Rule for Courts-Martial 701(a)(2) requires that trial counsel, on request of defense counsel, make available for inspection the types of evidence enumerated in sections (A) and (B) of that rule if the evidence is "*material to the preparation of the defense* or intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial." MCM, *supra* note 85, R.C.M. 701(a)(2) (emphasis added). Contrary to Judge Cox's suggestion, the rule does not say "exculpatory evidence." In United States v. Trimper, 28 M.J. 460 (C.M.A. 1989), the COMA held that the phrase "material to the preparation of the defense" is not limited to exculpatory evidence and may include evidence offered on rebuttal. Rule for Courts-Martial 701(a)(2) and the majority holding in *Simmons* do not require the government to "seek out" exculpatory evidence. *But see* MCM, *supra* note 85, R.C.M. 701(a)(6) (the government is required to disclose evidence favorable to the accused regardless of defense request). The government is required, however, to seek out the items requested by the defense that may be "material to the preparation of the defense." The government can best accomplish this by making the documents available to the defense whether they are in the possession of the trial counsel or in the possession of the law enforcement authorities handling the case. The trial counsel generally has more direct access to the files of law enforcement officials investigating the case than defense counsel.

[131] 39 M.J. 559 (A.C.M.R. 1994). Pursuant to his pleas, Kinzer was found guilty of conspiracy, larceny, and solicitation of another to commit an offense in violation of Articles 81, 121, and 134. *See* UCMJ, arts. 81, 121, 134 (1988). Apparently, Kinzer had several discussions with a government witness about using an explosive device to rob an armored car. The witness reported these discussions to law enforcement authorities. Kinzer eventually called off the robbery but not before the government obtained enough evidence to charge him with and convict him of the above mentioned charges.

[132] *Kinzer*, 39 M.J. at 562.

[133] *Id.* at 561.

[134] *Id.*

The ACMR expressed its dissatisfaction with the trial counsel's attitude regarding his duty to discover and disclose evidence in the law enforcement files. The ACMR recognized that *Simmons* and R.C.M. 701(a)(2) and (6) "place a higher 'due diligence' requirement on the trial counsel"[135] to discover and disclose evidence. Trial counsel will not be excused from this duty even if the "undisclosed evidence could have been discovered by a reasonably diligent defense counsel."[136]

Trial counsel should open up their files as well as those of law enforcement personnel and should arrange a date and time for defense counsel to "inspect" their files as well as those of the law enforcement agents. Trial counsel also should be cautious about providing standard responses to disclosure requests. A negative response to requested material may mislead a defense counsel from pursuing evidence that he or she otherwise may have found or sought. A misleading or incorrect response to the existence of evidence also may affect the presentation of the defense case. Although the appellate courts have not directly addressed the issue of a misleading or inaccurate government response to a discovery request, the courts may consider this when determining the existence of prejudice to an accused for the government's failure to disclose the evidence or in determining whether the defense should have discovered the evidence.[137]

Trial counsel should educate law enforcement personnel on the discovery and disclosure requirements that the R.C.M. and case law impose on them. If law enforcement personnel are sensitive to discovery requirements, they are better able to assist trial counsel in complying with those requirements.

Defense counsel should not rely on trial counsel to "discover" everything. In *Simmons*, the defense counsel should have investigated the polygraph results when the government's lead witnesses indicated deception during the polygraphs. Polygraphers normally conduct postpolygraph interviews, especially where deception is indicated. At a minimum, the defense counsel should have been alerted to "dig a little deeper" into the polygraph examinations. Defense counsel who are not fully investigating their clients' cases may face ineffective assistance of counsel claims.

The duty to disclose is a continuing one.[138] If trial counsel or law enforcement authorities do not have evidence at the time of the request, but later acquire or discover it, the trial counsel is under a continuing duty to disclose the evidence to the defense. Trial counsel should report or disclose evidence that has been requested or otherwise is required to be disclosed as soon as they become aware of it. This continuing duty to disclose applies to both trial and defense counsel.

If a dispute arises regarding a discovery request or a trial counsel's duty to disclose evidence, the defense should raise the issue with the military judge. The military judge ultimately is responsible for regulating discovery and can resolve disputes between the parties regarding the obligation to disclose evidence.[139]

The discovery practice in the military should be open and complete. Counsel should not play tactical games by withholding evidence from the opposing party, especially when the R.C.M. require disclosure. Furthermore, to avoid discovery issues and unnecessary delay, counsel should be familiar with discovery and disclosure requirements in the military and should make every effort to provide full disclosure to the opposing party. The analysis to R.C.M. 701 sets forth the basis for open and full discovery

> Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better informed judgments about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truthfinding process and to the efficiency with which it functions.[140] Major Wilkins.

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. They also 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.

Administrative & Civil Law Note

First Ethics Counselor CLE Workshop

Attention Ethics Counselors. The first Ethics Counselor CLE Workshop will be held 12-14 October 1994. This new two-and-one-half day course is for Army attorneys who are appointed, work as, or are pending assignment as Ethics Counselors.

[135] *Id.* at 562 n.5.

[136] *Id.*

[137] In *Simmons*, the COMA discussed whether the accused was "misled by the prosecution from pursuing" alternative defenses. United States v. Simmons, 38 M.J. 376, 383 (C.M.A. 1993).

[138] MCM, *supra* note 85, R.C.M. 701(d).

[139] *Id.* R.C.M. 701(g).

[140] *Id.* R.C.M. 701, analysis, app. 21, at A21-30.

This course focuses on ethics counselor responsibilities. Topics include ethics counselor fundamentals, procurement integrity, postgovernment employment restrictions, completion and review of financial disclosure reports, private organizational relationships, travel and transportation rules, gifts and gratuities rules, the *Joint Ethics Regulation*, and investigation and reporting of suspected violations of ethics standards.

