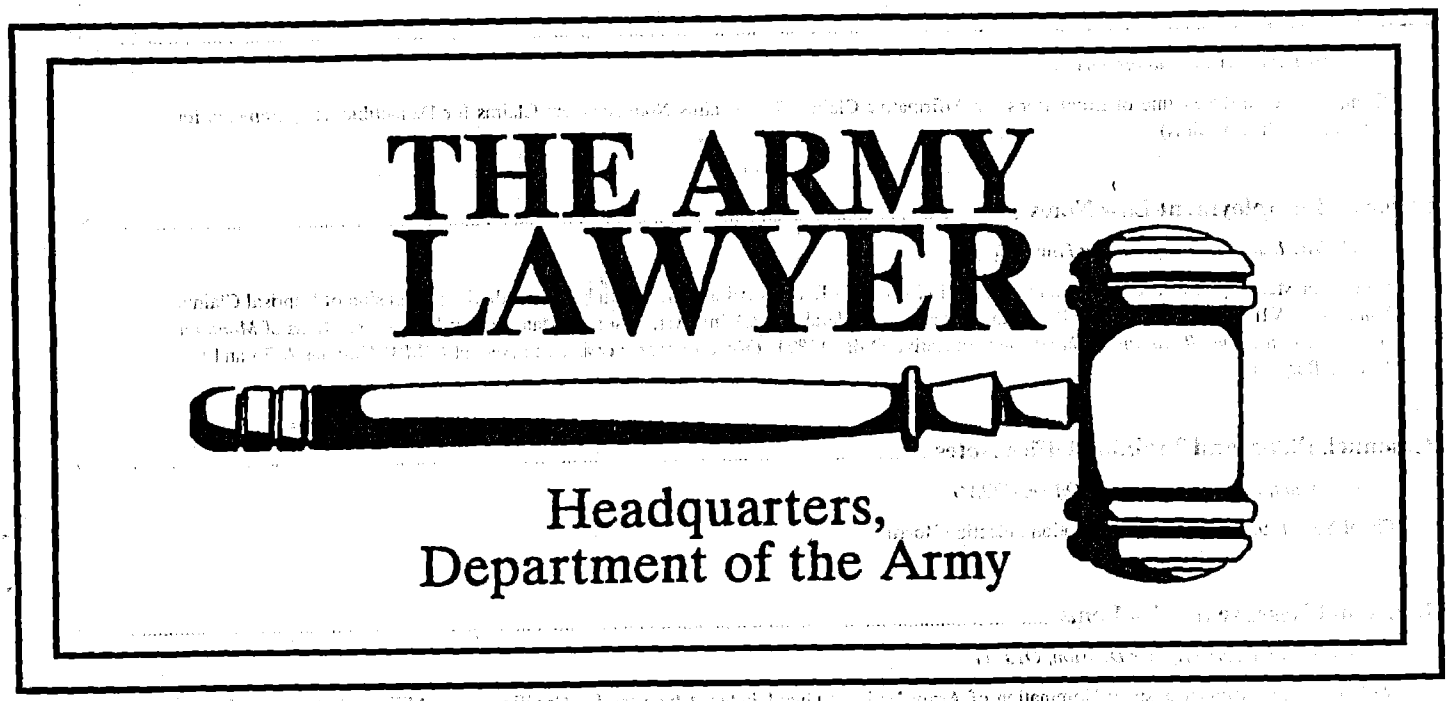

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The Army's Victim/Witness Assistance Program

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Introduction

The court-martial panel has just sentenced the accused to eight years confinement for attempting to rape a fellow soldier. You, the trial counsel, cannot wait to get home to get a good night's sleep. You think this case is over. You go back to your office to put the case file away for the last time. Your fellow office mates, the Deputy Staff Judge Advocate, and Staff Judge Advocate (SJA) have been giving you the usual congratulatory offerings. You are feeling good about your performance and you know that justice was done. Then the Chief of Justice drops the bombshell on you. After telling you what a great job you did, he asks, "What arrangements have been made with the victim under our victim/witness liaison program?"

The usual answer to this question is, "I didn't know there was such a program" or "I didn't think the victim was eligible for any assistance once the trial is over." These answers are common. Many judge advocates are not aware of the Victim/Witness Assistance Program because they are not involved in this area.

The purpose of this article is to remind trial counsel and others involved in prosecuting courts-martial that once the verdict is in, the government's obligation to victims and witnesses is far from over. Victims and witnesses of crime have several rights that you must guarantee.

This article will describe the Army's Victim/Witness Program. It also will discuss changes in the program as a result of changes in Department of Defense (DOD) Directive 1030.1,[1] and *Army Regulation (AR) 27-10*.[2] It will review the role of the Army's corrections system in the Victim/Witness Program, to include a discussion on the Army's clemency and parole process and how it affects the rights of victims and witnesses. This article also will answer some basic questions victims and witnesses generally have about the Army's Corrections System. Appendices A and B are two nonexhaustive lists of questions chiefs of military justice and other military justice managers can ask their victim/witness liaison and trial counsel to ascertain the effectiveness of the local Victim/Witness Assistance Program. Appendix C contains a list of references the victim/witness liaison should have on hand for informational purposes.

Overview of the Army's Victim/Witness Assistance Program

The Army's Victim/Witness Assistance Program implements the Victim and Witness Protection Act of 1982,[3] the Victims of Crime Act of 1984,[4] and the Victims' Rights and Restitution Act of 1990.[5] The Army's Victim/Witness Assistance Program applies to victims of offenses under the Uniform Code of Military Justice (UCMJ)[6] and witnesses in proceedings conducted pursuant to the UCMJ.[7] Victims of crimes under the jurisdiction of state, other federal, or foreign authorities also may come under this program.[8]

The Victim/Witness Assistance Program is based on the idea that the military justice system would not function as effectively as it does without the cooperation of victims of, and witnesses to, the crimes.[9] All parties involved in the military justice system must actively pursue the program's goals of ensuring that victims and witnesses are treated fairly, with dignity, and are subjected to minimum interference with their right to personal privacy and property rights.[10]

Victims of attempted or actual violence deserve special attention to minimize further traumatization, as do child and

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[1] DEP'T OF DEFENSE DIRECTIVE 1030.1, VICTIM AND WITNESS ASSISTANCE (draft 1994) [hereinafter DOD Dir. 1030.1 (draft)]. At the time of this writing, DOD Dir. 1030.1 (draft) was to be published in fiscal year 1995.

[2] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ch. 18 (8 Aug. 1994) [hereinafter AR 27-10].

[3] 18 U.S.C. §§ 1503, 1505, 1510, 1512-1515, 3146, 3579, 3580 (1988).

[4] 42 U.S.C. §§ 10601-10603 (1988).

[5] 42 U.S.C. 10606-10607 (Supp. III 1991).

[6] 10 U.S.C. §§ 801-946 (1988).

[7] AR 27-10, *supra* note 2, para. 18-1.

[8] *Id.*

[9] *Id.* para. 18-2.

[10] *Id.* para. 18-2a.

sexual assault victims.[11] However, the Army's Victim/Witness Assistance Program is not limited in scope to victims of serious violent crime.[12] The program applies to all victims adversely affected by criminal conduct and witnesses who provide information regarding criminal activity.[13] All victims and witnesses of crime who have suffered physical, financial, or emotional trauma shall receive assistance and protection.[14]

The terms "victim" and "witness" should be interpreted broadly. Family members of victims and witnesses also can be included in the program when certain conditions are met.[15] However, the term "witness" does not include witnesses allegedly involved as coconspirators, accomplices, or other principals.[16] Military attorneys should be aware of these terms and should not limit themselves to only considering the actual victim or eyewitness of a crime when trying to identify individuals who qualify for assistance under the program.

The SJA is responsible for the Victim/Witness Program at the local level.[17] The SJA will designate one or more victim/witness liaisons to administer the program.[18] The SJA must ensure that this person is properly trained.[19] The new DOD Directive 1030.1 will require victim/witness liaisons to attend annual training that covers, as a minimum, the following areas: victims rights; compensation available for victims and witnesses through federal, state, and local agencies; the government's responsibilities to victims and witnesses; and the procedures in DOD Directive 1030.1.[20]

The victim/witness liaison generally is not responsible for personally providing specific victim/witness services unless that individual is qualified to provide the service in question, and no other organization or service agency exists with primary responsibility to provide the service.[21] Usually, the victim/witness liaison is a facilitator.[22] The victim/witness liaison will act as a point of contact through which victims and witnesses may obtain information concerning, and assistance in securing, available victim/witness services.[23]

Selecting a Victim/Witness Liaison

The victim/witness liaison should be, when practicable, a commissioned or warrant officer, or civilian in the grade of GS-11 or above.[24] When necessary, an enlisted person in the grade of E-6 or above, or civilian, GS-6 or above, may be designated as the victim/witness liaison if a commissioned or warrant officer is unavailable.[25] The victim/witness liaison should be familiar with the military justice system and have the ability to maintain courteous and effective relations with the military community, service organizations, and the general public.[26]

Civilians are best suited for this job because they tend to remain at a command location for a longer period of time. The most important quality a victim/witness liaison can possess is an intimate working knowledge of the military community and outside agencies that have services to provide victims and witnesses. A victim/witness liaison needs to be aware of these services to be an effective facilitator. Victim/witness liaisons who have the potential for long-term stability are better able to develop relationships with people in military service organizations as well as state run victims' organizations.

A victim/witness liaison's longevity also is a factor when it comes time to notify victims and witnesses of their right to submit statements to clemency boards for their consideration

[11] *Id.* para. 18-2b.

[12] *Id.* para. 18-3.

[13] *Id.*

[14] *Id.*

[15] *Id.* paras. 18-3, 18-5a, 18-5b.

[16] *Id.* para. 18-5b.

[17] *Id.* para. 18-9b.

[18] *Id.* para. 18-10a.

[19] *Id.* para. 18-8. Staff Judge Advocates should send their victim/witness liaison to one of the training seminars that the Department of Justice is sponsoring for the DOD on Victim/Witness Assistance. The Department of Justice has planned three seminars during fiscal year 1995.

[20] DOD Dir. 1030.1 (draft), *supra* note 1, para. F.5.

[21] AR 27-10, *supra* note 2, para. 18-10a.

[22] *Id.*

[23] *Id.*

[24] *Id.* para. 18-10b.

[25] *Id.*

[26] *Id.*

on matters such as the perpetrator's eligibility for parole. If the victim/witness liaison is a soldier, a greater likelihood exists that he or she will transfer to another assignment before the perpetrator is eligible for a clemency hearing. If the trial counsel who prosecuted the case has also transferred to another post, the victims and witnesses will have no familiar person to turn to when they need to discuss their rights in this matter.

A civilian paralegal in the criminal law division is best suited for the position of victim/witness liaison because the paralegal is closest to the people identifying and working with victims and witnesses. However, because personality is crucial in being a successful victim/witness liaison, it may be appropriate to designate a civilian in another section of the SJA office—such as, the legal assistance office—as the victim/witness liaison.

Victims' Rights

Army Regulation 27-10 specifically sets out the rights of victims. Under this regulation, a crime victim has the right to be treated with fairness, dignity, and a respect for privacy; be reasonably protected from the accused offender; be notified of court proceedings; be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial, or for other good cause; confer with the attorney for the government in the case; restitution, if appropriate; and receive information regarding conviction, sentencing, imprisonment, and release of the offender from custody.[27] The new version of *AR 27-10* contains posttrial notification requirements that were deleted from the previous edition of the regulation.[28] This emphasizes the government's obligation to victims and witnesses after the defendant is sentenced.

The new version of DOD Directive 1030.1 also specifically requires that sentencing authorities, convening authorities, and clemency and parole boards consider making restitution to the victim a condition of granting pretrial agreements, reduced sentences, clemency, and parole.[29] It also will make individuals other than investigators and lawyers more aware of victim's rights. It will require Service Secretaries to ensure that chaplains, health care personnel, family service center personnel, unit commanders, and corrections personnel receive appropriate training to comply with victim assistance guidance.[30]

Initiating Victim/Witness Assistance

The first step in victim/witness assistance is identifying victims and witnesses who are candidates for assistance. Law enforcement and investigative personnel usually initiate victim/witness assistance when they tell victims what emergency medical and social care is available to them.[31] These agencies are the obvious starting point because they usually are the first ones on the scene of a crime. The victim/witness liaison should ensure that the investigative agencies provide the victim with the victim/witness liaison's name, location, and telephone number.[32] The victim/witness liaison will provide a victim/witness information packet to any known victim at least at the time an Article 32 investigative officer is appointed or when charges are referred to court-martial.[33]

The leadership in the SJA office also can keep track of the identification process when they read the daily military police blotters. These leaders should read the blotters not only with an eye towards cases that need prosecution, but also for possible victims and witnesses who may require assistance.

Victim/Witness Services

Once a victim or witness has been identified and contacted, the victim/witness liaison needs to identify what services are available for the victim or witness and decide what services might apply. The victim/witness liaison will assist victims of crime in obtaining financial, legal, and other social service support by informing them of the public and private programs that are available to provide counseling, treatment, and other support.[34] Examples of social services that may be available to victims on a military installation[35]—in addition to medical treatment at military treatment facilities—include services such as the Army Community Services Program,[36] Army

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[27] *Id.* para. 18-6.

[28] *Id.* paras. 18-17b(8), 18-17c.

[29] DOD Dir. 1030.1 (draft), *supra* note 1, para. D.5.

[30] *Id.* para. E.3.c.

[31] AR 27-10, *supra* note 2, para. 18-11a.

[32] *Id.* para. 18-11b.

[33] *Id.* para. 18-11c. A sample Victim Information Packet is located in *AR 27-10, supra* note 2, Appendix D.

[34] *Id.* para. 18-12b.

[35] *Id.*

[36] DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICES PROGRAM (30 Oct. 1990) (describing a variety of programs that victims and witnesses can use). These programs include family assistance during emergencies, relocation assistance, foster care, family employment and financial assistance, as well as the program most military attorneys are aware of, the Family Advocacy Program.

Emergency Relief,[37] Legal Assistance,[38] the American Red Cross,[39] and Chaplain Services.[40]

Victim/witness liaisons also should be knowledgeable about civilian community-based victim treatment and compensation programs. Department of Defense Directive 1030.1 will require victim/witness liaisons to have a copy of a soon to be published Department of Justice pamphlet that details each state's victim/witness compensation programs and points of contact for that program.[41]

For families of soldiers who are leaving the area, the victim/witness liaison should work with the Transportation Officer to assist with the transportation and shipment of household goods. These services are available to victims and witnesses who are family members of the accused, even if he or she receives a punitive or other than honorable discharge.[42]

As a ready reference, the victim/witness liaison should prepare a list detailing those agencies, both in the military community and in the civilian community, that are available to provide assistance. This list should have, as a minimum, a summary of the services that the agency can provide, the applicable regulation that details the services to be provided, the point of contact for each of these agencies, and a phone number where the point of contact can be reached.

The victim/witness liaison also will be required to inform a victim of a dependent-abuse offense that they have a right to compensation under federal law.[43] These laws provide for compensation of dependents of military members who are separated from the military for abusing their dependents.[44] Dependents who are victims of abuse by military members who are losing their right to retired pay as a result of abusing their dependents, may be entitled to a portion of that retired pay under the law.[45] Victims who are dependents of members separated for dependent abuse, but are not retirement eligible, are eligible for compensation.[46] Victims who are abused by their retirement eligible sponsors also are eligible for medical and dental care, commissary, and exchange privileges.[47]

Notifying Victims of Their Rights

Victims should be advised of the stages in the military criminal justice system and the role that they can be expected to play in the process.[48] Most victims are unfamiliar with the criminal justice system in general, and of the military criminal justice system in particular. Explaining the system and the critical elements in the system is important. Some of the areas that victim/witness liaisons should discuss are preferral of charges, the role of the commander, jurisdiction, the range of punishments, the different level of courts—such as, the difference between a general and a special court-martial—the Article 32 hearing, the key players in the system—such as, the prosecutor, defense attorney, and convening authority—and the importance of certain events that affect the handling of the case, such as pretrial confinement.[49]

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[37] DEP'T OF ARMY, REG. 930-4, ARMY EMERGENCY RELIEF (4 Sept. 1992) (describing Army Emergency Relief (AER) services). The AER's primary program provides emergency financial assistance to eligible individuals to include loans or grants for basic needs. When circumstances justify, assistance also may be given for dental care, eyeglasses, hearing aids, wheelchairs, or similar needs.

[38] *See* DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (30 Sept. 1992) (describing Army legal assistance services available to eligible individuals). A legal assistance attorney can assist victims and witnesses in a variety of areas. The legal assistance office should be contacted as a matter of course to inquire on possible assistance in most cases.

[39] DEP'T OF ARMY, REG. 930-5, THE AMERICAN RED CROSS (19 June 1973) (detailing the services that the Red Cross provides Army personnel). The Red Cross can provide financial assistance and referral services to agencies specializing in legal aid, medical or psychiatric care, employment, or family and child welfare agencies.

[40] DEP'T OF ARMY, REG. 165-1, CHAPLAIN SERVICES (31 Aug. 1989) (describing the pastoral care that Army chaplains can provide to victims and witnesses). The regulations referenced *supra* notes 36-39 are a good resource to get a general idea on what services *may* be available at your installation. Victim witness liaisons should contact each of these agencies at their installation to determine the actual services available at that installation.

[41] DOD Dir. 1030.1 (draft), *supra* note 1, para. E.3.e; Telephone Interview with Susan Shriner, Program Specialist, Office for Victims of Crime, United States Department of Justice (March 8, 1994). This manual, currently being called the *Department of Justice Federal Crime Victim and Witness Resource Guide* should be an all-encompassing reference manual. It will include phone numbers for points of contact located in every state that deals with victim/witness assistance. It also will include phone numbers for points of contact in the federal system as well as fact sheets on what services and resources are available to victims and witnesses.

[42] AR 27-10, *supra* note 2, para. 18-12b(7).

[43] DOD Dir. 1030.1 (draft), *supra* note 1, para. F.2c.

[44] 10 U.S.C. § 1058 (Supp. V 1993); § 1408(h) (Supp. IV 1992).

[45] *Id.* § 1408(h) (Supp. IV 1992).

[46] *Id.* § 1058 (Supp. V 1993). Unfortunately, as of this writing, regulations have yet to be promulgated to provide a means to effectuate this statute.

[47] *Id.* § 1408(h)(9)(A) (Supp. IV 1992).

[48] AR 27-10, *supra* note 2, para. 18-13.

[49] *Id.* app. D. Appendix D sets out most of this information in a narrative fashion that is part of the victim/witness information packet.