See *CLE News—Resident Course Quotas* later in this issue for information on registering for this or any other TJAGSA course.

Claims Report

United States Army Claims Service

1993 Affirmative Claims Report

In calendar year 1993, Army claims offices collected over $11,823,577 in medical care recovery claims and $1,181,082 in property damage recovery claims. Although this year's medical care recovery total dropped slightly from calendar year 1992, recovery is higher than in any of the five years prior to 1992. The decline in both property damage and medical care recovery may be the result of favorable response to the Army's emphasis on safety in fiscal year 1993, marked by eight percent fewer total accidents, injuries, and fatalities.

To equitably reward claims offices—regardless of size—for their achievements in affirmative claims, the United States Army Claims Service (USARCS) uses a two-tiered recognition system. The top offices in total medical care recovery are recognized as are the top offices in total property damage recovery. Additionally, the offices that demonstrate the most improvement in medical care recovery and the offices that demonstrate the most improvement in property damage recovery also are recognized. Finally, USACSEUR is receiving special recognition as the top office in total affirmative claims recovery.

The Judge Advocate General has issued certificates of achievement in four awards categories. These offices are listed below in order of achievement. Ms. Jedlinski.

1. Total Medical Care Recovery:
   a. United States Army Armor Center and Fort Knox
   b. XVIII Airborne Corps and Fort Bragg
   c. I Corps and Fort Lewis
   d. 1st United States Army and Fort Meade
   e. III Corps and Fort Hood
2. Total Property Damage Recovery:
   a. United States Army Armament, Research, Development and Engineering Command [Picatinny Arsenal]
   b. United States Army Communications—Electronics Command and Fort Monmouth
   c. Armed Forces Claims Service, Korea
   d. III Corps and Fort Hood
   e. United States Army Armament, Munitions and Chemical Command [Rock Island]
3. Medical Care Recovery, Most Improved:
   a. 24th Infantry Division (Mechanized) and Fort Stewart
   b. 25th Infantry Division (Light) and United States Army Hawaii
   c. United States Army Engineer Center and Fort Leonard Wood
   d. National Training Center, Fort Irwin
   e. United States Army Garrison, Fort McPherson
4. Property Damage Recovery, Most Improved:
   a. United States Army Infantry Center and Fort Benning
   b. Rocky Mountain Arsenal
   c. United States Army Field Artillery Center and Fort Sill
   d. 10th Area Support Group, Japan
   e. United States Military Academy.

1994 Claims Training Course

The USARCS Claims Training Course (USARCS-1, School Code 182) will be conducted 14 to 18 November 1994.

This four and one-half day course is designed to be a "Train-the-Trainer" course for claims judge advocates, claims attorneys, paralegals, and senior adjudicators. It will address claims office management, claims policy, and the investigation, adjudication, and settlement of claims. The course will focus on tort claims, personnel claims, Article 139 claims, ethics, affirmative claims, and automation.

I encourage you to send your claims judge advocate, claims attorneys, or your senior civilians and enlisted claims personnel whose primary responsibilities encompass general claims office supervision. These individuals will return to your office with improved claims management skills and an ability to train others in your office.

This course is managed under the Army Training Requirement Resources System (ATRRS). Staff judge advocates desiring to nominate personnel must ensure that nominees meet specified prerequisites and request quotas through their installation G3/training/ATRRS directorates or offices. Information on the prescribed format for obtaining reservations for this training course must be obtained from individual installation training offices. Some installations require military attendees to use a *Department of the Army Form 4187, Personnel Action*. For civilian attendees, some installations require the ten-part *Department of Defense Form 1556, Request, Authorization, Agreement, Certification of Training and Reimbursement*. Other installations only will accept automated applications. For this reason, staff judge advocates desiring to obtain quotas for this course must coordinate with servicing training offices.

Only 100 slots are allotted for this course. Please sign up no later than 20 September 1994 through your installation ATRRS. As your selectee is identified on ATTRS, this Service will dispatch hotel and course registration forms. These forms need to be completed and mailed to the hotel and my administrative assistant, respectively, as soon as possible.

The USARCS point of contact is Ms. Audrey E. Slusher, commercial (301) 677-7009 extension 206, or DSN: 923-7009 extension 206. Ms. Slusher.

USARCS Telephone Change

Over the last year, new telephone switching equipment was installed at Fort Meade and the USARCS. To make effective use of this new technology, the USARCS will have converted all its incoming military lines (commercial access: (301) 677-XXXX or DSN: 923-XXXX) to its Mitel Voice Processing System effective 1 July 1994. All commercial lines (301) 621-XXXX, leased through Bell Atlantic, will be disconnected to reduce telephone expenses.

After 1 July 1994, one telephone number will be used to access the USARCS's telephone extensions. *The new access number for the USARCS is commercial: (301) 677-7009 or DSN: 923-7009.* Callers who reach the USARCS using the new number will be connected to the automated attendant (AA) and voice mail (VX) messaging system. After presenting a greeting, the AA system will outline a menu of options for the different sections of the USARCS. If the three-digit telephone extension of the called party is known, it can be entered at anytime. The caller may bypass the prompts by selecting the desired option before the prompt has finished playing.

Callers may directly contact any employee within the USARCS by dialing the person's extension number. If the caller does not know the extension number, a directory of extension numbers is available by pressing the pound (#) key. If the called party is not available, the system will cycle back to the main greeting. In most cases, another USARCS employee within the same section will pick up the phone or the person will have forwarded his or her calls to the VX system for answering.

Fax machine numbers bypass the voice mail system and are as follows:

1. Office Of CDR, Adm, Budget, IMO—commercial: (301) 677-6708, DSN: 923-6708

2. Tort Claims Division—commercial: (301) 677-2643, DSN: 923-2643

3. Personnel Claims Division—commercial: (301) 677-4646, DSN: 923-4646

4. Personnel Claims Recovery Branch—commercial: (301) 677-5909, DSN: 923-5909

Request widest dissemination of this information. Point of contact for this action is CW3 Sprague, commercial: (301) 677-7009, X341, or DSN: 923-7009, X341, CW3 Sprague.

Personnel Claims Note

Return to Internal Damage to Electronic Items

In a May 1993 *Army Lawyer* note,[1] the USARCS provided guidance on how to perfect carrier liability for internal damage to an electronic item absent external damage. A January 1994 note[2] revisited this topic. The May 1993 note focused on proving that the damage occurred during shipping, while the January 1994 note illustrated the importance of establishing "tender to the carrier in good condition."[3] Both notes recognized the need for the shipper to develop and provide the requisite proof.

Since the articles appeared, the General Accounting Office (GAO) issued Settlement Certificate Z-2866671-27.[4] Although the Settlement Certificate on internal damage to a television has no effect beyond the issue and parties involved, it did underscore the importance of developing a strong case of "tender in a good condition."

The facts were that at origin, in addition to some minor preexisting damage, the carrier noted on the inventory that the television's operating condition was unknown. At delivery, without reporting any external damage to either the television or its shipping container, the shipper reported that the television made a popping noise when he plugged it in. The shipper's repair estimate indicated that a circuit board was cracked. The repair estimate indicated that the likely cause of the damage was that the television had been dropped or mishandled.

[1] *See* Claims Report, *Internal Damage to Electronic Items*, ARMY LAW., May 1993, at 50.

[2] *See id. Internal Damage to Electronic Items—Revisited*, ARMY LAW., Jan. 1994, at 40.

[3] *Id.*

[4] *See* Settlement Certificate Z-2866671-27 (GAO, Apr. 7, 1994).

The repair estimate provided sufficient proof that the television was damaged, but it did not establish that the damage occurred in transit. To show that the damage occurred in transit, the shipper must prove that he gave the television to the carrier in a good operating condition and that the carrier delivered it in a damaged condition.[5] Without this proof, the shipper fails to establish that the damage was caused in transit and the claim should be denied.

To establish the tender of the television in a good operating condition, the USARCS contacted the shipper and asked him how he knew that his television was damaged in transit. The shipper provided a statement in which he stated that the television worked when he gave it to the carrier because he had watched the NFL playoffs on television on the Sunday prior to it being shipped and that his spouse had recorded soap operas from it up to the day it was shipped.

Based on this information, the USARCS was satisfied that the shipper had established a prima facie case of carrier liability and offset the carrier for the cost of the television's repair. The carrier asserted that it was not liable for the internal damage to the television and appealed to the GAO for a refund. Based on the shipper's statement, the GAO agreed that the television had been tendered in good condition and upheld the Army's offset.

About a month after the GAO had issued its Settlement Certificate, the Comptroller General issued a similar decision.[6] Comptroller General decisions are controlling precedent. This latest decision opens an area of potential carrier recovery for all claims offices.

The issue under review by the Comptroller General was internal damage to a VCR, absent external damage to either the VCR or its shipping container. The facts in this matter were similar to those in the Settlement Certificate discussed above. At origin, the carrier noted on the inventory that the VCR's operating condition was unknown. After delivery, the shipper complained that his VCR did not operate properly. The shipper's repair estimate revealed that the VCR had a broken circuit board. The USARCS held the carrier liable for the damage and offset it the cost for the VCR's repairs. The carrier appealed to the GAO for a refund. The GAO ordered the refund in this instance because, unlike the matter concerning the television, the USARCS did not have proof that the VCR was tendered in a good operating condition.

Prior to USARCS's appeal to the Comptroller General, the USARCS obtained proof that the VCR was in a good operating condition prior to shipment. The shipper provided a statement in which she wrote that "the VCR was functional prior to moving from Fort Wainwright, Alaska, to Fort Carson, Colorado. We used it often prior to moving with no problems. I assure you that the VCR was in working condition when packed and stored."[7] Although the statement was not as specific as watching the NFL playoffs, the Comptroller General determined that the shipper's statement established that she had tendered the VCR in good operating condition, that it was damaged at delivery, and that the carrier was liable.

The importance of this decision should not be underestimated, and it should be shared with all claims office personnel. Because of this decision, claims office personnel who are confronted with a claim for an electronic item that has internal damage, but no external damage, will be able to identify the additional information required to substantiate the shipper's claim. At that time, claims personnel can ask the shipper for a statement which explains the condition of the item at the time of tender.

Fill-in-the-blank statements and general statements that the item worked prior to shipment are insufficient. The claimant must describe in detail the condition of the item prior to shipment and, more importantly, how he or she knew that the item was in good working order prior to the shipment. Each claimant's statement will be unique. Although this may require more effort from the claims office initially, it will ease not only the claims process, but also the recovery process and eliminate the need for the USARCS to seek out the claimant months, sometimes years, after delivery to obtain this information. Captain Upton.

Management Note

New Codes for Fiscal Year 1995

The claims accounting codes for fiscal year (FY) 1995 have one change.

The FY designator advances from "4" to "5". This is the *third* digit in the *first group* of digits in every claims payment or deposit accounting classification, making the first group of digits "2152020" instead of "2142020."