On request, the victim must be notified of any results in the case.[50] Unfortunately, once the court-martial is concluded, the victim is not always notified of the results, especially if the convening authority granted clemency. The new DOD Directive 1030.1 requires that on request, the victim must be informed of any clemency, where the perpetrator was confined and how much of the sentence the perpetrator could serve.[51]

Commanders' Consultation with Victims

Commanders ordinarily should brief the victims of crimes caused by perpetrators in their unit on decisions not to prefer charges, decisions on pretrial restraint of the offender or of his or her release, pretrial dismissal of charges, and negotiations of pretrial agreements and their potential terms.[52]

A commander may designate someone else to perform this task.[53] The designee should be from the SJA office, and usually is the trial counsel or the victim/witness liaison.[54] A crime victim should have an advisory role in decisions involving the areas discussed above.[55] Although the victim's views should be considered, the commander has the final responsibility to take appropriate action.[56]

Victim consultation may be limited when justified.[57] Some justifications include avoiding endangering the safety of the victim and witness, jeopardizing an ongoing investigation, disclosing classified or privileged information, or unduly delaying the disposition of an offense.[58]

Property Return and Restitution

Property that has been seized from victims to be used as evidence will be returned to the victims as expeditiously as possible.[59] Victim/witness liaisons will inform victims of the applicable procedures for requesting return of their property.[60] Victims should be told that sometimes the evidence must remain in the hands of law enforcement officials for an extended period of time.

Victims also should be informed of the various means available to them for seeking restitution for personal injury or property damage.[61] When applicable, the victim/witness liaison should inform the victim of UCMJ Article 139 procedures[62] and the United States Army claims system, private lawsuits, and any crime victim compensation available from civilian sources.[63] The local claims official is the best point of contact for victims and witnesses who need advice in this area.

Protection of Victims and Witnesses

Victims and witnesses should be advised that tampering with or retaliating against a victim or witness is a crime.[64] Intimidation and threats to victims or witnesses, obstruction of justice, and subornation of perjury are offenses under the Uniform Code of Military Justice.[65] Victims need to know that if they are threatened, harassed, or intimidated, they should report it immediately to the military authorities.[66] Victims and witnesses also can be temporarily attached or permanently

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[50] DOD Dir. 1030.1 (draft), *supra* note 1, para. F.2.g(7).

[51] *Id.* paras. F.2.l, F.2.m.

[52] AR 27-10, *supra* note 2, para. 18-14a.

[53] *Id.* para. 18-14b.

[54] *Id.* paras. 18-14a, 18-14b.

[55] *Id.* para. 18-14c.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* para. 18-15a.

[60] *Id.*

[61] *Id.* para. 18-15b.

[62] 10 U.S.C. § 939 (1988). Victim/witness liaisons should have a copy of the Robert Frezza's note on assistance to victims and witnesses using Article 139, UCMJ procedures; *see* Claims Report, *Article 139 and The Victim Witness Protection Act of 1982*, ARMY LAW., Jan. 1982, at 40.

[63] AR 27-10, *supra* note 2, para. 18-15b.

[64] 18 U.S.C. §§ 1512, 1513 (1988).

[65] These are all offenses under UCMJ article 134. *See* MANUAL FOR COURTS-MARTIAL, United States, pt. IV, ¶ 96 (obstruction of justice), ¶ 98 (subornation of perjury), ¶ 110 (communicating a threat) (1984) [hereinafter MCM].

[66] AR 27-10, *supra* note 2, para. 18-16a.

reassigned, and given other protective assistance if their safety is threatened.[67]

Trial counsel need to be aware of these provisions so that they can advise commanders seeking ways to protect victims and witnesses. Trial counsel also need to know about the process for getting temporary restraining orders and the commander's ability to give a lawful order for accused soldiers to stay away from victims and witnesses. In cases where reassignment is considered, your local personnel officer should be contacted. The personnel officer may be able to obtain an emergency reassignment in some cases.[68]

Victim/Witness Liaison as Witness Intermediary

The victim/witness liaison may act as an intermediary between a witness and representatives of the government and the defense for the purpose of arranging witness interviews in preparation for trial.[69] The victim/witness liaison should consider, however, the requirement for equal access to witnesses.[70] The victim/witness liaison must ensure that the witnesses are treated with dignity and respect and that their other rights are guaranteed.[71] The victim/witness liaison should not be used to prevent the defense from gaining access to witnesses.[72]

Witness Expenses

Witnesses requested or ordered to appear at Article 32 investigations or courts-martial may be entitled to reimbursement for certain expenses.[73] The victim/witness liaison should help the witness obtain timely payment of fees and related costs.[74] Some of these costs include travel costs, per diem, child care, and parking.[75]

The victim/witness liaison should have a point of contact at the local finance and accounting office who is aware of the Victim/Witness Assistance Program, is sensitive to the needs of the victim, and appreciates that timely payments lessen an already difficult situation. These costs usually can be calculated before the victim or witness arrives at the office so a partial payment can be made before or immediately after arrival.[76]

Waiting Areas at Trial

At courts-martial and investigative proceedings, victims and government witnesses should, to the extent possible, be afforded the opportunity to wait in an area separate from the accused or defense witnesses to avoid embarrassment, coercion, or similar emotional distress.[77] If possible, someone should stay with the victim and witnesses while they are waiting to testify. This person can answer the questions that they might have and provide them security.

Posttrial Victim/Witness Assistance

The victim/witness liaison must determine if the victim or witness wants to be notified of the perpetrator's release from confinement.[78] Release from confinement includes completion of sentence through either minimum or maximum release dates, release on parole (to include temporary home parole, temporary emergency home parole, or parole granted by a legal authority), death, escape, placement in a work release program when the place of employment is located outside of the installation boundaries, release through clemency action, or any similar type of action releasing the prisoner from incarceration away from the installation.[79]

The victim/witness liaison also will determine if the victim or witness wants to be notified of clemency or parole action, or be given the opportunity to submit information or appear before the Army Clemency and Parole Board during clemency and parole hearings.[80] If the victim or witness wants to be

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[67] *Id.* para. 18-16b.

[68] *See* DEP'T OF ARMY, REG. 614-200, ASSIGNMENTS, DETAILS, AND TRANSFERS: SELECTION OF ENLISTED SOLDIERS FOR TRAINING AND ASSIGNMENT, ch. 3, sec. II, (17 Oct. 1990).

[69] AR 27-10, *supra* note 2, para. 18-16d.

[70] *See id.*; MCM, *supra* note 65, R.C.M. 701.

[71] AR 27-10, *supra* note 2, 18-16d.

[72] *Id.*

[73] *Id.* para. 18-20.

[74] *Id.*

[75] DOD Dir. 1030.1 (draft), *supra* note 1, para. F.2.h(1).

[76] DEP'T OF ARMY, REG. 37-106, FINANCE AND ACCOUNTING FOR INSTALLATION: TRAVEL AND TRANSPORTATION ALLOWANCES, para. 13-73 (31 Jan. 1990).

[77] AR 27-10, *supra* note 2, para. 18-16c.

[78] DOD Dir. 1030.1 (draft), *supra* note 1, paras. F.2.l, F.2.m.

[79] Message, Headquarters, Dep't of Army, DAMO-ODL, subject: Victim/Witness Notification (031514Z Sep 93) [hereinafter DA Message].

[80] *Id.*

notified of the clemency or parole hearing, the victim/witness liaison will obtain the current address or anticipated address from the victim or witness.[81] This information will be provided to the local Army corrections systems facility commander or installation military police representative responsible for the initial incarceration, pending determination and transfer of the prisoner to the permanent incarceration location.[82] The victim/witness liaison will transfer victim/witness information so that it is not disclosed to the prisoner or other unauthorized personnel.[83]

If the victim desires notification, the victim/witness liaison will not only notify the gaining corrections facility, but also send notice to the Department of the Army's central repository of the victim's request to be informed concerning offender status and changes to offender status.[84] This is a new requirement in DOD Directive 1030.1. Unfortunately, the Army's central repository has not been established.[85]

The Army's Corrections System

The Army's corrections system is usually even more foreign to victims and witnesses than the military justice system. The following is a general overview of the Army's corrections system.

The Army confines soldiers at several facilities in the United States and overseas. Where a soldier sentenced to confinement ultimately is confined depends on the amount of confinement that the soldier was sentenced to and where the soldier was sentenced at.[86]

The United States Disciplinary Barracks at Fort Leavenworth, Kansas, is the long-term confinement facility for all the services.[87] Soldiers who receive a sentence of greater than three years of confinement are sent to this facility.[88]

Soldiers sentenced to confinement for three years or less are confined at several regional confinement facilities.[89] A soldier is usually sent to the regional facility closest to where he or she was sentenced.[90] These regional facilities are located at Fort Knox, Kentucky; Fort Lewis, Washington; Fort Sill, Oklahoma; Fort Hood, Texas; and Fort Carson, Colorado.[91] Soldiers who are sentenced to confinement for ninety days or less at Fort Riley, Kansas, or Fort Benning, Georgia, can serve their time at facilities at these installations.[92]

The Army has confinement facilities located overseas as well. These facilities act as holding facilities for convicted soldiers awaiting transfer to a stateside confinement facility and also confine soldiers sentenced to confinement for ninety days or less.[93] These facilities are located at Coleman Barracks, Manheim, Germany; Camp Humphreys, Korea; Quarry Heights, Panama; and Fort Wainright, Alaska.[94]

Once confined, a soldier rarely serves the full sentence to confinement.[95] Soldiers are eligible for several programs that can grant conditional release from confinement, reduction in sentence, or administrative credit that acts as a reduction to the sentence.[96]

Parole is a release from confinement to the community under the supervision of a United States probation officer.[97]

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[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] DOD Directive 1030.1, *supra* note 1, para. E.3.d.

[85] Telephone Interview with LTC Conover, Chief, Corrections Branch, Department of the Army (March 7, 1994).

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*; *see also* DEP'T OF ARMY, REG. 15-130, ARMY CLEMENCY AND PAROLE BOARD (9 Aug. 1989) [hereinafter AR 15-130].

[97] AR 15-130, *supra* note 96, para. 1-3.b(2).

Parole must be requested by the inmate and can only be granted if certain conditions are met.[98] The prisoner must have an approved court-martial sentence that includes an unsuspended dismissal or punitive discharge or have been administratively discharged or retired.[99] The prisoner must have served at least one-third of the term of confinement, but in no case less than six months.[100] Soldiers sentenced to life in prison must have served at least ten years of their sentence.[101] A prisoner sentenced to death is not eligible for parole unless the sentence is commuted to a lesser punishment.[102]

Clemency is a remission or suspension of the unexecuted part of a court-martial sentence.[103] An inmate's eligibility for clemency depends on the original length of sentence.[104] Clemency will not be granted when the sentence to confinement is less than twelve months.[105] Prisoners serving sentences of greater than twelve months confinement will be considered for clemency at various times while serving their sentence depending on the original length of the sentence adjudged.

A prisoner also can receive administrative credit for work performed while confined.[106] This acts as a day-for-day sentence reduction that is dependent on the type of work the prisoner performs.[107] The decision to grant this "good-time" sentence abatement is up to the confinement facility Commandant.[108]

Victim Notifications While Prisoner Is Confined

Once a prisoner has been confined to an Army Corrections System facility, the victim or witness will be notified by the most expeditious means practical.[109] Telephonic notification of victims and witnesses will be confirmed in writing.[110] The Army Corrections System Facility Commander will send the victim or witness, by certified mail, return receipt requested, a letter informing the victim or witness of the proposed actions concerning the particular prisoner that they are interested in.[111] The victim/witness will only be notified of a decision to release a prisoner from confinement and not have the ability to comment on that decision.[112] They will have an opportunity, however, to submit matters before a decision is made on action dealing with a parole or clemency matter.[113] Correspondence concerning parole or clemency actions will inform the requesting victim or witness of the upcoming event and provide the address and point of contact at the clemency and parole board, from whom additional information is available.[114] This correspondence also will inform the victim or witness that they can submit correspondence to the board concerning the action or may choose to appear before the board at their own expense.[115]

Department of Defense Directive 1030.1 requires the confinement facility to contact the Army's central repository to determine if any victim or witness has requested notification in the offender's case.[116]

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[98] *Id.* para. 3-1.c(1).

[99] *Id.* para. 3-1.c(1)(a).

[100] *Id.* para. 3-1.c(1)(c).

[101] *Id.*

[102] *Id.* para. 3-1.c(2).

[103] *Id.* para. 1-3.b(1).

[104] *Id.* para. 3-1.b.

[105] *Id.* 3-1.b(1).

[106] DEP'T OF ARMY, REG. 190-47, UNITED STATES ARMY'S CORRECTIONAL SYSTEM, paras. 6-9c, 6-9d (1 Nov. 1980).

[107] *Id.*

[108] *Id.*

[109] DA Message, *supra* note 79, para. E.1.

[110] *Id.*

[111] *Id.*

[112] *Id.* para. E(3).

[113] *Id.* para. E(4).

[114] *Id.*

[115] *Id.*

[116] DOD Dir. 1030.1 (draft), *supra* note 1, para. F.4.a.

Conclusion

The Victim/Witness Assistance Program is an important but neglected area in the military justice system. Greater emphasis needs to be placed on the government's obligations towards victims and witnesses after the sentence is handed down and the perpetrator is sent to jail. Training is the key component in ensuring that an effective victim/witness program exists at your installation. The mandatory training provisions for all players in the military justice system in the upcoming DOD Directive emphasize this point.

Appendix A

Basic Questions for Evaluating the Victim/Witness Program

1. Who is the victim/witness liaison?

2. How long has this person been in the position?

3. What specialized training has the victim/witness liaison undergone?

4. What training programs are available in our state?

5. What training programs are budgeted for the current and next fiscal year for the victim/witness liaison to attend?

6. How many active files of victims and witnesses are we maintaining? How are we sending the victim/witness requests for posttrial notification to the Army's central repository?

7. What procedures are in place for notifying victims of their rights?

8. How are commanders consulting with victims about preferral of charges and other things of that nature?

9. What are the agencies on post that the victim/witness liaison has been dealing with and who are the appropriate points of contact at each agency?

10. What state agencies are available for assisting victims and who are the points of contact at these agencies?

11. What procedures are in place for identifying victims and then notifying them of their rights?

12. Ask to see a copy of your command's victim/witness information packet. Is the information set out in *AR 27-10*, chapter 18 and Appendix D, included?

13. How many victims filed Article 139 claims in the last two years?

14. Is there a separate waiting area at courts-martial and investigative proceedings for victims and government witnesses located away from the accused or defense witnesses to avoid possible embarrassment, coercion, or similar emotional distress to any person?

15. How many times has the victim/witness liaison acted as an intermediary between a witness and the defense counsel?

16. Does the victim/witness liaison remain with victims and witnesses during the interview with the defense counsel?

17. How and what are victims being advised of concerning the status of their cases?

18. What expenses are reimbursable to the witnesses required to be at courts-martial?

19. Who is the point of contact at the finance office that processes witnesses' vouchers so that they can be paid expeditiously?

20. What confinement facilities are our soldiers sent to and who are our points of contact there regarding victim/witness assistance?

Appendix B

Questions to Ask Trial Counsel to Ascertain Their Awareness of the Victim/Witness Liaison Program

1. Who is the victim/witness liaison on post?

2. How many times have you used the victim/witness liaison as a trial counsel?

3. What role does the victim/witness liaison play in the military justice system and what services are available to victims?

4. What role does the command play in consulting with victims when (preferring charges, . . .)?

5. How many times have you acted as the commander's designee when informing victims about the charging process?

6. What can a victim or witness get reimbursed for if required to be at a proceeding?

7. What can be done to protect a victim or witness from being harassed or intimidated?

8. How are witnesses and victims notified of trial outcomes and rights before clemency hearings?

Appendix C

Victim/Witness Program References

1. Victim and Witnesses Protection Act of 1982, 10 U.S.C. §§ 1503, 1505, 1510, 1512-1515, 3146, 3579, 3580 (1988).

2. Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10603 (1988).

3. Victims' Rights and Restitution Act of 1990, 42 U.S.C. §§ 10606-10607 (Supp. III 1991).

4. 10 U.S.C. § 1058 (Supp. V 1993); 10 U.S.C. §1408(h) (Supp. IV 1992).

5. Dep't of Defense Directive 1030.1, Victim and Witness Assistance (Draft 1994).

6. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, Chapter 18, Victim/Witness Assistance (8 Aug. 1994).

7. DEP'T OF ARMY, REG. 15-130, ARMY CLEMENCY AND PAROLE BOARD (9 Aug. 1989).

8. Criminal Law Division Note, *State Compensation for Victims of Crime*, ARMY LAW., Mar. 1992, at 51.

9. Criminal Law Division Note, *Victim-Witness Assistance*, ARMY LAW., June 1991, at 63.

10. Claims Report, *Article 139 and the Victim and Witness Protection Act of 1982*, ARMY LAW., Jan. 1988, at 40.

11. Department of Justice Pamphlet, *Department of Justice Federal Crime Victim and Witness Resource Guide* (Draft 1994).

12. National Organization for Victim Assistance (NOVA). General information may be obtained by writing to: NOVA, 1757 Park Road, NW, Washington, D.C. 20010 or by calling (202) 232-6682.

13. General information can be obtained by calling the Program Specialist, United States Department of Justice, Office for Victims of Crime at (202) 307-5983.

Technical Data Rights in Government Contractor Value Engineering Change Proposals

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Introduction

Through a variety of techniques, the government encourages its contractors to ever greater innovation and efficiency. In the long run, this innovation and efficiency should result in the government obtaining better supplies and services at a lower cost to the taxpayer. Value engineering is an acquisition technique designed to achieve all three goals: innovation, efficiency, and above all, cost savings.

On the other hand, a government contractor is in business to make money. To do that effectively, it must maintain every possible advantage over its competitors. To that end, contractors seek to keep their innovations secret. Unfortunately, submission of an innovative, more-efficient solution to a government requirement through a value engineering proposal means that, at least to the government, the innovation is no longer secret.

The essence of an innovation lies in the technical data that explain it; when the innovation is submitted as a value engineering proposal, the government must examine that data to determine whether the innovation is worthwhile. The government recognizes, however, that a contractor loses the incentive to develop better and cheaper methods of performance if its innovations pass into the public domain before it has an opportunity to capitalize on them. If a contractor's technical data were to become public knowledge on release to the government, a contractor's reluctance to share the data may cause it to refrain from suggesting that the government use its innovation. The government would thereby lose the benefit of the innovation and any resulting cost savings. Therefore, the government permits contractors to restrict the government's dissemination of technical data under certain circumstances.

At the same time, the government desires to reduce the cost of obtaining supplies and services in the future by publicizing efficient methods of providing supplies and services, and by maximizing competition among contractors willing to use efficient techniques. This article explains the statutory and regulatory provisions through which the government—particularly the Department of Defense (DOD)—seeks to achieve cost savings through value engineering, while balancing the government's interest in competition with a contractor's interest in exploiting its own innovations.