For example, the FY 1995 accounting classification for a Chapter 11 (Personnel) claim is as follows:

Payment 2152020 22-0201 P436099.11-4230 FAJA S99999

Deposit 2152020 22-0301 P436099.11-4230 FAJA S99999

Every claims office that pays claims—whether by manual voucher or electronically—must ensure that FY 1995 has been entered in the installation accounting system. It may do so by contacting the system administrator at the servicing finance office.

Under no circumstances should a claims office use a FY 1994 fund cite for claims certified for payment after the beginning of FY 1995 (1 October 1994). To determine if the servicing finance office is using the correct fiscal code, the claims office should review the accounting classification found on the bottom of the claims office's copy of the finance-generated payment voucher. Captain Caldwell.

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[5] Missouri Pacific R.R. Co. v. Elmore & Stahl, 377 U.S. 134 (1964).

[6] Department of the Army—Reconsideration, B-255777.2, May 9, 1994 (unpub.).

[7] *Id.*

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Fiscal Year (FY) 1994/95 JAGC Selection Board Schedule

The following is a listing of selection boards scheduled during FY 1994/95. The Command and General Staff College (CGSC) Board and the Major Promotion Selection Board will be held earlier than in prior years.

Date	Competitive Category
20-23 September 1994	Lieutenant Colonel Promotion Selection Board
11-13 October 1994	OGSC Advisory Selection Board
18-20 October 1994	CVI/VI Career Status Selection Board
15-18 November 1994	Captain Promotion Selection Board
6 December 1994	FLEP Selection Board
13-17 December 1994	Major Promotion Selection Board
28 February 1995	Captain Promotion Selection Board
19-20 April 1995	CVI Career Status Selection Board
23 May - 3 June 1995	Senior Service College Selection Board
15-18 August 1995	Colonel Promotion Selection Board
15-18 August 1995	Captain Promotion Selection Board
19-22 September 1995	Lieutenant Colonel Promotion Selection Board

The eligibility criteria and or zones of consideration will be announced by message approximately sixty to ninety days before the board convenes.

Civilian LL.M. Program

Each year, The Judge Advocate General (TJAG) selects a limited number of outstanding career officers to attend civilian law schools for one year at government expense. The officers obtain advanced legal education in specialized areas such as international law, criminal law, contract law, environmental law, labor law, and tax law.

To qualify, officers must have completed the Graduate Course and have less than seventeen years of active federal commissioned service as of 1 October of the academic year in which the course begins. Particular attention will be given to officers who have written articles, research papers, or a thesis, including such works completed while attending the Graduate Course. Along with normal assignment factors, the key considerations for selection include proven performance and potential as reflected in officer evaluation reports, academic ability, prior experiences as a judge advocate, and the potential for utilization in assignments in the concentration in which the LL.M. is awarded.

Officers completing the program incur a three-year active duty service obligation and must serve a utilization tour of three years. Officers selected must complete all requirements to receive the LL.M. degree prior to the report date for their utilization tour. Officers who do not complete the three-year service obligation before leaving active duty may be subject to recoupment of the costs of their schooling.

Officers are selected for the LL.M. program during the normal assignment cycle from among qualified officers who apply. The Chief, Personnel, Plans, and Training Office (PP&TO) evaluates the candidates and recommends who should be selected to TJAG. Any qualified officer interested in applying for the LL.M. program should apply to PP&TO by 1 November 1994. Applicants should indicate desired areas of concentration in order of preference and detail any experience or aptitude which would not be apparent from a review of personnel files. For further information, contact COL Thomas J. Romig, PP&TO, at commercial (703) 695-1353 or DSN 225-1353. Major Poling.

Professional Responsibility Notes

Department of the Army Standards of Conduct Office

Use and Release of Information in Professional Conduct Files

Supervisory Judge Advocates' Closure of Unfounded and Minor Cases

The Professional Conduct Branch, Department of the Army Standards of Conduct Office (SOCO), maintains copies of all preliminary screening inquiries (PSI) and related documents, including those in which the allegations were determined to be unfounded or minor.[1] Retention of, and access to, these records has concerned some attorneys who have been the subjects of these allegations.

The Judge Advocate General's (TJAG) policy is that copies of all PSIs, including those where the allegations have been determined to be unfounded, must be forwarded to the Chief, SOCO.[2]

Retaining these records serves the following purposes:

(1) To assist TJAG in evaluating, managing, and regulating the delivery of legal services by offices and personnel under TJAG's jurisdiction.

(2) To compile monthly and yearly statistics.

(3) To respond to character inquiries. Army lawyers applying for employment or bar membership ordinarily are asked to state whether they have ever been investigated and, if so, by what agency. With the consent of the applicant, the potential employer or bar normally writes and asks SOCO to relate the circumstances of the inquiry.

(4) To protect both the attorneys who were the subjects of allegations and the Army from charges that the complaints were ignored or not investigated.

(5) To dispose of repetitive requests to inquire into previously investigated allegations. These requests often reach OTJAG through a variety of channels, such as congressionals, Inspector General complaints, White House correspondence, the United States Army Court of Military Review filings and decisions, and Article 69 appeals.

Under the pending revision to *Army Regulation (AR) 27-1*, only substantiated allegations, and other information that is determined by TJAG or The Assistant Judge Advocate General (TAJAG) to be relevant to an individual's potential as an Army lawyer, will be documented in an individual's Career Management Individual File (CMIF). These documents will be available to personnel managers. Nothing will be documented in CMIFs until the new *AR 27-1* is published.

Individuals will be advised of, and given a chance to rebut, any intended CMIF filing. This practice parallels the protection of the Privacy Act, which allows individuals to access and amend their records.[3]

The CMIF maintained by the Personnel, Plans, and Training Office will contain only the final action documents—that is, the counseling letter, reprimand, or closeout memorandum memorializing oral counseling by the staff judge advocate. If no adverse information is substantiated, no document of any type will go into the CMIF.

When making assignments or taking other personnel actions in OTJAG, the document in the CMIF is all that will be considered; no review of SOCO files will occur.

Files in SOCO also may be available to decision makers within the Department of Defense (DOD). For example, these disclosures will be made on a need-to-know basis when an individual is being considered for promotion.[4]

Requests from outside the DOD for information contained in professional responsibility files normally will not be honored without the written authorization of the subject officer. Even *reporting* that an individual has been the *subject* of an inquiry may constitute an unwarranted invasion of privacy and blemish an attorney's reputation. However, files pertaining to serious breaches of the Army Rules of Professional Conduct for Lawyers may be released to civilian licensing authorities.

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[1] *See generally* 50 Fed. Reg. 22,135 (1985); *as amended by* 55 Fed. Reg. 51,467 (1990) (adding matters pertaining to attorney professional responsibility inquiries); Privacy Act of 1974; Adding Systems of Records, 58 Fed. Reg. 3936, 3937 (1993) (Judge Advocate General Professional Conduct Files).

[2] Retention of these files is based on 10 U.S.C. § 3037(c)(2) (1988); MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 109 (1984); DEP'T OF ARMY, REG. 690-200, CIVILIAN PERSONNEL: GENERAL PERSONNEL PROVISIONS, ch. 213, subch. 4, para. 4-5b (1 Feb. 1981) (C7, pending publication); DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICE, ch. 7 (15 Sept. 1989) [hereinafter AR 27-1]; Privacy Act systems notices, *supra* note 1.

[3] 5 U.S.C.A. § 552a(d) (West 1977 & Supp. 1993).

[4] Defense Officer Personnel Management Act (DOPMA), subch. I (codified as amended at 10 U.S.C.A. §§ 611-618 (West 1988 & Supp. 1993)).

These policies reflect a careful balance between individual privacy and use of relevant information in accordance with law and regulations. Any anxiety for judge advocates who have been the subjects of professional misconduct or mismanagement allegations can be eased by understanding why SOCO maintains copies of all PSIs, and the very limited access that personnel managers have to those files. The revised regulation clearly spells out that only "substantiated allegation[s]" of professional misconduct, and "any other substantiated information that is determined by TAJAG (or TJAG) to be relevant to an individual's potential as a member of the JALS [Judge Advocate Legal Service] will be documented . . . in the individual's Career Management Individual File (CMIF)."[5]

[5] AR 27-1, *supra* note 2, para. 7-9b (this language is taken from the approved regulation which is pending publication).

Supervisory Judge Advocates' Closure of Unfounded and Minor Cases

Under the new procedures, supervisory judge advocates will not close cases or inform individuals that cases are closed until they have coordinated with and obtained the concurrence of the SOCO. The revised *AR 27-1* will require supervisory Judge Advocates to "coordinate with the Chief, SOCO" prior to closing cases as unfounded or minor. This will permit supervisory judge advocates to issue final closure notices that really are final. Supervisory judge advocates still will be required to forward copies of all inquiries to SOCO for the reasons stated above. Lieutenant Colonel Neveu and Mr. Eveland.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Professional Development Education for Reserve Judge Advocates (JA) During Fiscal Year (FY) 1995

ARPERCEN's FY 1995 funding priorities for Reserve JA professional development education (PDE) are as follows: (1) JAs assigned to troop program unit (TPU) positions; (2) JAs assigned to individual mobilization augmentee (IMA) positions; (3) JAs assigned to the individual ready reserve (IRR). ARPERCEN's additional priorities in the PDE category are first "required PDE" then "other PDE."

Required PDE is that PDE required for promotion or branch qualification. The JA Officer Basic Course, the JA Officer Advanced Course, and the Command and General Staff Officer Course are the only *required* courses.

Other PDE includes functional courses at The Judge Advocate General's School (TJAGSA), the Combined Arms and Service Staff School, on-sites, and education required for the officer's position. Judge advocates assigned to TPUs must obtain funding for other PDE from their commands. ARPERCEN does not have sufficient funds for IMA JAs to attend other PDE on separate orders. However, IMA JAs *may* be able to attend other PDE through the orders for their annual two weeks of training as described in the next paragraph. ARPERCEN has no funds available for IRR JAs to attend other PDE.

Individual mobilization augmentee JAs may attend a functional course at TJAGSA or an on-site as part of their annual training with prior approval of the officer's IMA agency/command. The agency/command forwards the officer's request to the ARPERCEN IMA division. If sufficient funds are available, the IMA Division authorizes funding of travel and per diem to the PDE and agency/command on one set of orders.

For example, an IMA JA assigned to the Office of The Judge Advocate General (OTJAG) and living in Alexandria, Virginia, wants to attend a TJAGSA sponsored on-site in the Washington, D.C., area and the five-day military entertainment law course at TJAGSA. The officer initiates his request by sending a completed *DA Form 1058-R, Application for Active Duty for Training, Active Duty for Special Work, and Annual Training*, to his usual point of contact for annual training (AT) at OTJAG. The officer includes on the *DA Form 1058-R* his request to attend the two-day on-site followed by the five-day functional course and ending with five days at OTJAG. If OTJAG approves the officer training at other locations for seven days, it forwards the request to ARPERCEN's IMA Division for funding. If funds are available, the IMA Division authorizes the PMO to issue the order and obtain a quota for the functional course at TJAGSA. The tour would be no more than twelve days, like the typical AT tour, with travel and per diem to TJAGSA funded by ARPERCEN. The officer must choose an on-site within commuting distance of his home.