As explained below, some believe that the balance has been struck too far in the contractors' favor. They believe that the validation process, through which a procuring DOD agency challenges a contractor's assertion of limited government rights in technical data, unfairly permits a contractor to limit the government's use of the data pending final determination

of data rights.[1] On the other hand, a contractor that does not aggressively assert at every opportunity its rights in technical data, including in its value engineering change proposals, runs the risk of losing its competitive edge (and substantial profits) through government disclosure of its innovations to others.

Value Engineering

Generally

Value engineering encourages contractors to develop cost-saving methods of performance. The *Federal Acquisition Regulation* (*FAR*) defines value engineering as an organized effort to analyze the contract performance process for the purpose of achieving the lowest cost consistent with the contract requirements.[2]

With few exceptions, every supply, service, or construction contract of $100,000 or more contains a value engineering clause.[3] Value engineering is optional for smaller contracts.[4] It also is optional for all architect-engineer contracts.[5] The *FAR* prohibits use of value engineering in supply or service contracts as follows:

> (1) for research and development other than full-scale development,
>
> (2) for engineering services from not-for-profit or nonprofit organizations,
>
> (3) for personal services,
>
> (4) providing for product or component improvement, unless the value engineering incentive application is restricted to areas not covered by provisions for product or component improvement,
>
> (5) for commercial products that do not involve packaging specifications or other special requirements or specifications, or
>
> (6) when the agency head (*e.g.*, Secretary of the Air Force, Army, or Navy) has exempted the contract or class of contracts from the value engineering requirements of the *FAR*.[6]

Contract changes implement value engineering initiatives. A contractor proposes a cost-saving idea to the contracting officer in the form of a value engineering change proposal (VECP). Then the contracting officer either rejects the proposal or accepts it. If the contracting officer accepts the proposal, the contracting officer modifies the contract to incorporate the VECP.[7] By definition, a VECP is a proposal that will reduce the contract price.[8] As an incentive to the contractor, the government shares the cost savings with the contractor as a reward for the contractor's efforts.

The contractor shares in the savings on the contract for which it submits a VECP, known as the instant contract. Depending on the contract type and the value engineering clause in it, the contractor may share savings on other contracts as well. It may share the savings from concurrent contracts, which are other ongoing contracts to which the contracting office applies the VECP. It also may share the savings from future contracts in which the same contracting office or its successor incorporates the VECP, usually limited to a share period of three years following acceptance of the first item or services incorporating the VECP. Finally, it may share collateral savings, which are essentially consequential government cost savings related to the items or services procured under the instant contract, including savings on logistic support or government furnished property.[9]

In certain contracts, the value engineering savings may be subject to limitations. For example, in construction contracts, a VECP earns the contractor a share of savings only on the instant contract and on collateral costs.[10] The value engineering clause in architect-engineer contracts prohibits the government from sharing any savings with the contractor at all.[11] Finally, the head of the contracting activity may exclude the sharing of collateral savings in any contract or class of con-

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[1] Lieutenant Colonel Richard B. Kaeser & Jonathan P. Blucher, *Technical Data Rights: How they Work—Why They Won't*, 29 A.F. L. REV. 223, 238 (1988).

[2] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 48.001 (1 Apr. 1984) [hereinafter FAR].

[3] *Id.* 48.201(a); 48.202.

[4] *Id.*

[5] *Id.* 48.201(f).

[6] *Id.* 48.201(a).

[7] *Id.* 48.103; 52.248-1; 52.248-3.

[8] *Id.* 48.001; 52.248-1(b); 52.248-3(b).

[9] *Id.* 48.001; 48.104-1; 48.104-2; 52.248-1; 52.248-3.

[10] *Id.* 48.104-1(b); 52.248-3.

[11] *Id.* 48.104-1(c); 52.248-2. In other words, the government keeps 100% of the savings.

tracts, if he determines that it would not be cost effective to track and calculate collateral savings.[12]

The *FAR* permits two types of value engineering—an incentive approach and a mandatory program.[13] Under the incentive approach, the contract encourages the contractor to develop cost saving approaches in return for a share of the savings. Contractor participation is voluntary.[14] In a mandatory program, the contract requires and pays the contractor to explore cost savings for certain contract line items, in return for a smaller share of the savings.[15] In supply or service contracts, except architect-engineer contracts, the government may use the mandatory program in lieu of an incentive approach,[16] or in addition to it.[17] The government uses a mandatory program primarily in contracts for development of new items, or in contracts with broad specifications when the government anticipates that the contractor will develop cost-saving methods during performance.[18] The government may only use a mandatory program in architect-engineer contracts,[19] and it may only use an incentive approach in construction contracts.[20] In incentive-type construction contracts, the government may not use value engineering.[21]

The contractor's share of the savings is lower under a mandatory program than under an incentive approach,[22] because under a mandatory program the contractor already receives payment under a separately priced contract line item for exploring cost savings in the first place. It receives that payment regardless of whether the government accepts any of its proposals.

To qualify as a VECP, a proposal must require a change to the instant contract for its implementation, and it must result in reducing the overall projected cost to the government agency, without impairing essential functions or characteristics.[23] Furthermore, a proposal does not qualify as a VECP if it involves a change in the following:

(1) in deliverable quantities only,

(2) in research and development end items or research and development test quantities due solely to results of previous testing under the instant contract, or

(3) to the contract type only.[24]

Interestingly, the proposal need not be an idea that the contractor developed. It may be an idea that the contractor borrowed from industry, a method it has used in other government contracts, or even a method the government has developed.[25]

The contractor submits its VECP to the contracting officer.[26] The contracting officer must accept or reject the proposal, or at least notify the contractor as to when the contracting officer will render a decision, within forty-five days.[27] If the contracting officer accepts the VECP, the contracting officer modifies the contract to incorporate the change.[28] If the contracting officer rejects it, the contractor has no appeal. The contracting officer's decision is final and

[12] *Id.* 48.201(e); 52.248-1 (Alternate III); 52.248-3 (Alternate I).

[13] *Id.* 48.101(b).

[14] *Id.* 48.101(b)(1).

[15] *Id.* 48.101(b)(2).

[16] *Id.* 48.201(c); 52.248-1 (Alternate I).

[17] *Id.* 48.201(d); 52.248-1 (Alternate II).

[18] JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 307 (2d ed. 2d prtg. 1986).

[19] FAR 48.201(f); 52.248-2.

[20] *Id.* 48.202; 53.248-3.

[21] *Id.* 48.202. Incentive-type contracts include the cost-plus-award-fee and cost-plus-incentive-fee contract types.

[22] *Id.* 48.104-1; 52.248-1.

[23] *Id.* 48.001; 52.248-1(b); 52.248-3(b).

[24] *Id.*

[25] John J. Kirlin, Inc. v. United States, 827 F.2d 1538, 1541 (Fed. Cir. 1987); B.F. Goodrich Co. v. United States, 398 F.2d 843, 847 (Ct. Cl. 1968); Robin Indus., Inc. v. United States, 29 Fed. Cl. 122, 131 (1993).

[26] FAR 52.248-1(d); 52.248-3(d); 48.103(a).

[27] *Id.* 48.103(b); 52.248-1(e)(1); 52.248-3(e)(1).

[28] *Id.* 48.103(b); 52.248-1(e)(3); 52.248-3(e)(3).

the contractor cannot appeal it under the contract's disputes clause.[29]

Although the value engineering clauses prescribe the minimum contents of a VECP,[30] failure to follow a particular format is not fatal. A proposal qualifies as a VECP if the government and the contractor understand it to be one.[31] Moreover, if the contracting officer implements the VECP by modifying the instant contract, the VECP is constructively accepted.[32] However, a crucial part of the contracting officer's analysis of a VECP is whether it will result in government savings on the instant contract. The contracting officer may see merit in the idea, but find that it would not be helpful in the instant contract. Accordingly, the contracting officer does not constructively accept the VECP if he or she merely retains the idea for use in subsequent government contracts.[33]

Technical Data in a VECP

In government contracts, "data" means recorded information, regardless of form or method of recording.[34] "Technical data" means data of a scientific or technical nature, including computer software documentation. "Technical data" does not include computer software itself, nor does it include data incidental to contract administration, such as financial or management information.[35]

The value engineering clauses for supply, service, or construction contracts[36] permit the contractor to restrict the government's use of its technical data, or any other part of its VECP. The contractor simply marks the restricted portions with a legend. Essentially, the legend prohibits the government from disclosing the data outside the government, and permits the government to disclose the data within the government only for purposes of evaluating the VECP.[37] The value engineering clauses also describe the rights that the government receives in the VECP and its supporting data if the contracting officer accepts the VECP. On acceptance of the proposal, the government obtains unlimited rights in the data, unless the data qualifies as "limited rights" data. If it is limited rights data, the government receives only those rights "specified in the modification adopting the proposal, and the government will appropriately mark the data."[38] Unfortunately, the clauses do not explain precisely what rights the modification should specify. No reported cases have addressed this issue, but at least one government contracts scholar has indicated that the intent of the clauses is to provide the contractor the rights specified in the technical data policies found in *FAR* part 27 and the *Defense Federal Acquisition Regulation Supplement* (*DFARS*) part 227.[39] This view certainly is consistent with the clauses themselves, which refer to the definitions of "unlimited rights" and "limited rights" found in *FAR* part 27.[40] This view also is consistent with the case law on value engineering, which interprets the value engineering provisions liberally, in the contractor's favor.[41]

Prior to 1977, the value engineering clause did not permit a contractor to restrict the government's use of data once it accepted the VECP. The government received unlimited rights in the technical data submitted.[42] This is still the case with value engineering in architect-engineer contracts; the value engineering clause for architect-engineer contracts does not authorize the contractor to restrict the government's use of a value engineering proposal.[43]

Rights in Technical Data

With this backdrop—that is, that the *FAR* and *DFARS* technical data policies apply to technical data contained in a VECP—the law as it relates generally to the various rights in the technical data of DOD contractors needs to be examined.

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[29] *Id.* 48.103(c); 52.248-1(e)(3); 52.248-3(e)(3). The disputes clause is located at 52.233-1.

[30] *Id.* 52.248-1(c); 52.248-3(c).

[31] *See* B.F. Goodrich Co. v. United States, 398 F.2d 843, 848 (Cl. Ct. 1968); ICSD Corp., ASBCA No. 28028, 90-3 BCA ¶ 23,027, at 115,630; *see also* McDonnell Douglas Astronautics Co., ASBCA No. 19971, 76-2 BCA ¶ 12,117, at 58,209.

[32] John J. Kirlin, Inc. v. United States, 827 F.2d 1538, 1541 (Fed. Cir. 1987); SCM Corp., ASBCA No. 26544, 85-1 BCA ¶ 17,783, at 88,812.

[33] *See John J. Kirlin, Inc.*, 827 F.2d at 1541.

[34] FAR 27.401; DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 227.401(7) (1 Dec. 1991) [hereinafter DFARS]; *id.* 252.227-7013(a)(7).

[35] 10 U.S.C. § 2302(4) (1988); FAR 27.401; DFARS 227.401(18); 252.227-7013(a)(18).

[36] FAR 52.248-1(m); 52.248-3(i).

[37] *Id.*

[38] *Id.*

[39] RALPH C. NASH, JR., GOVERNMENT CONTRACT CHANGES 9-40 (2d ed. 1989).

[40] FAR 52.248-1(m); 52.248-3(i).

[41] *See generally* Airmotive Eng'g Corp. v. United States, 535 F.2d 8, 12 (Ct. Cl. 1976); Mishara Constr. Co., ASBCA No. 17957, 75-1 BCA ¶ 11,206, at 53,357; Airmotive Eng'g Corp., ASBCA No. 17139, 74-1 BCA ¶ 10,517, at 49,836-37, *mot. for reconsid. denied*, 74-2 BCA ¶ 10,696.

[42] NASH, *supra* note 39, at 9-41.

[43] FAR 52.248-2.

The rules governing rights in the technical data of DOD contractors are based on the Defense Procurement Reform Act of 1984[44] (Reform Act). Because of this special statutory treatment of technical rights for DOD contractors, very little of the *FAR* applies to the DOD acquisitions involving technical data. Instead, the *DFARS* governs. The only portion of *FAR* part 27 that applies to DOD is the federal policy statement located at *FAR* 27.402.[45] Not even the *FAR* definitions apply to the DOD, although the *DFARS* duplicates some of them.[46] The *DFARS* sections governing technical data apply equally to prime contractors and to their subcontractors. Concerns regarding privity of contract generally do not apply, and the government and subcontractors may communicate directly regarding technical data.[47]

The National Defense Authorization Act for fiscal years 1992 and 1993 required the Secretary of Defense to implement new rules governing rights in technical data. The Act required the Secretary to establish a Government-Industry Committee on Rights in Technical Data (Section 807 Committee). The Section 807 Committee would then advise the Secretary on the new rules, and the Secretary was required to thoroughly consider its recommendations in developing those rules.[48] The Section 807 Committee met from July 1992 to December 1993.[49] The Section 807 Committee "concluded that the existing regulations are a disincentive to companies that create new technology with their own funding to provide that technology to the Defense Department."[50]

The DOD published its proposed new technical data rights rules, based on the Section 807 Committee's recommendations, on 20 June 1994.[51] The comment period for the proposed rules expired on 19 August 1994,[52] but they have yet to be incorporated into the *DFARS*. The Section 807 Committee "believes this proposed regulation establishes a balance between data developers' and data users' interests and will encourage firms to offer DOD new technology, and facilitate dual use development."[53]

The DOD's proposed rules would substantially alter *DFARS* part 227. Where necessary, this article will indicate significant differences between the current rules and the proposed rules.

The Competing Interests in Technical Data.

The DOD's perceptions of the competing interests in technical data are articulated in *DFARS* 227.402.[54]

The Government's Interests

The DOD believes that the government's needs for technical data are many and varied, and may exceed those of commercial users. The government needs technical data for training, overhaul and repair, cataloging, standardization, inspection, quality control, packaging, and logistics operations. The government must disseminate the technical data resulting from research and development contracts and production contracts to many different users. It also must make technical data widely available to increase competition, lower costs, and provide for mobilization. On the other hand, the government may have an interest in limiting the use of technical data. It has an interest in encouraging contractors to expend resources to develop new technologies and improve existing technologies to satisfy government needs. To encourage contractors to expend resources and develop applications of these technologies, the government may wish to allow them exclusive rights to exploit the technology.[55]

The Contractors' Interests

Contractors hold technical data closely, because the data's disclosure to competitors could jeopardize a competitive advantage. Public disclosure of technical data can cause serious economic hardship to the company that develops them.[56]

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[44] Defense Procurement Reform Act of 1984, Pub. L. No. 98-525, §§ 1201-52, 98 Stat. 2588 (codified as amended in scattered sections of 10 U.S.C.).

[45] FAR 27.400.

[46] *See* DFARS 227.401.

[47] *Id.* 227.403-75.

[48] National Defense Authorization Act for Fiscal years 1992 and 1993, Pub. L. No. 102-190, § 807, 98 Stat. 1421 (1991).

[49] 59 Fed. Reg. 31,584, 31,585 (1994) (to be codified 48 C.F.R. pts. 211, 227, 252) (proposed June 20, 1994).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 31,584.

[53] *Id.* at 31,585.

[54] The DOD's proposed rules would eliminate discussion of the competing interests. *See id.* at 31,584 to 31,620.

[55] DFARS 227.402-70(a).

[56] *Id.* 227.402-70(b).

or processes developed exclusively at private expense, a contractor must notify the government if it submits data for items or processes developed with a mixture of government and private funds.[76]

Typically, the contracting officer may negotiate only for standard data rights (unlimited, limited, or GPLR).[77] If the contracting officer agrees to limited rights or GPLR, the agreement must set a specific duration of the limited rights or GPLR (between one and five years), after which the government receives unlimited rights.[78] The chief of the contracting office must approve any limited rights or GPLR lasting longer than five years. Also, the chief of contracting must approve any agreement for nonstandard data rights.[79]

The DOD's proposed rules would eliminate the requirement to negotiate the technical data rights in a mixed funding circumstance. They provide that the government receives government purpose rights for five years and thereafter has unlimited rights in the data.[80] The contractor would not be required to negotiate any different data rights.

Severable Items

Even though the government may have an entitlement to unlimited rights in the technical data for a given item, that item may contain components that the contractor (or a subcontractor) developed exclusively at private expense. In that instance, the government receives only limited rights in the technical data for those components. If the contractor developed the component with a mixture of government funds and private funds, the government must negotiate with the contractor for the rights in that data—at least under the current *DFARS*. In short, the contractor does not lose its rights in the technical data for a component simply because it must incorporate the component into a larger item developed for the government.[81]

SBIR Program

The Small Business Innovation Development Act of 1982 created the SBIR Program.[82] This statute seeks to stimulate small businesses by strengthening their ability to reap the benefits of their own research and development efforts.[83] Among other things, it requires the executive branch to assist small business concerns to obtain the benefits of research and development performed under government contracts or at government expense.[84]

The rules governing rights in technical data under the SBIR Program are largely the same as those for any other technical data. However, some important differences do exist. The government generally receives only limited rights in technical data developed under the SBIR Program for four years following project completion. At the end of the four-year period, the government receives royalty-free GPLR.[85] If the technical data pertains to an item or process developed exclusively at private expense, the government receives only limited rights. Nothing in the legislation shortens those limited rights to four years.[86] Additionally, the contracting officer may allow the contractor to hold the copyright in the data, so long as the government receives royalty-free use of the data.[87]

However, the SBIR Program lists several exceptions to the limitations on the government's rights. The government may disclose the technical data outside the government as follows:

> (1) when necessary for program evaluation;[88] or
>
> (2) when the contractor consents in writing to additional disclosure.[89]

Furthermore, the government has unlimited rights in

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[76] DFARS 227.403-70(a)(1)(ii); 252.227-7013(j).

[77] *Id.* 227.403-70(c)(4). The DOD's proposed rules would eliminate this limitation. *See supra* note 70 and accompanying text.

[78] *Id.* 227.403-70(c)(3).

[79] *Id.* 227.403-70(c)(4).

[80] 59 Fed. Reg. 31,606 (1994).

[81] *See* Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA ¶ 18,415, at 92,416.

[82] 15 U.S.C. § 638 (1988 & Supp. IV 1992).

[83] *Id.* § 638(a) (1988).

[84] *Id.* § 638(b)(2) (1988 & Supp. IV 1992).

[85] DFARS 227.405-79(b)(2).

[86] *Id.* 227.405-79; 252.227-7013 (Alternate II).

[87] *Id.* 227.405-79(b)(3).

[88] *Id.* 227.405-79(b)(1)(i).

[89] *Id.* 227.405-79(b)(1)(ii).