The usual restrictions apply to IMA JA requests as described in the preceding paragraph. The IMA Division's

cut-off for receipt of training requests from the IMA agencies is 31 March. The IMA Division must receive the training request from the IMA agency at least sixty days prior to the beginning of the tour. The IMA Division will consider a request for exception to either restriction with appropriate justification. As always, other PDE training is subject to the availability of funds and school quotas.

The above example addresses ARPERCEN's funding of other PDE for IMA JAs. Individual mobilization JAs are cautioned, however, that they must have eleven consecutive days of duty to be eligible for an OER. An officer who splits his twelve-day tour between PDE and duty at the agency will not be eligible for an OER for the period. Lieutenant Colonel Carazza, Reserve JA Personnel Management Office.

Correction

Footnote 5, page 55, of the Guard and Reserve Affairs Items, in the July issue of *The Army Lawyer*, incorrectly stated that ARPERCEN might fund IRR JA attendance at on-sites. No funding is available for IRR JAs to attend on-sites. Nevertheless, IRR JAs may receive retirement points for attendance. Additionally, please note the following corrected address for ARPERCEN JA actions: Commander, ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Captain Storey.

The Judge Advocate General's School Continuing Legal Education (On-Site) Schedule Update

Following is an updated schedule of The Judge Advocate General's CLE On-Sites. If you have any questions concerning the On-Site schedule please direct them to the local action officer or CPT Eric G. Storey, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

THE JUDGE ADVOCATE GENERAL'S
SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
15-16 Oct. 94	Boston, MA 94th ARCOM/3d LSO Hanscom Air Force Base Bedford, MA 01731	AC GO RC GO Int'l Law Contract Law GRA Rep	 BG Sagsveen MAJ Martins MAJ Tomanelli Dr. Foley	MAJ Donald Lynde OSJA, 94th ARCOM ATTN: AFRC-AMA-JA 695 Sherman Ave. Ft. Devens, MA 01433 (508) 796-6332
22-23 Oct. 94	Minneapolis, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th St. Bloomington, MN 55425	AC GO RC GO Ad & Civ Int'l Law GRA Rep	 BG Lassart MAJ Castlen MAJ Whitaker Dr. Foley	LTC Richard A. Mosman 214th LSO Bldg. 505, 88th Division Rd. Fort Snelling, MN 55111 (612) 861-3331
5-6 Nov 94	New York, NY 77th ARCOM/4th LSO Fordham Law School New York, NY 10023	AC GO RC GO Ad & Civ Crim Law GRA Rep	 BG Lassart, BG Cullen, BG Sagsveen MAJ Block MAJ Masterton LTC Reyna	LTC Henry V. Wysocki 77th ARCOM Bldg. 637 Fort Totten, NY 11359 (718) 352-5703
12-13 Nov 94	Willow Grove, PA 79th ARCOM/153d LSO Willow Grove Naval Air Station Air Force Auditorium Willow Grove PA 19090	AC GO RC GO Ad & Civ Int'l Law GRA Rep	 BG Cullen MAJ McGillin MAJ Warren LTC Hamilton	LTC Christopher R. Wogan 153d LSO Woodlawn & Division Aves. Willow Grove, PA 19090 (215) 342-1700 (717) 787-3974
6-8 Jan 95	Long Beach, CA 78th LSO Hyatt Regency Long Beach, CA 90815	AC GO RC GO Int'l Law Ad & Civ GRA Rep	 BG Cullen LCDR Winthrop MAJ Peterson LTC Menk	COL James F. Gatzke 78th LSO 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (714) 229-3700

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP	ACTION OFFICER
21-22 Jan 95	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	AC GO RC GO Crim Law Contract Law GRA Rep BG Sagsveen MAJ O'Hare MAJ Pendolino Dr. Foley	LTC Matthew L. Vadnal 6th LSO 4505 36th Ave., W. Seattle, WA 98199 (206) 281-3002
18-19 Feb 95	Chicago, IL 214th LSO Cdr's Conference Room Ft. Sheridan, IL 60037	AC GO RC GO Int'l Law Contract Law GRA Rep	MAJ Ronald Riley 18525 Poplar Ave. Homewood, IL 60430 (312) 443-4550
25-26 Feb 95 split training w/Denver	Salt Lake City, UT 87th LSO Olympus Hotel 6000 Third Street Salt Lake City, UT 84114	AC GO RC GO Crim Law Ad & Civ GRA Rep BG Sagsveen MAJ Barton MAJ Pearson LTC Hamilton	COL Richard H. Nixon 1928 E. Millbrook Rd. Salt Lake City, UT 84106 (801) 468-2639
25-26 Feb 95	Denver, CO 87th LSO Fitzsimmons AMC, Bldg.820 Aurora, CO 80045-7050	AC GO RC GO Crim Law Ad & Civ GRA Rep BG Lassart MAJ Barto MAJ Pearson LTC Reyna	COL Richard H. Nixon 1928 E. Millbrook Rd. Salt Lake City, UT 84106 (801) 468-2639
4-5 Mar 95	Columbia, SC 120th ARCOM Univ of SC Law School Columbia, SC 29208	AC GO RC GO Crim Law Ad & Civ GRA Rep BG Sagsveen MAJ Winn MAJ Hernicz LTC Menk/CPT Storey	LTC Robert H. Uehling P.O. Box 2410 Columbia, SC 29224 (803) 733-2878
10-12 Mar 95	Dallas/Fort Worth 1st LSO	AC GO RC GO Int'l Law Crim Law GRA Rep BG Sagsveen LCDR Winthrop MAJ Burrell LTC Hamilton	COL Richard Tanner 401 Ridgehaven Richardson, TX 75080 (214) 991-2124
11-12 Mar 95	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Int'l Law Contract Law GRA Rep BG Cullen MAJ Martins MAJ Ellcessor LTC Menk/CPT Storey	LTC Merrill W. Clark 7402 Flemingwood Lane Springfield, VA 22153 (703) 756-2281
18-19 Mar 95	San Francisco, CA 5th LSO Sixth Army Conference Room Presidio of SF, CA 94129	AC GO RC GO Ad & Civ Crim Law GRA Rep BG Sagsveen, BG Lassart, BG Cullen MAJ Peterson LTC Bond LTC Reyna	COL Paul K. Graves 6th LSO 4505 36th Ave., W. Seattle, WA 98199 (206) 281-3002
1-2 April 95	Indianapolis, in National Guard	AC GO RC GO Ad & Civ Crim Law GRA Rep BG Cullen MAJ Diner MAJ Kohlman LTC Hamilton	COL George A. Hopkins 2002 South Holt Road Indianapolis, IN 46241 (317) 457-4349

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
7-9 Apr 95	Orlando, FL 81st/65th ARCOMS	AC GO RC GO Contract Law Int'l Law GRA Rep	 BG Lassart MAJ DeMoss LTC Winters Dr. Foley	MAJ John J. Copelan, Jr. Broward County Attorney 115 South Andrews Ave. Suite 423 Fort Lauderdale, FL 33301 (305) 357-7600
29-30 Apr 95	Columbus, OH 83d ARCOM/9th LSO	AC GO RC GO Ad & Civ Crim Law GRA Rep	 BG Lassart Maj J. Frisk MAJ Wright LTC Reyna	LTC Robert J. Beggs 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-2589/5108
5-7 May 95	Huntsville, AL 121st ARCOM Corps of Engineer Ctr. Huntsville, AL 35805	AC GO RC GO Contract Law Crim Law GRA Rep	 BG Cullen MAJ Hughes Maj A. Frisk LTC Reyna	LTC Bernard B. Downs, Jr. HHC, 3d Trans Bfr 3415 McClellan Blvd. Anniston, AL 36201 (205) 939-0033
12-13 May 95	Gulf Shores, AL ALANG	AC GO RC GO GRA Rep	 BG Cullen Dr. Foley	COL Larry Craven Office of The Adjutant General Attn: AL-JA P.O. Box 3711 Montgomery, AL 36109 (205) 271-7471
19-21 May 95 (Armed Forces is 20 May)	Kansas City, MO 89th ARCOM 3130 George Washington Blvd. Wichita, KS 67120	AC GO RC GO Contract Law Ad & Civ GRA Rep	 BG Lassart MAJ Causey Maj Jennings LTC Menk	LTC Keith H. Hamack HQ, Fifth U. S. Army Attn: AFKB-JA Fort Sam Houston San Antonio, TX 78234 (210) 221-2208 DSN 471-2208

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 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

3-7 October: 1994 JAG Annual Continuing Legal Education Workshop (5F-JAG).

12-14 October: 1st Ethics Counselors' CLE Workshop (5F-F201).

17-21 October: USAREUR Criminal Law CLE (5F-F35E).

17-21 October: 35th Legal Assistance Course (5F-F23).

17 October-21 December: 135th Basic Course (5-27-C20).

24-28 October: 126th Senior Officers' Legal Orientation Course (5F-F1).

31 October-4 November: 240th Fiscal Law Course (5F-F12).

14-18 November: 18th Criminal Law New Developments Course (5F-F35).

14-18 November: 58th Law of War Workshop (5F-F42).

5-9 December: USAREUR Operational Law CLE (5F-F47E).

5-9 December: 127th Senior Officers' Legal Orientation Course (5F-F1).

1995

9-13 January: 1995 Government Contract Law Symposium (5F-F11).

10-13 January: USAREUR Tax CLE (5F-F28E).

23-27 January: 46th Federal Labor Relations Course (5F-F22).

23-27 January: 20th Operational Law Seminar (5F-F47).

6-10 February: 128th Senior Officers' Legal Orientation Course (5F-F1).

6-10 February: PACOM Tax CLE (5F-F28P).

6 February-14 April: 136th Basic Course (5-27-C20).

13-17 February: 59th Law of War Workshop (5F-F42).

13-17 February: USAREUR Contract Law CLE (5F-F15E).

27 February-3 March: 36th Legal Assistance Course (5F-F23).

6-17 March: 134th Contract Attorneys' Course (5F-F10).

20-24 March: 19th Administrative Law for Military Installations Course (5F-F24).

27-31 March: 1st Procurement Fraud Course (5F-F101).

3-7 April: 129th Senior Officers' Legal Orientation Course (5F-F1).

17-20 April: 1995 Reserve Component Judge Advocate Workshop (5F-F56).

17-28 April: 3d Criminal Law Advocacy Course (5F-F34).

24-28 April: 21st Operational Law Seminar (5F-F47).

1-5 May: 6th Law for Legal NCOs' Course (512-71D/E/20/30).

1-5 May: 6th Installation Contracting Course (5F-F18).

15-19 May: 41st Fiscal Law Course (5F-F12).

15 May-2 June: 38th Military Judge Course (5F-F33).

22-26 May: 42d Fiscal Law Course (5F-F12).

22-26 May: 47th Federal Labor Relations Course (5F-F22).

5-9 June: 1st Intelligence Law Workshop (5F-F41).

5-9 June: 130th Senior Officers' Legal Orientation Course (5F-F1).

12-16 June: 25th Staff Judge Advocate Course (5F-F52).

19-30 June: JATT Team Training (5F-F57).

19-30 June: JAOAC (Phase II) (5F-F55).

5-7 July: Professional Recruiting Training Seminar

5-7 July: 26th Methods of Instruction Course (5F-F70).