> (1) form, fit, and function data (pertaining to items delivered under any government contract);
>
> (2) manuals and instructional materials (developed under a government contract);
>
> (3) technical data (that are corrections or changes to government furnished data); and
>
> (4) technical data otherwise publicly available (or that the contractor has previously disclosed without restriction).[90]

The DOD's proposed rules would revise technical data rights under the SBIR program. The proposed rules would retain the government's current unlimited rights in four types of data. They also would retain the current *DFARS* provisions granting the government only limited rights in data that a SBIR contractor develops exclusively at private expense. Other types of data would be treated similarly as data developed with a mixture of government and private funds.[91] The government would receive "SBIR data rights" (which closely resemble government purpose rights) for five years following project completion. At the expiration of the five years, the government would receive unlimited rights in the data.[92]

Commercial Items Under the Proposed Rules

Under the current *DFARS* part 227, the foregoing principles regarding determination of technical data rights applies equally to commercial and noncommercial items.[93] The DOD's proposed rules would carve out, however, special treatment for commercial items. The DOD would acquire only the same technical data regarding a commercial item as does the general public.[94] The DOD could acquire additional technical data only if the data were needed for proper installation, maintenance, handling, or repair of the commercial item, or if the data described a modification to the commercial item to meet the requirements of the government solicitation.[95] In any event, the government generally would receive only the equivalent of limited rights in any technical data it ultimately receives regarding the commercial item. However, it would receive the equivalent of unlimited rights in any technical data that:

> (1) have been provided to the Government or others without restrictions . . . other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the [commercial item] . . . ;
>
> (2) are form, fit, and function data;
>
> (3) are a correction or change to technical data furnished to the contractor by the Government; or
>
> (4) have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired [the equivalent of unlimited rights].[96]

The Contractor's Assertion of Its Data Rights

A contractor must assert any restrictions on government use of its technical data.[97] If it fails to do so properly, the government receives unlimited rights. The contractor restricts the data by following the proper notice and marking procedures.

Notice

A contractor must notify the contracting officer of any restricted technical data, that is, technical data in which the government should not have unlimited rights.[98] Specifically, the contractor must notify the government of any technical data pertaining to items or processes

> (1) developed exclusively at private expense,
>
> (2) developed in part at private expense, or
>
> (3) developed exclusively at government expense, but for which the offeror or con-

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[90] *Id.* 252.227-7013(b) (Alternate II).

[91] *See supra* note 80 and accompanying text.

[92] 59 Fed. Reg. 31,615 (1994).

[93] *See supra* notes 68 through 92 and accompanying text.

[94] 59 Fed. Reg. at 31,587.

[95] *Id.*

[96] *Id.* at 31,612.

[97] DFARS 227.403-70(a); 227.403-72; 252.227-7013.

[98] *Id.* 227.403-70(a); 252.227-7013(j).

tractor requests exclusive commercial rights (*i.e.*, GPLR).[99]

The DOD's proposed rules are less detailed. They simply would require the contractor to provide notice of technical data "provided to the Government with restrictions on use, modification, reproduction, release, or disclosure."[100]

The *DFARS* prescribes minimum contents for the notice, as well as a format for the representation which the notice must contain. The contractor must represent that the information contained in the notice is current, accurate, and complete to the best of its knowledge and belief.[101]

Under the DOD's proposed rules, the notice would be unnecessary for technical data regarding commercial items. The data rights in such data would be enumerated in the *DFARS*, they would apply to the technical data by operation of law, and the contractor would not be required to repeat them in a notice.[102]

The contracting officer maintains a list of all restricted technical data and incorporates it into the contract.[103] The contractor has a continuing duty to notify the government of technical data restrictions,[104] therefore, updating the list is an ongoing process, subject to validation.[105] The contractor's notices serve as the basis for the list. The contracting officer lists any data for which the contractor asserts a restriction, unless the contracting officer questions the restriction. In that event, the contracting officer leaves it off the list, but must initiate the validation process.[106]

Marking the Data

Although the contract may contain a list of restricted technical data, the contractor must do even more to protect its rights. When it delivers the data to the government, it must place a legend on the data in a format prescribed by the technical data rights clause. The contractor also must indicate with specificity which portions of the data are subject to the restriction by circling, underscoring, or noting those portions.[107] Like the notice requirement, the DOD's proposed rules would eliminate the need to mark technical data regarding commercial items. The data rights would apply by operation of law and the contractor would not be required to repeat them in a legend affixed to the data.[108]

If the data arrives unmarked, the government may presume it has unlimited rights in the data.[109] However, the contractor may request permission within six months after delivery to add the restrictive markings to the data, at its own expense. The contracting officer may permit this action, if the contractor demonstrates that the omission was inadvertent, establishes that the marking is valid, and relieves the government of liability with respect to the technical data.[110]

The contractor and its subcontractors must maintain adequate procedures to insure that they use restrictive markings only when authorized by the technical data clause.[111]

If a contractor submits technical data with restrictive markings that do not conform to proper content and format, the government nevertheless complies with the appropriate restriction. The government notifies the contractor that it must correct the markings. If the contractor fails to do so within sixty days, the government corrects the markings at the contractor's expense. These corrections are not subject to the validation process.[112]

If the contracting officer questions the validity of a restriction asserted in a marking, the contracting officer may challenge it under the validation procedures described below.[113]

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[99] *Id.*

[100] 59 Fed. Reg. at 31,591.

[101] DFARS 227.403-70(a)(5); 252.227-7013(j)(3).

[102] *See* 59 Fed. Reg. at 31,587.

[103] DFARS 227.403-70(b); 252.227-7013(k).

[104] *Id.* 227.403-70(a)(4).

[105] *Id.* 227.403-70(a)(3)(ii). *See infra* notes 116 to 120 and accompanying text for a discussion of the validation process.

[106] DFARS 227.403-70(b); 252.227-7013(l).

[107] *Id.* 252.227-7013.

[108] *See* 59 Fed. Reg. 31,587 (1994).

[109] *See* DFARS 227.403-72(c); *see also* Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA ¶ 18,415, at 92,427.

[110] DFARS 227.403-72(c).

[111] *Id.* 227.403-72; 252.227-7018.

[112] *Id.* 227.403-72(e); 252.227-7013(f)(2).

[113] *Id.* 227.403-72(d); 252.227-7013(f)(1).

Excess Restriction

A contractor does not lose protection of its technical data in components it develops exclusively at private expense.[114] However, a contractor should be careful not to excessively restrict the data. For example, it should not place a restrictive legend on an entire technical data submission when only portions of it merit restriction. When faced with such excess restrictions, the contractor officer should ask the contractor to narrow the restrictions to the specific data concerned.[115]

Challenging a Restriction: The Validation Process

The Reform Act established a procedure for the contracting officer to follow when that individual has reason to question a contractor's restriction.

Reviewing Restrictions

The government should review every restriction that a contractor asserts on its technical data. The review should take place prior to acceptance of the data, but no later than three years after final payment or three years after delivery of the data to the government, whichever is later. The only grounds on which the contracting officer may challenge a restrictive marking after three years have passed are when the technical data

(1) is publicly available,

(2) has been furnished to the United States government without restriction, or

(3) has been otherwise made available without restriction.[116]

Prechallenge Request for Information

Prior to challenging a restriction formally, the contracting officer must request for the contractor to provide sufficient information to explain its basis for the restriction. If the contractor fails to respond to the prechallenge request within a reasonable period, the contracting officer challenges the restriction. If the contractor responds but provides insufficient information, the contracting officer should request additional information. The *DFARS* does not specify how many opportunities the contractor should receive to supplement its information. It merely indicates that the contracting officer should provide the contractor a reasonable time to supply information sufficient to justify the restriction. If after receipt of the information, the contracting officer determines that reasonable grounds exist to question the restriction's validity, and that continued adherence to the restriction would make subsequent competition impracticable, the contracting officer challenges the restriction.[117]

Issuing the Challenge

The contracting officer challenges the restriction by written notice to the contractor, stating the grounds for the challenge and requiring a response within sixty days. The contracting officer informs the contractor that any previous contracting officer's final decision within the preceding three years—upholding the validity of the restriction after challenge—is sufficient justification. The contracting officer also informs the contractor that failure to respond to the challenge will result in a contracting officer's final decision under the disputes clause.[118]

Deciding the Case

The disputes clause governs the remainder of the validation procedure. The contractor's response to the challenge is a claim under the disputes clause, so the contracting officer issues a final decision within sixty days.[119] The contractor must establish its entitlement to the restriction by clear and convincing evidence.[120]

The Reform Act clarified the jurisdiction of the Armed Services Board of Contract Appeals (ASBCA) and the United States Claims Court (Claims Court)[121] over appeals regarding data rights claims by making them disputes within the meaning of the Contract Disputes Act of 1978 (CDA).[122] Prior to the Reform Act, the ASBCA and the Claims Court treated disputes over technical data rights differently. In these disputes the contractor essentially sought equitable relief, seeking a

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[114] *See* 10 U.S.C. § 2305(d)(4) (1988); DFARS 227.403-71(b)(3); *see also* Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA ¶ 18, 415, at 92,416.

[115] *See Bell Helicopter Textron*, 85-3 BCA at 92,428-29.

[116] DFARS 227.403-73(a).

[117] *Id.* 227.403-73(b); 252.227-7037(c).

[118] 10 U.S.C. § 2321(d); DFARS 252.227-7037(d).

[119] DFARS 252.227-7037. For the disputes clause, *see* FAR 52.233-1.

[120] Zodiac of America, Inc., B-220012, Nov. 25, 1985, 85-2 CPD ¶ 595, at 3; Wayne H. Coloney Co., Inc., B-211789, Aug. 23, 1983, 83-2 CPD ¶ 242, at 1.

[121] The Claims Court was renamed the United States Court of Federal Claims by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (codified as amended in scattered sections of 28 U.S.C.).

[122] 10 U.S.C. § 2321(g) (1988). However, this provision applies only to disputes arising under contracts whose solicitations were issued after the Reform Act's effective date (19 October 1985). Pub. L. No. 98-525, § 1216(c)(2), 98 Stat. 2599. The CDA is codified at 41 U.S.C. §§ 601-613 (1988 & Supp. IV 1992).

declaratory judgment that the contracting officer erred in denying the data restriction, or seeking injunctive relief requiring the government to honor the contractor's asserted restriction, or both. The ASBCA heard these cases. It recognized that it lacked authority to grant injunctive relief or to order specific performance, but nevertheless maintained that it had authority to determine the underlying dispute over the data rights.[123] The Claims Court, on the other hand, declined to hear these cases, maintaining that it lacked authority to grant equitable relief.[124] No reported Claims Court decisions on this issue after the Reform Act became effective have resulted, but it appears that the Claims Court would now accept jurisdiction of such disputes. Its refusal to accept jurisdiction prior to the Reform Act stemmed from a provision that Congress considered for the CDA, but did not include in the CDA's final version. That provision would have granted the Claims Court jurisdiction to render declaratory judgments in data rights disputes. Because Congress declined to include this language in the final version of the CDA, the Claims Court opined that Congress, at least prior to the Reform Act, did not intend for the Claims Court to have authority to render declaratory judgment in these disputes.[125]

Therefore, contractors had only three approaches by which to challenge a contracting officer's final decision on technical data rights. One was to appeal to the ASBCA. Another approach was to seek injunctive relief in a federal district court, asserting jurisdiction under the Administrative Procedure Act (APA)[126] to enjoin the government from releasing a trade secret in violation of the Antitrust Procedural Improvements Act of 1980.[127] Under this approach, however, the district court did not perform de novo review of the contracting officer's final decision, as the ASBCA or Claims Court performed when reviewing a final decision pursuant to the CDA. Instead, the district court limited its review to the APA's abuse of discretion standard. Thus, so long as the contracting officer's decision was not arbitrary and capricious, the decision withstood the district court's review.[128] Yet another approach was to protest to the General Accounting Office (GAO) if the government sought to use the technical data in a subsequent acquisition. The GAO determined on a case-by-case basis, however, whether it would consider these protests.[129] It acknowledged that it lacked authority to specifically enjoin a contracting officer from using the technical data in the solicitation.[130] At the same time, the GAO maintained that it could consider these protests to protect against unauthorized disclosure of data, and thereby prevent government liability for damages resulting from the disclosure. The GAO held that it could recommend cancellation of the solicitation and resolicitation without using the data, or recommend sole source award to the contractor who held the proprietary interest in the data.[131] Since the enactment of the Reform Act, the GAO has not overruled its prior decisions, but it has indicated that a protest may not be an appropriate remedy. It has indicated that an action against the government for damages or an administrative claim is more appropriate.[132] However, it has continued to hear protests on a case-by-case basis.[133] In some cases, when the GAO has seen no merit in the protester's claim to a proprietary interest in the technical data, it has denied the protest without even reaching any discussion of appropriate remedies.[134]

Appeal and Stay

Under the disputes clause, the contractor can appeal the contracting officer's final decision to the ASBCA within ninety days,[135] or to the Claims Court within twelve months.[136] The government cannot violate the asserted restriction for at

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[123] *See* General Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195, at 106,959.

[124] *See* Williams Int'l Corp. v. United States, 7 Cl. Ct. 726, 731 (1985).

[125] *Id.* at 729.

[126] Administrative Procedure Act, ch. 1189, §§ 1-12, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). The code section regarding a right of action in the district court for a government employee's violation of the Antitrust Procedural Improvements Act of 1980 is located at 5 U.S.C. § 702 (1988).

[127] 18 U.S.C. § 1905 (Supp. IV 1992); *see also* Megapulse v. Lewis, 672 F.2d 959, 971 (D.C. Cir. 1982).

[128] *Compare* Conax Florida Corp. v. United States, 824 F.2d 1124, 1130 (D.C. Cir. 1987) (finding no abuse of discretion); *with* Dowty Decoto, Inc. v. Department of Navy, 883 F.2d 774, 781 (9th Cir. 1989) (finding an abuse of discretion).

[129] Tyco, Inc., B-171601, Jan. 7, 1972, 17 Cont. Cas. Fed. (CCH) ¶ 81,038.

[130] Data Gen. Corp., B-185897, Apr. 28, 1976, 55 Comp. Gen. 1040, at 1042, 76-1 CPD ¶ 287, at 3.

[131] *Id.*; Neff Instrument Corp., B-216236, Dec. 11 1984, 84-2 CPD ¶ 649, at 3.

[132] Q-Dot, Inc., B-235688, Sept. 28, 1989, 89-2 CPD ¶ 280, at 4; Del Mar Avionics, B-231124, Aug. 25, 1989, 88-2 CPD ¶ 180, at 4, *aff'd on reconsideration*, 89-1 CPD ¶ 131.

[133] *See* Hex Indus., B-243867, Aug. 30, 1991, 91-2 CPD ¶ 223, at 2.

[134] Litton Applied Technology, B-227090, B-227156, Sept. 3, 1987, 87-2 CPD ¶ 219, at 6.

[135] 41 U.S.C. § 606 (1988).

[136] *Id.* § 609(a)(3).

least ninety days following the contracting officer's final decision.[137] If the contractor appeals the final decision, this stay remains in effect until final disposition of the appeal.[138]

The *DFARS* lists two exceptions to the stay. One arises if the contractor intends to appeal to the Claims Court rather than to the ASBCA. In that event, it must notify the contracting officer of this intent within ninety days following the contracting officer's final decision. If the contractor fails to provide this notice, the contracting officer may ignore the restriction at the expiration of the ninety days.[139] The other exception is a Secretarial waiver. If the Secretary of the Army, Navy, or Air Force determines that urgent and compelling circumstances prohibit awaiting a final disposition of the contractor's appeal, the Secretary may waive the stay.[140]

The stay provision did not exist prior to October 1985.[141] It was part of the first *DFARS* contract clause to implement the Reform Act's validation process, and went into effect in October 1985 under an interim rule of the Defense Acquisition Regulation Council.[142] After a comment period, the validation clause, in essentially its current form, was added to the *DFARS* in May 1987.[143] Some believe that the validation process, with its stay provisions, enable a contractor to frustrate legitimate government rights to use technical data. They contend that the process permits a contractor to effectively enjoin the government for months or years pending disposition of an appeal. Arguably, the contractor can effect even an undeserved restriction well beyond the time in which the government would need the data for competition, perhaps even locking itself into a sole source position in the process.[144]

Government Avoidance of the Validation Process

The notion may occur to a contracting officer to forego the validation process altogether. The contracting officer may see it as an unnecessary investment of time if the contracting officer is unsure whether the government will ever have a need for the technical data in the future. Additionally, the contracting officer may see a tactical advantage in waiting until the government needs the technical data at some future date, then attempt to use it at that time and deal with the contractor's objections in the context of a GAO protest. Because the GAO has reviewed such protests only on a case-by-case basis,[145] the contracting officer might hope that the GAO would decline to hear the protest. In any event, the contracting officer would avoid placing the issue before the ASBCA or the Claims Court—or so the contracting officer might believe.

Q-Dot, Inc.,[146] a recent GAO protest, demonstrated the fallacy of this viewpoint and its resulting pitfalls. This case involved a two-phase Air Force contract for development of a pulse-to-digital converter system for turbine flowmeter measurement of fluid flows and rotor speeds during engine and rocket propulsion testing. In the first phase of the contract, the Air Force made multiple awards for design, construction, and demonstration of a single channel of a thirty-channel, one-step pulse-to-digital converter and for a preliminary design for the thirty-channel system. The second phase would involve production of a workable thirty-channel prototype incorporating the features developed in the first phase. When the Air Force disseminated the specifications for the prototype to potential offerors, Q-Dot protested to the GAO, alleging that the Air Force included limited rights data that Q-Dot had supplied in the first phase. The GAO declined to hear the protest, opining that the appropriate remedy for the protester was an administrative claim or a judicial action for damages.[147]

The first phase contract contained the technical data rights validation clause,[148] and Q-Dot submitted its technical data with restrictive markings. However, the contracting officer never invoked the validation process.

The GAO's decision does not reveal why the contracting officer did not use the validation procedures—it merely indi-

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[137] DFARS 252.227-7037(f)(2)(ii).

[138] *Id.* 252.227-7037(g).

[139] *Id.* 252.227-7037(f)(2)(ii).

[140] *Id.* 252.227-7037(f)(2)(iii) and (iv).

[141] Prior to October 1985, *DFARS* 252.227-7013(d) encompassed the entire process by which a contracting officer removed unjustified restrictive markings. There was no stay provision. *See* 48 C.F.R. § 252.227-7013(d) (1985).

[142] Technical Data (DAR Case 84-187) Validation of Proprietary Data Restriction (DAR Case 84-216), A.F. ACQUISITION CIRCULAR 85-32 (Dep't of Air Force, Washington, D.C.), Oct. 16, 1985, at B-1 [hereinafter AFAC].

[143] PATENTS, DATA, AND COPYRIGHTS, DEFENSE ACQUISITION CIRCULAR 86-3 (Dep't of Defense, Washington, D.C.), May 15, 1987, at 2; Patents, Data, and Copyrights (DAR Case 84-187), AFAC 87-15, May 14, 1987, at B-1.

[144] Kaeser & Blucher, *supra* note 1, at 238.

[145] *See supra* note 129 and accompanying text.

[146] B-235688, Sept. 28, 1989, 89-2 CPD ¶ 280.

[147] *Id.* at 4.

[148] DFARS 252.227-7037.

cates that the contracting officer believed the data had become public knowledge when he used it in the specifications. Perhaps the contracting officer thought it unnecessary to invoke the validation process under those circumstances. Perhaps the contracting officer merely neglected to invoke it. Perhaps he sought to bypass it altogether and await Q-Dot's reaction when he used it in the specifications.

Regardless of his motivation, the contracting officer should have challenged the restrictive markings when he concluded that they were improper and determined that the government needed to disseminate the data to other offerors. Other contracting officers should learn from this case and not follow his example. The technical data rights clauses require the government to abide by restrictive markings or challenge them under the validation process. Moreover, the challenge should come as soon as the contracting officer concludes that the restrictions are unjustified, because time is not on the government's side in these matters. Had the contracting officer in *Q-Dot* waited until three years had passed, he would have severely limited the grounds on which he could challenge the restrictions.[149] Finally, bypassing the validation process in an effort to postpone the issue to the protest of a subsequent solicitation using the data seems fruitless. Assuming that the GAO continues the position it articulated in *Q-Dot*, these types of cases ultimately will flow to the ASBCA or the Claims Court, which is where they would go had the contracting officer followed the validation procedures.

Protecting Data Rights in a VECP

The Case of Ordinance Devices, Inc.

A recent ASBCA appeal involving a value engineering change proposal illustrates the risk that a contractor takes when it does not assert its technical data rights. *Ordinance Devices, Inc.*[150] involved procurements of fuse demolition kits (FDKs), a component in mine clearing line charges. In August 1984, the Navy awarded Ordinance Devices a contract for the manufacture of FDKs. While still performing the contract, Ordinance Devices developed an improved FDK and submitted its design to the Navy in a VECP in 1987. The Navy accepted the VECP and modified the contract's technical data package (TDP) to incorporate the new design. Subsequently, the Navy provided the Army a copy of the TDP for use in Army procurements of mine clearing line charges. When the Army used the TDP to procure mine clearing line charges, Ordinance Devices filed a claim with the Navy for a share of the Army's contract savings. Ordinance Devices claimed that the Army contract was a future contract within the meaning of the value engineering clause, and that it was therefore entitled to a share of the savings realized on that contract. The Navy's contracting officer denied the claim, and Ordinance Devices appealed to the ASBCA. Of critical importance to the claim was the definition of the "acquisition savings" in which Ordinance Devices was entitled a share under the value engineering clause. The clause indicated that "'Acquisition savings' means savings resulting from the application of VECPs to contracts awarded by the same contracting office *or its successor* for essentially the same unit."[151] This definition is the same one found in the current value engineering clause.[152] The ASBCA opined that the Army was not a "successor" under the clause and denied Ordinance Devices' appeal.

Apparently, Ordinance Devices did not submit its VECP with restrictive data markings, and the ASBCA's decision does not recite the facts in detail sufficient to determine whether Ordinance Devices had a legitimate proprietary interest. Nevertheless, the lesson that a contractor should learn from *Ordinance Devices Inc.* is to make the notifications and markings necessary to protect its rights in the technical data submitted as part of a VECP. Otherwise, it will not receive a share of the savings if other government agencies benefit from the innovation. If a contractor asserts its data rights, the issue of whether a "successor" government agency uses the technical data is immaterial, because rights in the technical data remain the same regardless of which government agency desires to use it.[153] More importantly, if a contractor submits technical data without markings, it gives the government unlimited rights. Once it relinquishes unlimited rights to the government, it cannot normally take them back.[154] Conversely, the government is bound by any data restrictions that the contractor asserts unless the contracting officer invokes the validation process.[155]

If a contracting officer receives a VECP with restrictive markings on it, the contracting officer should act on it pursuant to the technical data rights clauses.[156] The contracting officer should do so primarily because the clauses instruct the

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[149] *See supra* note 116 and accompanying text.

[150] ASBCA No. 42709, 93-2 BCA ¶ 25,794.

[151] DEP'T OF DEFENSE, DEFENSE ACQUISITION REG. 7-104.44(a) (ASPR 1976 ed., rev. Oct. 20, 1982) (emphasis added).

[152] FAR 52.248-1.

[153] The Reform Act establishes rights of "the United States" in technical data. 10 U.S.C. § 2320. The contract clause establishes the rights of "the Government" in the technical data. FAR 52.248-1.

[154] *See supra* notes 109, 110 and accompanying text.

[155] DFARS 227.403-70(b)(1).

[156] *Id.* 252.227-7013; 252.227-7037.

contracting officer to include the data on the contract's list of limited rights data, or in the alternative to begin the validation procedures. Additionally, if the contracting officer does nothing, and waits until the three-year period to challenge the asserted data restriction expires, the contracting officer limits the grounds on which the contracting officer can challenge the restriction.[157]

Negotiating Technical Data Rights

Even if a contractor does not believe that it can restrict the government to limited rights in its VECP's technical data, it still can seek to negotiate some limitation on the government's rights in the data. If the technical data pertains to an item or process developed with a mixture of government and private funds, the government normally is required to negotiate the data rights. If the item or process was developed solely with government funds, the government has the option to negotiate the data rights, despite its entitlement to unlimited rights.[158]

If the government is not required to relinquish any data rights, should it do so? The advantage to doing so is to encourage a contractor to develop better and cheaper products that meet the government's needs. If a contractor submits the technical data as part of a VECP, it must believe that it will save the government money, because a VECP by definition is a proposal that will reduce the overall projected cost of the contract.[159] If the government consistently refuses to relinquish data rights, contractors may perceive few incentives to develop more efficient methods of supplying goods and services. A contractor would not be eager to undertake research and development if it believed that the government would place the resulting technical data in the public domain. The contractor would only have incentives to provide precisely what the government required and never suggest better and cheaper alternatives.

The disadvantage to the government of relinquishing some data rights to the contractor is that the government may lock the contractor into a sole source position for subsequent acquisitions. Common sense dictates that competition encourages lower prices, whereas a monopoly provides fewer incentives to keep prices low. A contracting officer who contemplates relinquishing data rights should consult with the using organization in an effort to predict what the government's future needs are for the goods or services, and how soon the government may need them. If the government anticipates similar acquisitions in the near future, the contracting officer should consider relinquishing data rights for only a very short period of time, or not at all. If the government does not foresee such acquisitions in the near future, relinquishing data rights for a longer period may be in order, to permit the contractor to exploit the innovation for commercial purposes.

Impact of the DOD's Proposed Rules

The Section 807 Committee's goal in developing the DOD's proposed rules on technical data rights was to strike a balance between data developers' and data users' interests in such a way as to encourage companies to offer new technology to the DOD.[160] Probably because it viewed the current rules as a disincentive to contractors to provide new technology to the DOD,[161] it tilted the current balance in the contractors' favor. The rules it has developed limit the DOD's access to certain technical data, and create additional limitations on the government's rights in other technical data.

For technical data regarding noncommercial items, the proposed rules offer something for the government as well as for the contractor. On the one hand, the eight types of technical data in which the government always receives unlimited rights would expand slightly. In three of those types, the rules would eliminate the caveat that the data must be required for the performance of a government contract or subcontract.[162] Alternatively, the contractor would receive a much stronger bargaining position in regard to technical data for an item or process developed with a mixture of government and contractor's funding. No longer would the contractor be obliged to negotiate the technical data rights with the government. The proposed rules would establish government purpose rights in the data for five years; the contractor would be free to limit the government to those rights and could refuse government requests to negotiate a relinquishment of additional rights.[163] The contractor thereby could place itself in an exclusive position to exploit the innovation for commercial purposes for five years.

The proposed rules' greatest enhancement of contractors' technical data rights would apply when the technical data relates to a commercial item or process. The proposed rules define commercial items in part as:

> items . . . developed or regularly used for other than governmental purposes that—

[157] *See supra* note 116 and accompanying text.

[158] *See supra* note 69 and accompanying text.

[159] *See supra* note 23 and accompanying text.

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

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

[162] *See supra* note 68 and accompanying text.

[163] *See supra* note 80 and accompanying text.

(i) Have been sold, leased, or licensed to the public; or,

(ii) Have been offered for sale, lease, or license to the public; or,

(iii) Have not been offered, sold, leased, or licensed to the public but will be available for commercial sale or license in time to satisfy the delivery requirements of [the] contract. . . .[164]

If an item or process is commercial, then the government's rights in the technical data related to it would be severely restricted. The government would receive unrestricted rights in a very limited portion of the technical data—primarily the technical data that the contractor desired to release to the public.[165] Moreover, the contractor would not be required to notify the government of restricted uses nor place restrictive legends on the data to preserve its rights. The restrictions would apply by operation of law.[166] Finally, the contractor need not take a position at the outset as to whether the item or process is commercial. It could wait to see what uses the government intends to make of the technical data. When the government attempts to disseminate the technical data, the contractor could then assert that the item or process is commercial. The government could thus be faced with limitations on use of the technical data, and resulting damages claims if it disseminated the data contrary to its license.

For a contractor performing a contract containing a value engineering clause, the proposed rules would offer an incentive to propose commercial items or processes in VECPs. If the contractor can fit the item or process it proposes within the "commercial" definition, it can limit the government's use of the technical data that describe it. Because the definition encompasses prospective uses of the item or process, the contractor need not limit itself to proposing items or processes that have already been put to commercial use. The contractor can put a new item or process to commercial use before it completes performance of the government contract and meet the definition—and thereby create a limitation on the government's technical data rights. Furthermore, the contractor need not worry about a result similar to that in *Ordinance Devices Inc.*,[167] if its VECP proposes a commercial item or process, because notice and marking would not be necessary to preserve limitations on the government's use of the technical data.

Conclusion

This article explains the statutory and regulatory provisions through which the government, particularly the DOD, seeks to achieve cost savings while balancing the government's interest in competition with a contractor's interest in exploiting its own innovations. When a contractor submits a VECP, it seeks a share of the money its idea saves the government. At the same time, the contractor would prefer to keep its innovation from its competitors, so that it may exploit its innovation to the maximum extent before the innovation enters the public domain. The essence of an innovation lies in the technical data that explain it. Therefore, the contractor desires to limit the government's ability to disseminate that technical data. The government's rights in the technical data associated with a VECP, including rights to disseminate the data, are the same as its rights in technical data generally. The various rights appear in *DFARS* part 227, along with a validation process designed to resolve disputes over technical data rights.

Some believe the validation process, with its stay provisions, strikes the balance too far in the contractor's favor.[168] Surprisingly, there have been no reported cases before the ASBCA or the Claims Court involving appeals arising from the new validation procedures. The only reported technical data rights case involving a contract awarded after the Reform Act was implemented in the *DFARS* is *Q-Dot, Inc.*[169]—a GAO protest.[170] If the stay provisions are such a powerful weapon for a contractor's arsenal, it seems surprising that none have put them to use. *Q-Dot* demonstrates one possible explanation for the absence of reported cases. Perhaps some contracting officers seek to avoid the validation process altogether. *Q-Dot* also demonstrates the risks inherent in that rea-

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[164] 59 Fed. Reg. 31,612 (1994).

[165] *Id.*

[166] *Id.*

[167] *See supra* notes 150 to 152 and accompanying text.

[168] Kaeser & Blucher, *supra note* 1, at 238.

[169] B-235688, Sept. 28, 1989, 89-2 CPD ¶ 280.

[170] Other reported cases postdating the Reform Act involved contracts that predated the Reform Act. *See* Dowty Decoto, Inc. v. Department of Navy, 883 F.2d 774, 775 (9th Cir. 1989); Conax Florida Corp. v. United States, 824 F.2d 1124, 1126 (D.C. Cir. 1987); Ford Aerospace & Communications Corp., ASBCA No. 29088, 88-2 BCA ¶ 20,748, at 104,829; Hex Indus., B-243867, Aug. 30, 1991, 91-2 CPD ¶ 223, at 2; Del Mar Avionics, B-231124, Aug. 25, 1989, 88-2 CPD ¶ 180, at 2, aff'd on reconsideration, 89-1 CPD ¶ 131; Litton Applied Technology, B-227090, B-227156, Sept. 3, 1987, 87-2 CPD ¶ 219, at 3; Zodiac of America, B-220012, Nov. 25, 1985, 85-2 CPD ¶ 595, at 2. Two cases postdating the Reform Act regarded the same technical data (technical drawings), and the decisions did not indicate whether the contractor supplied the data under a contract that predated the Reform Act. Ingersoll-Rand Co., B-236495, Dec. 12, 1989 89-2 CPD ¶ 542; Ingersoll-Rand Co., B-236391, Dec. 5, 1989, 89-2 CPD ¶ 517.

soning. Seeking to avoid the process offers no tactical advantage to the government and serves only to postpone the process.[171] Furthermore, invoking the process at a later time can seriously jeopardize the government's data rights.[172]

Alternatively, a contractor that does not aggressively assert and defend its rights in technical data submissions runs the risk of losing any return on its innovative ideas, as happened to Ordinance Devices.[173]

The essential lesson gleaned from *Ordinance Devices* and *Q-Dot* is that the technical data rights assertion and validation processes are facts of life that contractors and contracting officers cannot ignore. They apply to VECPs as much as they apply to data submissions required as a deliverable under a DOD contract. Neither contractors nor contracting officers can afford to remain silent when technical data rights are at stake—each must act to protect its rights. A contractor risks losing important rights in the technical data it submits with a VECP if it fails to properly assert them, and a contracting officer risks losing government rights in the technical data if the contracting officer fails to examine the contractor's data rights assertions and promptly challenge them if the contracting officer believes that the assertions are unjustified.

[171] *See supra* note 147 and accompanying text.

[172] *See supra* note 116 and accompanying text.

[173] *See supra* notes 150 to 155 and accompanying text.

Managing to Lead

Colonel Jack F. Lane, Jr.
Senior Judge, United States Army Court of Criminal Appeals

Introduction

Much has been written lately about "reinventing government," with a view toward improving government efficiency. Recently the Brookings Institute published a study entitled "Improving Government Performance."[1] One major recommendation was for top federal officials to promote a culture that values a proactive, problem-solving attitude in place of the reactive, problem-avoiding attitude that too often dominates bureaucracy. A contemporary study by the Families and Work Institute found that workers today are less willing to make sacrifices for work and, instead, desire to devote more time and energy to their personal lives.[2] On the positive side, the study found that workers place a high value on the quality of their work and work environment—the latter in terms of support, open communications, and flexible scheduling—as well as on pay and advancement. More importantly, the workers studied were most likely to care about the success of their organization when they had good relationships with managers, did not have to choose between their work and their personal lives, and felt that they have an opportunity to advance.

Judge Advocate General (JAG) Corps managers—judge advocates, warrant officers, noncommissioned officers, and civilians—need to be aware of studies like those mentioned above. While the military is a unique environment, the soldiers and civilians whom JAG managers lead are the products of society in general, and bring with them the work attitudes learned from their families and civilian work experiences. Further, an Army career can be very demanding—often at the expense of family life—and many young soldiers, including judge advocates, leave the service because they feel unfulfilled or resent the highly structured military environment. Therefore, JAG managers need to constantly reassess their management styles in light of emerging management lessons if the JAG Corps is to remain efficient and effective into the next century.

A good starting point for this reassessment is with one's management goals. Among those used by judge advocates at various times are: retaining the best people, ensuring the opportunity for professional development, providing a professional work environment that promotes pride in the military practice of law, and being competent, confident, and caring managers. In light of changes in the Army workforce because of downsizing, new societal attitudes about work, and rapid technological changes in the military workplace, goals such as these will present real challenges for JAG managers. The problem with goals is that they are simply ends to be

[1] Stephen Barr, *"Reinvent" Government Cautiously, Study Says*, WASH. POST, July 28, 1993, at A17.

[2] Barbara Vobejda, *Survey Says Employees Less Willing to Sacrifice*, WASH. POST, Sept. 3, 1993, at A2.

achieved; the real trick is to determine the *means* by which they can be achieved. To be successful, managers adopting these goals must develop personal management styles, or philosophies, to help them cope with the challenges in their particular organizations.

When teaching at The Judge Advocate General's School in the mid-1970s, Lieutenant Colonel (later Brigadier General) Del O'Roark used to tell judge advocates "If you can't lead, don't worry—you'll manage somehow." This quip highlighted the often distracting debate over the relationship between management and leadership—are Army officers "managers" or "leaders?" But must tension really exist between these two roles? "Management," as I learned at the Command and General Staff College, is both an art and a science. Management is an art because it requires skills acquired through experience, study, and observation, and a science because it relies on accumulated knowledge, systematized and formulated in reference to general truths or laws. Management can be defined as the process of planning, organizing, leading, and controlling the work of organizational members and of using all available resources to reach stated organizational goals.[3] More simply, management is the art of getting things done through people. In the final analysis, leading is a necessary ingredient of management. In behavioral science terms, "leading" means "motivating," which is a primary function of managers. If the manager cannot motivate workers to achieve desired results, then plans, organizations, and controls can become meaningless.

The self-development of effective managers is central to the success of any organization, according to Peter Drucker, a leader in modern management theory.[4] According to Drucker, as managers become more effective, they raise the performance level of the entire organization. Furthermore, Drucker finds that this has become more vital because work has changed from manual labor to knowledge work, which means that management's focus has shifted from efficiency—exemplified by time and motion studies—to effectiveness—that is, getting results. This management focus shift is relevant to the management of a JAG office. Like so many other aspects of work, effectiveness is a learned habit, the development of a complex set of practices. To be effective, managers must consider how their time is spent so that they can concentrate on areas where real results are possible, build on their own and others' strengths, and gear their efforts to results.

Time and Priority Management

Have you ever gotten to the end of the day and wondered where the time went? Did you find that all those things you planned, on your way to work, were still not done? If this happens on a regular basis, you have lost control of your time!

Effective managers in a knowledge-based environment must focus on results. Judge advocate managers must have time to direct their vision towards results, finding and eliminating time-wasters. One of the biggest time-wasters is doing your subordinates' work—if not for them, then with them. When a subordinate is struggling with a task and seeks further guidance, the manager too often unwittingly assumes the position of coworker. The manager then becomes directly responsible for the results or progress of the work, abdicating the management role for an action officer role. Thus, he or she no longer has time to manage. One way this happens is for the manager to "redo" everything the subordinate does. Unfortunately, few actions impede the development of junior soldiers or civilian employees, or stifle their desire to strive for achievement more than to have the branch or division chief rewrite every letter, memorandum, or brief so that it sounds like the chief wrote it.

While JAG managers may not be able to do much about either boss-imposed (we all work for a commander or other superior) or system-imposed time-wasters, they can avoid adding to them for their subordinates. Managers should not have meetings just for the sake of meetings; weekly staff calls in a small JAG office where everyone talks frequently to each other may not be needed for information flow or be productive in terms of positive results. Further, do not have people attend meetings if the subject is not of concern to them, because this wastes their time. Let people know the subject of the meeting ahead of time so they can come prepared and, if feasible, distribute a "strawman" proposal ahead so that attendees come to the meeting focused on the issues. Many times a manager needs to meet with only one or two people in a section. Rather than plan a meeting to be held in the manager's office, the manager should go to the work area. This allows the manager to see what is happening in the section, to interact (even minimally) with a variety of workers along the way,[5] and to save the subordinates' time.