10-14 July: 7th STARC Judge Advocate Mobilization & Training Workshop

10-14 July: 6th Legal Administrators' Course (7A-550A1).

10 July-15 September: 137th Basic Course (5-27-C20).

17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).

24-28 July: Fiscal Law Off-Site (Maxwell AFB).

31 July-16 May 1996: 44th Graduate Course (5-27-C22).

31 July-11 August: 135th Contract Attorneys' Course (5F-F10).

14-18 August: 13th Federal Litigation Course (5F-F29).

14-18 August: 6th Senior Legal NCO Management Course (512-71D/E/40/50).

21-25 August: 60th Law of War Workshop (5F-F42).

21-25 August: 131st Senior Officers' Legal Orientation Course (5F-F1).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 12th Contract Claims, Litigation and Remedies Course (5F-FI3).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

December 1994

4-8, NCDA: Forensic Evidence, San Diego, CA.

5-9, GWU: Construction Contracting, Washington, D.C.

5-9, ESI: Federal Contracting Basics, San Diego, CA.

5-9, ESI: Operating Practices in Contract Administration, Washington, D.C.

5-9, ESI: Accounting for Costs on Government Contracts, Washington, D.C.

6-7, ESI: Terminations, San Diego, CA.

6-9, ESI: ADP/Telecommunications (FIP) Contracting, San Diego, CA.

7-8, GWU: Procurement Law Research Workshop, Washington, D.C.

12-14, ESI: Continuous Improvement and Total Quality Management, Washington, D.C.

13-15, ESI: International Business and Project Management, San Diego, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below:

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

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

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

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

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

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

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

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

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

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

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

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

GWU: Government Contracts Program, The George Washington University, National Law Center, 2020 K Street, N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.

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

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.

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

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

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

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

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

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

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

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

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

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
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 July 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 A281240 Office Directory/JA-267(94) (95 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

*AD A282033 Preventive Law/JA-276(94) (221 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 A280725 Office Administration Guide/JA 271(94) (248 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 full time 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 [pkz110.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.

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
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
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 instructions 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.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.

FILE NAME	UPLOADED	DESCRIPTION
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
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	July 1994	Defensive Federal Litigation—Part A, July 1994.
JA200B.ZIP	July 1994	Defensive Federal Litigation—Part B, July 1994.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	January 1994	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 February 1994.
JA235.ZIP	August 1993	Government Information Practices.
JA241.ZIP	September 1993	Federal Tort Claims Act, August 1993.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. 31 August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
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	July 1994	Preventive Law Series, July 1994.
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.

FILE NAME	UPLOADED	DESCRIPTION
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506-1.ZIP	May 1994	Fiscal Law Course Deskbook, Part 1, May 1994.
JA506-2.ZIP	May 1994	Fiscal Law Course Deskbook, Part 2, May 1994
JA506-3.ZIP	May 1994	Fiscal Law Course Deskbook, Part 3, May 1994
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.

FILE NAME	UPLOADED	DESCRIPTION
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)

October VTC Topic (to be determined)

5 October	1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM
7 October	1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

November VTC Topic (to be determined)

8 November	1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal
9 November	1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

December VTC Topic (to be determined)

5 December	1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM
7 December	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 articles may be of use to judge advocates in performing their duties:

Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering from the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, 299 ICRC 98 (1994).

Paul J. Dickman, *Leaking Underground Storage Tanks: The Scope of Regulatory Burdens and Potential Remedies Under RCRA and CERCLA*, 21 N. KY. L. REV. 619 (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. New or Changed Publications

PUBLICATION NUMBER	TITLE	DATE
AR 608-12	Reimbursement of Adoption Expenses	2 May 94
AR 608-75	Exceptional Family Member Program	7 Dec 93
CIR 25-93-1	Army Handbooks, Publications, and Forms Listings and Mark-Sense Publication Requisitioning Procedures	1 Oct 93
CIR 608-94-1	Army Family Action Plan XI	31 Jan 94

8. The Army Law Library Service

a. 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.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Commander, United States Army Missile Command, Attn: AMSMI-GC (Doris Lillard), Redstone Arsenal, AL 35898-5120, DSN 746-2252, commercial (205) 876-2252, has the following material:

Board of Contract Appeals Decisions, volumes 56-2 through 93-3 (82 volumes).
Comptroller General's Procurement Decisions, volumes 91-1 through 94-1 and Index (8 volumes).
Contract Appeals Decisions (looseleaf binder).
Government Contractor (bound volumes) volumes 1-3, 4-6, 7-9, 8, 10-12, 13-15, 19-21, 27-24, 25-27, (9 volumes).
Government Contractor, 27 Year Index, 1986 (1 volume).
How to Conduct Foreign Military Sales, The United States Guide (looseleaf binder), (Cullen, William, 1982).
United States Code, Congressional and Administrative News, (bound volumes) 1944, 1945, 1947 through 1967, 1969 through 1992 (145 volumes).
United States Law Week (looseleaf binders), volumes 54 through 61, (18 binders).
United States Code Annotated (226 volumes).
Williston on Contracts, Revised Edition (9 volumes).
Contracts, 3rd Edition (22 volumes).
Contracts, 4th Edition (5 volumes).
Yearbook of Procurement Articles, volumes 17, 18.

The new Freedom of Information Case List and Freedom of Information Act Guide & Privacy Act Overview, 1994 editions, are now available. This material may be purchased from the Government Printing Office, Customer Service, P.O. Box 1533, Washington, D.C. 20402-9325, (202) 783-3238 or local Government Printing Office bookstores. The approximate cost per set is $21.

*U.S. Government Printing Office: 1994 — 300-675/00006