Another time-waster is requiring voluminous reports or statistics. Many managers receive information that they never use, either because it is so detailed that it is more than they can easily assimilate or because it does not help them focus on their primary function of achieving organizational results. Consequently, managers are wasting their subordinates' time in preparing these reports. Judge advocate managers at different levels require different types of information, with different degrees of detail. For example, staff judge advocates (SJAs) have a responsibility to ensure that they request no more information about the claims operations than they need to ensure that the goals of the claims program are being met. They also should ensure that their chief of claims is receiving and acting on more detailed information, appropriate for direct operational responsibility.

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[3] JAMES A. F. STONER & R. EDWARD FREEMAN, MANAGEMENT 6 (5th ed. 1992).

[4] PETER F. DRUCKER, THE EFFECTIVE EXECUTIVE (1966). Much of the remainder of this article is based on thoughts generated by this management primer.

[5] In the management vernacular, this is often referred to as "MBWA"—that is, management by walking around.

One of the secrets of effectiveness is concentration—that is, allotting sufficient time to work on a project so that it is not rushed to completion prematurely. Effective managers concentrate on one thing at a time so that their thoughts do not become muddled. They also select those matters that they believe need their attention and time, and do not allow outside pressures to dictate what is given priority. Because the typical JAG office is a highly reactive environment, this is not easy. Judge advocate managers at all levels in the office need to work at minimizing reactive time and maximizing active time. One method is to ensure proper delegation, so that action officers are empowered to act independently—under broad guidance—on routine matters that do not need the SJA or chief's direct input and supervision.

Managers must avoid becoming captives of the past. The effective manager does not rely on the status quo, but moves on to what must be done to succeed tomorrow. This managerial attitude allows for new ideas and activities, encouraging creativity in achieving results. Peter Drucker stated, "An organization which just perpetuates today's level of vision, excellence, and accomplishment has lost the capacity to adapt. And since the one and only thing certain in human affairs is change, it will not be capable of survival in a changed tomorrow."[6] The JAG manager who accepts "we've always done it this way" as the answer for an otherwise unjustified office procedure or practice ultimately is doomed to repeat the mistakes of his or her predecessors.

Building on Strength

Effective JAG managers not only know and use their own strengths, but know and use their subordinates' strengths as well. Too often managers focus on a soldier's or civilian employee's weakness and seek to put the individual in a position where that weakness is minimized. Unfortunately, this can result in that person's strengths being wasted. The SJA or branch chief interested in achieving results will assign personnel to positions where their strengths can both be best utilized and be challenged to develop to their fullness. No SJA rightly suffered because his or her subordinates were strong and effective.[7]

Judge advocate managers responsible for offices with civilian employees, and who can structure the organization or civilian jobs therein, must avoid rewriting job descriptions to meet the peculiar talents or strengths of a particular employee. Civilian job descriptions are supposed to be objective—that is, focused on the role that the position plays in the organization. The manager's job is to find the right person for each job. When a JAG manager structures an organization around a particular civilian employee, especially one with exceptional expertise, the organization is doomed to fail when that employee leaves. Finding someone who can perform at the same level usually is unlikely; ultimately the manager must reorganize to meet the new circumstances, which disrupts operations.

By placing a subordinate in a position based on his or her strengths, the effective JAG manager is meeting one of the Corps' goals—developing subordinates. But more is required than simply matching individual strengths with duties. The position should be one that challenges the subordinate to grow, expanding these strengths and, if possible, overcoming weaknesses. For example, an SJA may assign a judge advocate with good research and analytical skills, but undeveloped writing skills, to the administrative law section where he or she can draft opinions under the tutelage of the branch chief, a skilled writer. The effective JAG manager also takes time to coach and guide subordinates. Such activity is never a "time-waster," as long as the manager remembers not to take on the subordinate's work.

These principles on subordinate development are fairly obvious to most SJAs or major headquarters division chiefs vis-a-vis junior action officers. The best senior JAG managers also develop their intermediate (branch, section) managers. That all managers are self-starters, self-directing, and can operate on their own, is a myth.[8] Branch and section chiefs need focus, guidance, and feedback if they are to be effective partners with SJAs and division chiefs in achieving organizational goals. All intermediate managers have to know what the senior JAG manager feels is important, and how well they are accomplishing their assigned responsibilities. This nurturing of middle managers can occur in a variety of ways. One is to involve all managers in a unit or organization in defining the unit or organization's mission and goals. First-time branch and section chiefs are new to the management field, and for the senior manager to conduct periodic personal coaching directly focused on the subordinate's management and leadership skills (or lack thereof), is especially important. Relying on formal courses alone is short-sighted. A senior manager who does nothing more than share "war stories" about management problems or the pros and cons of managers that he or she worked for still passes on valuable information to the subordinate that has just moved into a managerial position. The most effective JAG senior managers are those who take the time to listen to branch and section chief concerns and problems with mission accomplishment and personnel conflicts, and help the branch or section chief work out sound management solutions. These JAG managers are ensuring that the Corps will have good senior managers in the future.

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[6] DRUCKER, *supra* note 4, at 57.

[7] A word about the "whole man" concept. Although it may sound like an admirable equalitarian approach to personnel management, it actually hides what a person can do, thereby promoting mediocrity. *Id.* at 74.

[8] For a more fully developed view on this subject, *see* Clinton O. Longnecker & Dennis A. Gioia, *SMR Forum: Ten Myths of Managing Managers*, SLOAN BUS. REV., Fall 1991, at 81.

In the latest edition of their popular book, *The Managerial Grid III*, Professors Blake and Mouton focus on the interplay between a manager's concern for production and people.[9] On their grid, they display a variety of managerial styles. In a military environment with its emphasis on mission accomplishment, falling into what is called "authority-obedience management"—where production is the chief management concern—is easy. In simple terms, this management approach views people mainly in terms of their ability to contribute to production. The manager wields the authority and the subordinates obey. The manager watches work closely—"micromanages"—and little room for creativity exists—"just follow the standard operating procedure."

Forces in the workplace, like those identified in the Families and Work Institute study, are making "authority-obedience management" counter-productive. The human resources school of management has become the dominant management school today. As managers see their capital resources shrinking in a tight economy, they realize that they must pay attention to the human contribution if they want to improve efficiency and work output. Workers today increasingly seek self-fulfillment and a sense of personal contribution rather than simply money and advancement. An annual "top block" and end of tour award for everyone will fail as the "opiate of the masses" in this new environment. Alice Sargent, a consultant and lecturer in organizational development and managerial efficiency, advises that:

> Managers need the traditional skills of planning, organizing, and directing as well as the new interpersonal competencies. Open communication is essential for feedback, cooperation, and participation, and is critical for planning and strategic management. Continued give-and-take gives workers a sense of shared responsibility and ownership in the enterprise. This will be crucial in the turbulent times ahead, with scarce resources available to solve complex problems.[10]

Returning to Blake and Mouton's grid, the optimum management approach is "team management."[11] This approach combines high concern for production with high concern for people. It is based on a recognition of the interdependence of people engaged in productive work, and deals with relationships between people. Goals are attained because the people understand and agree with them; often they help develop them. Control is not removed, but is achieved by having everyone involved in planning so that all share concern for production and possess the desire to accomplish the organizational goals. It recognizes that people and production are interconnected.

For team management to succeed in a JAG office, the senior JAG manager must apply management principles—especially those dealing with human behavior—in such a way that the goals of the worker and the organization coalesce. This approach to management is consistent with traditional concepts of military leadership. General of the Army Omar Bradley said that a leader must project an energizing power that marshals and integrates the best efforts of his subordinates.[12] A leader, he said, also possesses human understanding and consideration of others, and encourages subordinates to speak up and disagree. Whether you call this "leadership" or "motivation," it is an important element of effective managership. It involves focusing equally both on contributions, standards, and level of work (production), and on relations with others (people). It is exemplified in two-way communications, which is basic to sound and effective teamwork.

Judge advocate managers who want the Corps to succeed in the future, with all of its complexities and uncertainties, must become more concerned about managing and leading, and not just assume that everything will fall into place. Effective JAG managers will be those who are not only in charge of time and priorities, but who also ensure that their subordinates meet their own challenges to excel. They will be team managers, as concerned with their people as they are with results. In so doing, these JAG managers will be "caring leaders" who provide opportunities for development and advancement, provide a professional work environment that promotes pride in the practice of military law, and ensure that the best people are retained and trained to be the senior JAG managers of tomorrow. The result will be a stronger JAG Corps better equipped to serve the Army and its soldiers.

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[9] ROBERT R. BLAKE & JANE S. MOUTON, THE MANAGERIAL GRID III (1985).

[10] ALICE G. SARGENT, THE ANDROGYNOUS MANAGER 79 (1983).

[11] BLAKE & MOUTON, *supra* note 9.

[12] General of the Army Omar N. Bradley, *Leadership*, PARAMETERS, Winter 1972, at 2-8.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial whose records of trial were received by the Army Judiciary during the first three quarters of Fiscal Year 1994 are shown below.

General Courts-Martial

	1Q,FY94	2Q,FY94	3Q,FY94
Records received by Clerk of Court	168	210	207
Days fr chgs or restnt to sentence	49	58	49
Days from sentence to action	65	70	72
Days from action to dispatch	7	11	7
Days en route to Clerk of Court	8	9	9

BCD Special Courts-Martial

Records received by Clerk of Court	36	39	40
Days fr chgs or restnt to sentence	37	42	30
Days from sentence to action	64	58	55
Days from action to dispatch	6	8	8
Days enroute to Clerk of Court	8	10	9

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES

RATES PER THOUSAND

Third Quarter Fiscal Year 1994; April-June 1994										
	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.45	(1.80)	0.37	(1.49)	0.52	(2.09)	1.06	(4.25)	1.10	(4.40)
BCDSPCM	0.17	(0.68)	0.16	(0.65)	0.26	(1.04)	0.12	(0.49)	0.41	(1.65)
SPCM	0.02	(0.09)	0.03	(0.10)	0.03	(0.10)	0.00	(0.00)	0.00	(0.00)
SCM	0.15	(0.59)	0.18	(0.70)	0.08	(0.31)	0.10	(0.41)	0.14	(0.55)
NJP	18.60	(74.42)	19.59	(78.37)	17.66	(70.65)	20.70	(82.81)	18.97	(75.89)

Note: Based on average strength of 554,773
Figures in parentheses are the annualized rates per thousand

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (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 12) is reproduced below:

This month's *Bulletin* includes a summary of state deadlines for submitting applications under Title V of the Clean Air Act and an information paper on the recent court order in the Pease Air Force Base case.

Resource Conservation and Recovery Act (RCRA)

Corrective Action

Recently, some Environmental Protection Agency (EPA) Regions have asserted RCRA corrective action authority against Army and Air Force installations that have, or previously had, interim status. For example, in June 1993, EPA Region VI proposed a RCRA 3008(h) Corrective Action Order at an Army installation that had withdrawn its permit application for an open burning/open detonation (OB/OD) site. The installation responded by incorporating Region VI's concerns in their Installation Restoration Program (IRP) and securing funding for the expanded requirements. Headquarters, Department of the Army, also briefed Region VI regarding the impact that Corrective Action Orders would have on Army-wide efforts to clean up sites on a worst to first basis under the IRP. The issue lay dormant until August 1994 when Region VI again proposed to issue an order. Generally, the Army will seek to negotiate an order that, at a minimum, recognizes work already accomplished under the IRP. The Air Force is facing similar orders in Regions IV and VI. In all three cases, negotiations have begun in the hopes of achieving an appropriate order. Because Corrective Action Orders will impact the Army's strategy for cleaning up sites, installations must provide proposed orders to their Major Command (MACOM) and the ELD expeditiously. Captain Cook.

Munitions Interim Policy Guidance

A couple of environmental news services have reported that installations could face fines if they adhere strictly to the Army's guidance on the application of current RCRA regulations to conventional explosive ordnance operations. A Department of Defense (DOD) working group drafted the guidance after studying RCRA regulations to determine how current requirements applied. While awaiting DOD action, the Navy, Army, and Air Force issued the guidance as Service policy in September 1993, November 1993, and January 1994. In November 1993, the DOD forwarded the guidance to the EPA for comments; the EPA returned their comments on 23 June 1994. The EPA acknowledged that "[t]his guidance improves upon the *Army Regulation 200-1*, paragraph 6-7 guidance, in that it more closely reflects the current RCRA rules and policies and has helpful diagrams." In addition to specific comments on particular provisions, the EPA stressed the following three general points that installations should note:

> 1. Department of Defense installations should work closely with their state regulators and not rely solely on federal guidance;
>
> 2. Any national guidance inevitably will be general, thereby necessitating communication with regulators regarding specific issues or site-specific situations; and
>
> 3. A few areas addressed in the guidance—that is, firing ranges and unused propellant bags—are still under review at the EPA and will be resolved in the waste munitions rulemaking.

Currently, none of the Services plans to revise the guidance. While the Services believe that the guidance is an accurate statement of the law and regulation, installations should coordinate with their federal, state, and local regulators when in doubt. At least one state, Oklahoma, reviewed the guidance and noted that it is "consistent with current interpretation of [Oklahoma] regulations." As always, contact your MACOM environmental law specialist or the ELD if you have questions. Major Bell.

Natural Resources

Ecosystem Update

The White House Ecosystem Management Initiative continues to roll along. The Interagency Task Force, chaired by the Director of the White House Office of Environmental Policy, is scheduled to complete its final draft report on ecosystem management by 4 November 1994. The findings and recommendations of this report will be important because they will eventually change the way that we manage our natural resources. Major Fomous.

Environmental Compliance Assessment System (ECAS)

ECAS and Installation Status Reports

Plans are underway to revise the way that the Army self-assesses its environmental compliance status. The ECAS has worked extremely well in identifying compliance and management issues at Army installations. The next step in the process is to ensure that the status of compliance can be tracked on an on-going basis, not just every four years. An internal assessment, conducted by installation or MACOM

personnel, can accomplish this. The Installation Status Report (ISR) Part II will be used to track compliance and management issues. The Army Environmental Center is coordinating an effort to develop an ISR relating to environmental issues that can be used as a leadership tool. The ISR Part II will be identified as an Annual Environmental Self-Assessment in *Army Regulation 200-1*,[1] but will be distinct from the ECAS. The format of the ISR will reflect the status of media compliance—such as, air and water—and will be grouped by environmental strategy pillars: Compliance, Conservation, Pollution Prevention, and Restoration. Implementation of the ISR Part II could begin by spring 1995. The ELD will provide notification of the start date. Mr. Nixon.

Statute of Limitations

The Case of Minnesota Mining and Manufacturing Co. v. EPA, CA DC[2]

On 9 May 1994, the United States Court of Appeals for the District of Columbia Circuit rejected the EPA's request for partial review of its ruling that the federal limitations statute at 28 U.S.C. § 2462 applies to all federal civil suits seeking administrative penalties unless Congress specifically provides otherwise. The EPA sought rehearing to convince the court that the date when the EPA could "reasonably discover the violation" should trigger the statute, not the date that the violation occurred. The EPA had sought a $1.3 million penalty for Toxic Substances Control Act reporting violations, some of which were time-barred by the five-year general federal statute of limitations. To promote consistent application, the Director of the Office of Regulatory Enforcement provided guidance to EPA regional counsel.[3] The memorandum outlines the EPA's strategy for addressing the statute of limitations question in other cases, including circumstances that the EPA feels are unaffected by the *3M* decision. While the EPA acknowledges that while *3M* is binding precedent in the United States District Court for the District of Columbia, "we are actively seeking to identify suitable test cases outside the D.C. Circuit." Because the Federal Facility Compliance Act's expanded waiver of sovereign immunity is not retroactive—that is, prior to 6 October 1992—*3M* may be of limited use to Army installations in defending against civil penalties imposed for RCRA violations. The EPA also is drafting a memorandum regarding application of the federal statute of limitations to continuing violations—such as, violations for which penalties accrue until the violation is corrected. The ELD will let you know when this guidance is issued. Major Bell.

Clean Air Act (CAA)

Proposed Changes to Refrigerant Technician Certification Rule

On 14 May 1993, the EPA promulgated a rule establishing a program for recycling ozone-depleting refrigerants recovered during the servicing or disposal of air conditioning and refrigeration equipment.[4] The refrigerant recycling rule mandates the testing and certification of refrigerant technicians by 14 November 1994. The EPA now proposes to further amend the rule to allow for certification of technicians who have successfully completed an unapproved certification program.[5] For technicians to be eligible for certification, the administrator of the unapproved program must apply for grandfathering in accordance with the proposal. Additionally, the EPA proposes to extend the certification deadline (to six months from the publication of the final amendment) for technicians who have successfully completed a program that applies for grandfathering. All other technicians must meet the 14 November 1994 deadline. Environmental law specialists should pass this information on to the appropriate technical personnel. Major Teller.

Clean Air Act—Title V Operating Permit Program State Application Deadlines

The following state deadlines have been obtained by contacting each state's air quality office. The EPA has not approved the deadlines and they are subject to change. Installations that must obtain a Title V operating permit must independently confirm their state's application deadline. Many deadlines are dependent on the date of EPA approval of the state's Title V program, which will vary widely and cannot be accurately determined at this point. While the CAA imposes a 15 November 1994 deadline for EPA approval of state programs, in many cases the deadline will not be met. Installations in states with application deadlines dependent on the date of EPA approval should closely monitor the status of their state's program.

For an installation to continue to operate after the application deadline and before issuance of a Title V permit, it must submit a "timely and complete" application. Submission of a timely and complete application creates an "application shield" that allows the installation to continue to operate pending issuance of the Title V permit, which could take several

[1] *Department of the Army, Regulation 200-1, Environmental Quality: Environmental Protection and Enhancement* currently is being revised.

[2] 17 F.3d 1453 (D.C. 1994).

[3] *See* Memorandum, Director, Office of Regulatory Enforcement, subject: Guidance on the Application of the Federal Five-Year Statute of Limitations to Administrative and Judicial Civil Penalty Proceedings (13 July 1994) (available on the Legal Automated Army-Wide System electronic bulletin board, Environmental Law Conference at "SOFL.WP5").

[4] 42 C.F.R. § 82.161 (1993). The EPA published an amendment to this rule on 19 August 1994; *see* 59 Fed. Reg. 42,950 (1994).

[5] 59 Fed. Reg. 41,968 (1994).

years. An application is deemed "complete" unless the state notifies the installation that the application is "incomplete" within sixty days after the application is submitted. If the state notifies an installation that its application is "incomplete" after the deadline has passed, the application will not be "timely" and the installation will not have the benefit of an application shield. Consequently, installations should file their Title V applications at least ninety days before the state's filing deadline. This will allow an installation sufficient time to correct an "incomplete" application and make a "timely" submission prior to the application deadline. Major Teller.

Alabama

One third of sources (randomly selected)—15 February 1995; remaining sources twelve months after EPA approval. Fort Rucker is in the first group.

Alaska

Twelve months from EPA approval.

Arizona

For SIC Code 97[6]—1 May 1995.

Arkansas

Six months after notification from the state. State expects to begin issuing notices in November 1994.

California

Twelve months after EPA approval.

Colorado

Twelve months after EPA approval (some nonmilitary sources are required to file earlier).

Connecticut

Twelve months after EPA approval.

District of Columbia

Twelve months after EPA approval. The District of Columbia will send notification letters recommending that smaller sources (less than 150 tons per year) apply within eight months of EPA approval.

Florida

Three deadlines based on type of facility: 2 April 1994—power plants and facilities subject to the New Source Review (NSR) or Prevention of Significant Deterioration (PSD) programs; 2 July 1995—facilities subject to the National Emissions Standards for Hazardous Air Pollutants (NESHAPs) and the New Source Performance Standards (NSPS) programs; 15 July 1995—all other facilities.

Georgia

Undetermined. The state has tentatively proposed the following schedule: March 1995—major sources in nonattainment areas; September 1995—major sources in attainment areas; January 1996—all other major sources. Synthetic minor source applications—1 January 1995.

Hawaii

26 November 1994 (some nonmilitary sources required to submit earlier).

Idaho

Three deadlines: 1 December 1994, 1 March 1995, or 1 June 1995. State will assign deadline for each facility, attempting to accommodate each facility's choice.

Illinois

Three to twelve months after EPA approval according to SIC code; for SIC code 97—nine months.

Indiana

Twelve months after notice (for one third of sources, notification is to begin in September/October 1994) or twelve months after EPA approval.

Iowa

Three-part application process. Part One (inventory and fee) due 15 November 1994; Part Two (compliance plan and schedules) due 15 May 1995; and Part Three (certification) must be submitted with both Parts One and Two. Voluntary application for synthetic minors—1 March 1995.

Kansas

Staggered from six to twelve months after EPA approval.

Kentucky

Twelve months after EPA approval.

Louisiana

Twelve months after EPA approval.

[6]The EPA and states generally classify military installations as Standard Industrial Classification (SIC) Code 97—National Security. STANDARD INDUSTRIAL CLASSIFICATION (SIC) CODE MANUAL (1987).

Maryland

For SIC code 97—twelve months after EPA approval.

Massachusetts

Three groups by SIC code; SIC code 97—due between 1 July 1995 and 1 September 1995.

Michigan

For SIC code 97—15 October 1996.

Minnesota

From 15 October 1994 through 15 November 1995 depending on SIC code; SIC code 97—15 November 1995. The state is proposing to shorten each deadline by three months, accordingly, for SIC code 97, the deadline would be 15 August 1995.

Mississippi

Twelve months from EPA approval (for some SIC codes six months, but not SIC code 97).

Missouri

First group—sixty days after EPA approval; second group—twelve months after EPA approval. First group is made up primarily of volunteers.

Montana

One third of sources already notified to submit thirty days after EPA approval; remaining sources—twelve months after EPA approval.

Nebraska

Twelve months after EPA approval.

Nevada

Twelve months after EPA approval.

New Jersey

SIC code 97—15 August 1995.

New Mexico

Sources with 1987 or later state operating permit—forty-five days after EPA approval; with pre-1987 operating permit—six months after EPA approval; no state operating permit—twelve months after EPA approval.

New York

Brief application due twelve months after EPA approval; for SIC code 97 final application due forty-eight months after EPA approval (uncertain whether the EPA will approve this application schedule).

North Carolina

For SIC code 97—sixty days after EPA approval.

North Dakota

Two application deadlines: 15 February 1995—oil and gas industry major sources; 15 November 1995—all other major sources.

Ohio

Staggered from sixty to 365 days after EPA approval.

Oklahoma

Twelve months after EPA approval.

Oregon

Twelve months after EPA approval.

Pennsylvania

The state is administering its program through its six regional offices. Each region will independently issue calls to source groups. Applications will be due within 120 days of call by the region or within one year after the state's permit regulations are finally published (final publication expected in January 1995).

South Carolina

Sources randomly assigned a deadline from 15 February 1995 through 15 November 1995 (Fort Jackson—15 July 1995).

South Dakota

Undetermined. State expects to first issue Title V permits to those sources that have existing air permits.

Tennessee

Volunteers—120 days after EPA approval (incentives offered); all others—twelve months after EPA approval.

Texas

SIC code 97—three years after EPA approval of interim program.

Utah

Three months after EPA approval.

Vermont

Undetermined. The state is still developing its regulations and is considering two options: (1) identifying a specific schedule

for sources in the regulation or (2) establishing a call mechanism. Forms and regulations should be available after November 1994.

Virginia

Undetermined, but will be no later than twelve months after EPA approval.

Washington

180 days after EPA approval.

Wisconsin

Staggered from 1 May 1994 to 1 October 1995 (Fort McCoy—1 March 1995; Badger AAP—1 June 1994).

Wyoming

Twelve months after EPA approval.

The Pease Air Force Base (AFB) Case

Pursuant to a decision by the Commission on Base Realignment and Closure (BRAC), Pease AFB, New Hampshire, was closed on 31 March 1990. The Air Force issued a Final Environmental Impact Statement (FEIS) on the disposal and reuse of the base on 14 June 1991. The FEIS concluded that the proposed redevelopment plans would impact on New Hampshire's ability to meet the air quality milestones mandated by the CAA Amendments of 1990. As a result of subsequent discussions with the EPA, the Air Force conducted further air quality analysis and the redevelopment authority entered into a Memorandum of Understanding (MOU) with the EPA and the state on 1 August 1991. Under the terms and conditions specified in the MOU, the parties agreed that redevelopment of Pease could go forward in compliance with the CAA. The Air Force issued an initial Record of Decision (ROD) on 20 August 1991, containing a conformity determination in accordance with CAA § 176(c)[7] and incorporating the terms of the MOU as the basis for the conformity determination. Subsequently, the Air Force updated the conformity determination in a memorandum for record, dated 20 March 1992.

On 13 April 1992, the Air Force issued a Supplemental ROD (SROD), modifying its plan to transfer parcels to the reuse authority. The SROD states that because of contamination on most of the reuse parcels, the Air Force cannot immediately transfer the affected parcels by deed. Specifically, the Air Force cited its inability to meet the requirement of § 120(h)(3)[8] of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that "all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer. . . ." The SROD states, however, that, as an alternative to transfer by deed, the Air Force will grant a long-term lease to allow the redevelopment to proceed pending compliance with the requirements of CERCLA § 120(h)(3). The SROD provides that the lease will convey the same degree of control as a deed. Consequently, after making a Finding of No Significant Impact (FONSI) for the long-term leasing action, the Air Force executed a fifty-five-year lease to the redevelopment authority.

In *Conservation Law Foundation (CLF) v. Air Force*,[9] the plaintiffs challenged the Air Force's actions regarding disposal and reuse of Pease AFB, citing violations of the National Environmental Policy Act (NEPA), the CAA, and the CERCLA. On 29 August 1994, the court entered an order granting in part and denying in part the motions for summary judgment filed in the case. In summary, the court held as follows:

CAA § 176(c) General Conformity Requirement.

The court held that the Air Force met the general conformity requirement of CAA § 176(c.)[10] Significantly, the court assumed that the CAA § 176(c) conformity requirement applies to both National Ambient Air Quality Standards (NAAQS) attainment and nonattainment areas. Additionally, the court held that the Air Force properly determined conformity with respect to New Hampshire's State Implementation Plan (SIP) and did not need to consider conformity with respect to the SIP for the adjoining state of Maine. Finally, the court found that the timing of the conformity determination met the requirements of CAA § 176(c).

NEPA

The court ordered the Air Force to conduct a Supplemental EIS (SEIS) within one year of the order. In so ordering, the court concluded as follows.

> (1) The sixty-day limitation on bringing NEPA challenges contained in the Base Closure and Realignment Act of 1988,[11]

[7] 42 U.S.C.A. § 7506 (West 1994).

[8] *Id.* § 9620.

[9] No. C-92-156-L (D.N.H. Aug. 29, 1994).

[10] Note that the Air Force's actions in the Pease case are grandfathered under the EPA's General Conformity Rule, effective 31 January 1994, which imposes stringent new substantive and procedural requirements in making conformity determinations.

[11] 10 U.S.C. § 2687 (1988).

only applies to matters arising prior to the closure or realignment action, not to matters after closure or realignment relating to the disposal or reuse. Consequently, the sixty-day limitation in the BRAC did not apply to the plaintiff's challenge to postclosure actions relating to the disposal and reuse of Pease AFB.

(2) The Air Force violated the NEPA in failing to prepare an SEIS after conducting a conformity analysis and developing conformity information after the FEIS. The failure to prepare an SEIS violated the NEPA public disclosure requirements.

(3) The FEIS was inadequate in failing to address the air quality impacts on the state of Maine, even though the Air Force was not required to consider such impacts in making a conformity determination under CAA § 176(c).

(4) The FEIS was inadequate in failing to analyze air quality mitigation measures related to the reuse and redevelopment of Pease AFB. The court held that the transfer of the property for reuse did not relieve the Air Force of the responsibility to evaluate mitigation measures related to the reuse.

(5) The EIS was inadequate in addressing the impact of the reuse on wetlands. The FEIS merely stated that "while it may be possible to complete development without filling any wetlands, the ultimate responsibility lies with the developer."[12] The court held that the FEIS must contain a "thorough examination of the environmental impact of the Pease development of the wetlands and a discussion of the mitigation alternatives."[13]

CERCLA.

Transfer of contaminated parcels to the redevelopment authority under a long-term lease arrangement, without a comprehensive remedial program in place and proven to be successful, violates CERCLA § 120(h). The court declined to issue a preliminary injunction voiding the lease, however, finding that the plaintiffs did not demonstrate the necessary irreparable harm. The court ordered that the SEIS "include a discussion of the current IRP status and delineate a remedial design."[14] Presumably, the court will revisit the issue on completion of the court-ordered SEIS.

The court's order raises the following concerns for Army installations:

1. Base realignment and closure installations may be precluded from leasing property for reuse pending compliance with CERCLA § 120(h). This may substantially delay reuse at some BRAC installations.

2. Final environmental impact statements must include a discussion of any conformity analysis and determinations made pursuant to CAA § 176(c). Failure to do so could result in having to prepare an SEIS to meet the public disclosure requirements of the NEPA.

3. The NEPA documentation prepared for actions in NAAQS attainment areas must thoroughly address the general conformity requirement of CAA § 176.

4. For BRAC reuse and redevelopment actions, the NEPA documentation must adequately address the air quality impacts of the proposed reuse and mitigation of those impacts. Major Teller.

[12] *Conservation Law Foundation*, No. C-92-156-L, at 51.

[13] *Id.* at 52.

[14] *Id.* at 60.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

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.

The Fort Riley Preventive Law Program

Introduction

Implementation of the new federal wage garnishment statute is scheduled to begin in October of 1994. How can an overworked, under-resourced installation legal assistance office (LAO) adequately and effectively warn thousands of soldiers about this major financial event and others without reducing existing client services?

This note outlines the 1994 Fort Riley Preventive Law Program and discusses one way that LAOs can market and deliver preventive law services to soldiers. All LAOs should aggressively approach preventive law with the prospect of eliminating "legal casualties" before they walk on the battlefield and into your office. Under the framework of *Army Regulation (AR) 27-3*, legal assistance attorneys can become more creative in their preventive law efforts with the goal of reducing their overall client work load.

AR 27-3: *The Army Legal Assistance Program*

The new legal assistance program allows Army leaders the flexibility to respond to legal assistance crises.[1] *Army Regulation 27-3* also gives LAOs guidance on how preventive law programs can be utilized to prevent legal assistance emergencies such as the impending involuntary allotment legislation.

Army Regulation 27-3 defines the mission of the Army Legal Assistance Program as assisting soldiers with their personal legal affairs in a timely and professional manner by:

(1) Meeting their needs for information on personal legal matters; and

(2) Resolving their personal legal problems whenever possible.[2]

The first part of this mission addresses preventive law. Legal assistance attorneys must inform soldiers and their families of critical legal issues and available services so that their conduct does not create legal difficulties or unnecessary expenses.[3] Legal assistance offices are charged with the responsibility of delivering timely information and help to members of the military community on their personal legal affairs.

Army Regulation 27-3 directs that the common legal problems of soldiers and their families be examined for ways in which those problems can be avoided, that common sense or legal solutions be recommended, and that solutions be shared with other attorneys providing legal assistance.[4] Instruction on the "legal landmines of life" can help soldiers and their families make better and informed decisions.

The Fort Riley Preventive Law Program

The Problem

The Fort Riley LAO saw an immediate need to increase the emphasis on preventive law services. Recent legislation allowing creditors to request involuntary allotments against soldier's pay prompted the decision to improve an existing preventive law program. Additionally, repeated problems in the areas of debt management, consumer sales contracts, consumer scams, bad checks, voluntary auto repossession, and landlord-tenant issues sparked the idea for a frontal attack against recurring problems plaguing Fort Riley soldiers.

The Fort Riley Solution

The Fort Riley LAO developed a three-pronged preventive law program to address common legal hazards facing Fort Riley soldiers as outlined and discussed below.

The Preventive Law Card (PLC)

The Fort Riley LAO developed a tri-fold wallet-sized reference card for soldiers highlighting information such as the

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[1] Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW., May 1993, at 3.

[2] DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 2-1a (30 Sept. 1992) [hereinafter AR 27-3].

[3] *Arquilla, supra* note 1, at 8.

[4] AR 27-3, *supra* note 2, para. 3-4a(1). *See Arquilla, supra* note 1, at 35.

LAO location, telephone number, available services, and the common legal pitfalls encountered by Fort Riley soldiers.[5] The card is designed in the tradition of the graphic training aid (GTA) routinely distributed to soldiers on various military subject areas. The Fort Riley LAO sought to place something in the soldier's hands that would not end up in the waste basket or on the floor at the end of a preventive law briefing. Making the PLCs wallet-size increases the chances that soldiers will retain and use them when needed.[6] The PLC contains the essence and character of the preventive law briefing while providing soldiers with a permanent, readily accessible legal reference.[7]

The PLC is widely distributed to clients seen in the LAO, at soldier readiness programs, inprocessing and outprocessing briefings, family support briefings, retirement briefings, and preventive law briefings. The goal of the Fort Riley LAO is to place a PLC in the hand of every soldier on the post—to include the Commanding General.[8]

The Preventive Law Briefing (PLB)

Army Regulation 27-3 requires that "training and education programs" be used to inform soldiers and their families of timely legal issues and local legal problems and concerns.[9] The PLB is a unique tool that can be used to deliver important legal information to soldiers.

The Fort Riley LAO strives to give a PLB that is short, simple, captivating, and *useful* (no dry legal nonsense) to every soldier in the division. The Fort Riley LAO currently uses the PLB as a forum to inform soldiers of important issues—such as, the impending involuntary allotment legislation—remind soldiers about free tax services available at the installation tax center, discuss Kansas's bad check and postdated check laws, and alert soldiers to common consumer scams operating around the installation.[10] The PLB's format is "road ready"; that is, the PLB can be given indoors or outdoors, in garrison or in the field environment. "War stories," charts, and other portable visual aids are used during the briefing to pique soldiers' interest and generate questions.

The PLB can be a LAO's best opportunity to meet soldiers and make a favorable impression on the local command. Preventive law programs support the unit's military mission and contribute directly to readiness, morale, discipline, and the quality of life of a unit's soldiers.[11] Commanders appreciate PLBs because the briefings target those soldiers most likely to fall prey to "legal landmines" and create annoying problems for the command. *Army Regulation 27-3* requires commanders to sponsor preventive law initiatives,[12] and makes them responsible for ensuring that preventive law services are provided in their commands.[13] Staff Judge Advocates are required to seek "command support and involvement" on their own preventive law initiatives,[14] and are encouraged to be aggressive and innovative in their preventive law efforts.[15]

Some suggestions may help your LAO coordinate PLBs.[16] The starting point for all PLBs is a good unit point of contact. Your criminal law division should be able to effectively develop these points of contact. Each criminal law attorney is assigned to specific units within the command. If your LAO is large enough, divide PLB responsibility among legal assistance attorneys to match the criminal law division's unit assignments. Then ask the criminal law attorneys to contact each of their assigned unit's Battalion Executive Officer or S-3 in charge of training, and inform them that Captain *X*, a legal assistance attorney, will call in the near future to sched-

[5] *See* Appendix for a copy of The 1994 Fort Riley Preventive Law Card. Special thanks to Trial Defense Service attorney Captain Wilhelm F. Bierman for his assistance in the design of the PLC. The PLC was designed "in-house" on Microsoft Word 6.0 and printed at the post printing facility.

[6] The Fort Riley LAO decided that a wallet-sized card would be more effective than a legal pamphlet or guide for distribution to soldiers. The logic behind using the PLC over a multipage legal guide was the ease of development and update, lower printing costs, and the greater chance that a soldier will retain the PLC over time.

[7] In addition to the legal assistance information provided, the PLC contains claims information highlighting common errors soldiers make when filing claims for missing or damaged household goods and privately owned vehicles.

[8] As of 1 May 1994, the Fort Riley LAO printed 12,500 PLCs and distributed over 9500 PLCs to soldiers during the months of February through April 1994—the inception of Fort Riley's new preventive law program.

[9] AR 27-3, *supra* note 2, para. 3-4b.

[10] At the request of the sponsoring unit command, additional topics discussed at PLBs include the need and uses of wills and powers-of-attorney; military tax information; and landlord-tenant issues such as irregular termination, eviction, landlord-tenant rights and duties, and security deposit refund issues.

[11] AR 27-3, *supra* note 2, para. 2-1b.

[12] *Id.* para. 1-4f(3). *See Arquilla*, *supra* note 1, at 35.

[13] AR 27-3, *supra* note 2, para. 3-3a.

[14] *Id.* para. 1-4g(8).

[15] *Id.* paras. 1-4g(9), 3-3b.

[16] If you regularly conduct PLBs, this information may help in streamlining existing LAO procedures.

ule a PLB. The criminal law attorney has likely developed a favorable rapport with the battalion POC and will clear the way for your preventive law efforts.[17]

If units are reluctant to schedule a PLB because of time constraints, be flexible. Plan PLBs to coincide with some other activity of the unit, such as payday activities, mandatory ethics briefings, law of war briefings, or soldier readiness programs. Legal assistance attorneys can present PLBs anywhere and at anytime on a moment's notice. If you work closely with your local Army Community Services (ACS) office, you also may want to schedule the ACS to join your PLB to discuss ACS-related services. A well-polished and informative PLB creates a favorable impression about legal assistance in the command. The highest compliment a LAO's preventive law program can receive is a call from a unit requesting a PLB for their soldiers.[18]

Maximize Use of Available Media

Use the local media to publish preventive law articles and messages to the military community. *Army Regulation 27-3* requires that "local print and electronic media" programs be used to inform soldiers and their families of their legal rights and entitlements; local legal problems and ways to avoid them; and the location, telephone numbers, and hours of operation of the legal assistance office.[19]

Media generally available to LAOs on Army installations include the post newspaper, television production facilities, and a command cable television message channel. While LAOs often use the print medium, video and television resources usually are not considered as a preventive law tool but can be equally effective.

The Fort Riley LAO writes a weekly consumer article for the post newspaper. The weekly column focuses on menacing consumer issues facing local soldiers. Weekly articles discuss federal law and Kansas state consumer law issues with primary importance placed on issues directly impacting the military community. In addition to the weekly column, the Fort Riley LAO submits a monthly article for the post newspaper dealing with other legal issues affecting the military community.

Larger installations are equipped with television facilities capable of producing video messages. Video presentations are very useful as a preventive law tool. The Fort Riley LAO is experimenting with the development of a video instruction program (VIP). The VIP will consist of a series of short video presentations educating clients on major preventive law issues such as consumer scams, involuntary allotment legislation, bad check laws, debt management, and landlord-tenant issues. The VIPs are designed to operate for the benefit of legal assistance clients while they sit in the LAO waiting room.

Fort Riley also has a command cable information television channel where preventive law messages air regularly. This form of medium is used to announce time-essential information. Cable messages air to a wide audience and do not exhaust valuable LAO resources.

Conclusion

Preventive law is a significant area of legal assistance. As the adage goes, "an ounce of prevention *is* worth a pound of cure," because prevention is much easier to administer than the cure. Keeping a client out of legal trouble is more important than assisting that individual with damage control after the mistake has been made.

The pursuit of an expanded preventive law program can require valuable attorney resources not readily available. To shepherd the masses in every legal area is impossible. Smaller LAOs should adopt an evolutionary approach to their preventive law program and keep it simple. Legal assistance office resources can be used more efficiently by tailoring preventive law efforts to critical legislation, local concerns, and legal problems repeatedly encountered by soldiers.

The Fort Riley LAO has not "cornered the market" on the preventive law program. Fort Riley does have, however, a well-defined program that focuses limited assets on a critical preventive law mission.[20] Captain Morris, Legal Assistance Attorney, First Infantry Division (Mech), Fort Riley, Kansas.

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[17] Criminal law attorneys should make initial contact with units targeted for a PLB. This practice avoids the common misconception among some units that all judge advocates are generic and serve as attorneys for the command. Legal assistance attorneys must clarify their roles as attorneys for the soldiers and not the command. Criminal law attorneys should initiate communication with units to avoid this inherent confusion concerning judge advocates' conflicting roles and loyalties.

[18] From February through April 1994, the Fort Riley LAO, with three attorneys, delivered PLBs to over 6000 soldiers in the command.

[19] AR 27-3, *supra* note 2, para. 3-4b.

[20] *Arquilla*, *supra* note 1, at 35.

Appendix

1994 Fort Riley Preventive Law Card

PREVENTIVE LAW CARD

Provided by the Staff Judge Advocate
Patton Hall (Bldg 200)
Fort Riley, Kansas 66442

Legal Assistance

The Soldier's Lawyer-239-3117/2820

Legal Advice On The Following Subject Areas Is Available:

- **Family Law:** Adoption, Custody, Divorce, Paternity & Support.
- **Landlord & Tenant Law:** Lease/Sales Agreements, Evictions.
- **Consumer Law:** Sales Contracts, Debt Collection Actions.
- **Military Admin Law:** Reports of Survey, OER/EER Appeals.
- **Immigration/Naturalization Law**
- **Bankruptcy Law**
- **Tax Preparation & Filing**
- **Wills/Powers-of-Attorney/Notary**

Credit Reports: Adverse credit info stays on your report for 7 years; Bankruptcy for 10 years. If denied credit due to a bad mark on your credit report, you have the right to know what Credit Reporting Agency provided this info. Request a copy of your report. Explain disputed info by placing a letter in your credit file for inclusion with future reports.

Used Cars: "AS IS" means what it says! Have the car inspected by a qualified mechanic before you buy.

Car Repairs: Most states require repair shops to give you a written estimate. Get a written estimate before you leave the shop.

Remember: If a deal sounds too good to be true, it is too good to be true!

Army Community Service: 239-9435
ACS Financial Planning Advice - 9-9450
Emergency After-Hours Service - 9-3052

Legal Landmines!

Consumer Scams & Door-To-Door Salesmen: DON'T GET RIPPED OFF! Watch out for magazine, life insurance, encyclopedia, and film processing contracts. HAVE YOUR JAG ATTORNEY READ THE CONTRACT BEFORE YOU SIGN!

Bad Checks: DON'T WRITE POST-DATED CHECKS! They can legally be cashed early. PAY OFF BAD CHECKS ASAP! If you don't, your creditor can collect over $500 in charges & fees. DON'T PAY $500 FOR A $10 PIZZA!

Garnishment: PAY DEBTS ON TIME! Otherwise, your creditor can sue you, obtain a judgment, apply to Army Finance, & take money directly out of your pay without your consent!

PCS & Debts: YOU CANNOT ESCAPE DEBTS BY PCS'ing! Notify creditors of your new address when you PCS. PROTECT YOUR CREDIT RATING! Pay creditors; otherwise, they can sue you and destroy your credit rating.

Deployment Issues:

Soldiers & Sailors Civil Relief Act: Soldiers whose military service prevents them from appearing at civil court proceedings may get a postponement. If you are involved in a lawsuit, DO NOT write or call the court before seeing your Legal Assistance Office first!

SGLI: Soldiers must designate all beneficiaries BY NAME. If you have minor children, talk to Legal Assistance about creating a trust within your will for SGLI insurance proceeds.

Wills/Powers of Attorney: Are your legal, financial, and personal affairs in order? Who will pay your bills during deployment? Make plans now, BEFORE YOU DEPLOY!

Family Care Plans: Review your plan. Make sure it is complete and up to date.

Voluntary Repossession: If you return your car to the dealer or bank to satisfy the loan, YOUR DEBT IS NOT PAID OFF! You still owe the loan balance, minus the resale price plus expenses of the sale.

Lease Agreements: PROTECT YOURSELF! Does your lease contain a Military Clause which allows you to break the lease if you come up on PCS or ETS orders? Conduct a walk-through inspection of the premises and document all pre-existing deficiencies on a paper signed by you and the landlord. NOTE: Oral promises by your landlord are not legally enforceable unless in writing!

Renter's Insurance: If your house, or quarters, or apartment burns, the value of your personal property can only be protected by renters' insurance. Consider insuring for "replacement value". Keep a record of what you own, to include serial numbers.

Claims

239-2633/3620

Household Goods: DON'T LET THE MOVERS RUSH YOU! Check items off the inventory sheet as they are brought into your home.

- List all missing and damaged items on DD Form 1840.
- READ THE FORMS! Don't rely on the mover's advice.
- You must file DD 1840 within 70 days of delivery or your recovery may be reduced.

POV'S: For theft & vandalism claims, you MUST also file a claim with your insurance company!

- Collision and hit & runs cannot be claimed.
- Maximum claim allowed for any car stereo system is only $500!
- **Large-Ticket Items:** RECORD ALL SERIAL NUMBERS! If an item is stolen, a serial number will help police track it down.

Landlord Tenant Relations

Legal assistance attorneys frequently face issues arising from the relationship of service member tenants and their landlords. Recently, a number of installations have adopted innovative and discrete approaches to these problems. The most effective may be a multifaceted approach, combining legislative advocacy, preventive law, community relations and, if necessary, litigation.

Camp LeJeune, North Carolina, tried the community relations approach. The legal assistance office, the local Chamber of Commerce, and the Board of Realtors formed a task force that created a form lease acceptable to all three parties. Unfortunately, the local Association of Landlords did not agree to the form lease and is attempting to prevent its use. Regardless of the outcome at Camp LeJeune, the community relations approach may be beneficial in other communities and is worth considering.

Another approach is an aggressive preventive law program. The following note from Fort Eustis, Virginia, illustrates the need for preventive law and discusses alternative approaches that attorneys may find useful in landlord-tenant cases. Major McGillin.

Early Termination and Landlord Maintenance Duties Assisting Service Members Before the Fact

Military service members are among the largest user groups of rental property. They regularly seek legal assistance in attempts to secure early termination of their lease agreements. Similarly, service members frequently turn to legal assistance attorneys for aid in prompting a landlord to make repairs or improvements to a rented premises. In both situations, service members are likely to consider their rights as tenants only after the need to avail themselves of such rights arises. Unfortunately, this usually occurs many months after signing their lease agreement.

Typically, service members' lease agreements may waive a number of their statutory and common law rights. While many states, like Virginia,[21] provide statutory tenant rights and landlord obligations, the majority of states also allow lease agreements to waive these rights. Consequently, when service members arrive at their post judge advocate general office with a landlord/tenant problem, they often already have waived the most effective tools available to the legal assistance attorney.

As a result, perhaps the most useful service that a legal assistance attorney can provide is to inform service members' about their statutory and common law landlord/tenant rights. Properly informed service members can detect waiver language and avoid the pitfalls of signing leases that contain this language. Outlined below is a brief summary of the more traditional statutory and common law rights afforded tenants, as they pertain to early termination and premises maintenance. While these rights may not be available in every state, they reflect the rights available in a majority of jurisdictions.

Warranty of Habitability

Over forty states now enforce some form of the common law remedy known as the implied warranty of habitability. This remedy imposes the assumption that property rented for residential purposes will be usable for that purpose. Fifteen states[22] have adopted the Uniform Residential Landlord Tenant Act (URLTA) which, although not referring specifically to a "warranty of habitability," contains provisions to that effect.[23] Additionally, the URLTA strictly prohibits lease agreements that contravene the rights provided for in that act—that is, providing an opportunity for redress even in a situation where the tenant may have signed a lease containing waiver language.[24] Most states, as is the case with those adopting the URLTA, employ compliance with state building and maintenance codes as an initial basis for determining whether a condition of habitability exists.[25]

Early Termination for Military Purposes

A number of states have enacted statutes that allow military members to terminate early if they: (1) have received permanent change of station (PCS) orders to depart thirty-five miles or more from the location of the dwelling unit; or (2) they are prematurely and involuntarily discharged or relieved from active duty.[26] Early termination for military purposes is incorporated in the Model Residential Landlord Tenant Act and as a result, in those states having adopted the URLTA, this right will not be waivable. However, the other thirty states typically recognize waiver.

Maintenance Duties

A number of states, including those adopting the URLTA, require that a landlord provide certain basic maintenance and services, such as water and heat to tenants. However, in all jurisdictions, including those adopting the URLTA, the landlord's maintenance duties may be altered or waived.[27] Furthermore, the large majority of standardized lease forms fail to provide terms that directly specify a landlord's duty to provide services that a tenant may view as essential and mistakenly assume are guaranteed regardless of the absence from lease terms. Air conditioning is an example of this. Tenants frequently seek repair or improvement of their air conditioning, but lacking a specific provision in the lease stating that air conditioning is provided, most jurisdictions will not enforce.

Many states make use of the state building or maintenance code to determine if a habitable condition exists. These codes

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[21] *See, e.g.*, VA. CODE ANN. §§ 55-248.2 to -248.40 (Michie 1994) (Virginia's adoption of Uniform Residential Landlord Tenant Act).

[22] To date, the following states have adopted the Model Residential Landlord Tenant Act in full: Alaska, Arizona, Connecticut, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, and Washington. 7B U.L.A. 44 (Supp. 1994).

[23] UNIF. RESID. LANDLORD TENANT ACT § 2.104, 7B U.L.A. 460 (1994).

[24] *Id.* § 1.403(a)(1), 7B U.L.A. 450.

[25] *Id.* § 2.104(1)(a), 7B U.L.A. 460.

[26] *See, e.g.* VA. CODE ANN. § 55-248.21:1 (Michie 1994) (service person transferred 35 miles away may terminate); ARIZ. REV. STAT. § 33.1413(E) (1994) (service members who receive late notice of change of station may terminate leases without penalty). Other states that have military clauses include: Delaware, Georgia, Kansas, Maryland, North Carolina, and Pennsylvania.

[27] UNIF. RESID. LANDLORD TENANT ACT § 2.104, 7B U.L.A. 460 (1994).

also may serve as a legal source for requiring improvement or repair of a rental property. A number of states[28] have adopted the model building and property maintenance codes published by the Building Officials and Code Administrators International, Inc. (BOCA). The BOCA Model Maintenance Code delineates a variety of maintenance requirements with considerable detail. Unfortunately, most state codes do not list these requirements, but instead require referencing the actual BOCA publications for the exact provisions.[29] Joseph R. Price, Summer Intern, Legal Assistance Office, Office of the Staff Judge Advocate, Fort Eustis, Virginia.

Tax Note

Tax Update for 1994 Federal Income Tax Returns

Legal assistance officers around the world now preparing for the 1994 federal income tax filing season may find this update useful in publicizing many of the numbers of most concern to military taxpayers.[30] Lieutenant Colonel Hancock.

Key Changes for 1994

The Omnibus Budget Reconciliation Act of 1993[31] imposed two changes that will affect many military taxpayers in 1994 and later years.

Moving Expenses

The first change applies to moving expenses, now an adjustment to gross income.[32] This change allows taxpayers to subtract moving expenses from their gross income without itemizing deductions on *Form 1040, Schedule A.*

The news is not all good, however, as moving expenses have been redefined narrowly. Moving expenses are now limited to the reasonable expenses—

> (1) of moving household goods and personal effects from the former residence to the new residence, and
>
> (2) of traveling (including lodging) from the former residence to the new place of residence.
>
> Such term shall not include any expenses of meals.[33]

This change eliminates these common moving expenses military taxpayers incur when moving: the cost of meals and lodging for premove househunting trips; temporary lodging costs (*e.g.*, meals and lodging for a brief time at the new location before settling into the new residence); costs incident to sale (or lease) of the old residence; and costs incident to purchase (or lease) of a new residence. Consequently, few military taxpayers will have any moving expenses that qualify for the new adjustment to gross income.

This change also has caused some confusion over the tax status of certain military allowances (*e.g.*, temporary lodging allowance (TLA), temporary lodging expense (TLE), dislocation allowance (DLA), and move-in-housing allowance (MIHA)).[34] The IRS has indicated that it will publish guidance to clarify that certain military allowances provided incident to PCS moves continue to be excludable from gross income despite the 1993 tax law changes. The guidance is expected to confirm the intent of the IRS to restore the tax treatment of our allowances to a status that existed before the 1993 change. Thus, TLA, TLE, and MIHA are not included in taxable income *at this time*. However, the excess of DLA over allowable moving expenses is still taxable income even though DLA is not included as income on a W-2 form.[35]

Charitable Contribution Substantiation

A second change that will affect those generous military taxpayers who are audited applies to charitable contribu-

[28] To date, 25 states (Maine, New Hampshire, Vermont, New York, Massachusetts, Connecticut, Rhode Island, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Kentucky, Indiana, Illinois, Wisconsin, Michigan, Missouri, North Dakota, Nebraska, Kansas, Oklahoma, Texas) have adopted part or all of the BOCA Model Building codes. In some cases, the codes only apply to part of the state.

[29] To obtain copies of the BOCA model codes you may contact the BOCA at: Building Officials and Code Administrators International, Inc., 4051 West Flossmoor Road, Country Club Hills, Illinois, 60478-5795, or by telephone (708) 799-2300. Costs for the manual range from $38 to $66 depending on the format and whether the ordering individual is a BOCA member.

[30] This update will be included in *JA 269, Tax Information Series*, a handbook of tax information flyers that The Judge Advocate General's School publishes annually in January. This publication contains a series of camera-ready tax information handouts that may be reproduced for use in local preventive law programs. This update also has been uploaded in ASCII format on the Legal Automation Army-Wide System Bulletin Board as 94FTAXUP.ZIP. The 1995 edition of *JA 269* will be uploaded before the end of January 1995.

[31] Pub. L. No. 103-66 (1993).

[32] I.R.C. §§ 62(a)(15), 217 (RIA 1994).

[33] *Id.* § 217(b).

[34] *See* TJAGSA Practice Note, *Moving Expense Allowances Not Taxable*, ARMY LAW., Aug. 1994, at 60. This note reprints Message, Headquarters, Dep't of Army, DAJA-LA, subject: Moving Expense Allowances Not Taxable (021614Z Jun 94). This message incorporates information announced by the Internal Revenue Service (IRS) in IRS Notice 94-59, 1994-23 I.R.B., 1994 WL 191,325; *see also* TJAGSA Practice Note, *The 1994 Moving Expense* Adjustment?, ARMY LAW., Apr. 1994, at 48.

[35] *See* TJAGSA Practice Note, *supra* note 34; *see also* DAJA-LA information paper, subject: Taxation of Moving Allowances (11 Aug. 1994).

tions.[36] A cancelled check is no longer sufficient proof of a charitable contribution when the giver contributes more than $250 at any one time. Now, the recipient must provide the donor a written receipt to prove contributions above $250.[37] Taxpayers giving items valued above $250 on an occasion to charitable organizations should request a receipt to serve as substantiation in the event that the IRS audits the taxpayer.

This new substantiation requirement will not affect those military taxpayers who contribute less than $250 per pay period through a payroll deduction (e.g., Combined Federal Campaign). Contributions made by withholding from a taxpayer's wages and paid by the taxpayer's employer to a donee organization are deemed substantiated by (1) a pay stub, *Form W-2*, or other document furnished by the employer that evidences the amount withheld for the purpose of payment, and (2) a pledge card or other document prepared by the donee organization that includes a statement that the organization does not provide goods or services in whole or partial consideration for any contributions made to the organization by payroll deduction.[38]

What Form Must be Used?

Many military taxpayers must file a federal income tax return to obtain refunds. The tax form you should use depends on your filing status and income level and on the type of deductions and credits you claim. The IRS has established the following guidelines for choosing tax forms:

- You may use *Form 1040EZ*[39] if the following circumstances exist: (1) you are single or married filing jointly, are less than sixty-five years old (both you and your spouse if filing jointly), and have no dependents; (2) your taxable income is less than $50,000; and (3) your interest income does not exceed $400. If you use this form, you may not itemize deductions, claim credits, or take adjustments.

- You may use *Form 1040A*[40] if your taxable income from wages, salaries, tips, interest, and dividends is less than $50,000. If you use this form, you may not claim any itemized deductions; however, you may claim an IRA adjustment and credits for child and dependent care and earned income.

- If you intend to itemize deductions, or have taxable income over $50,000, you must file *Form 1040* ("the long form").[41] Remember, moving expenses are now an adjustment to income (report on revised *Form 3903*[42] and claim on *Form 1040*, line 24).

When to File?

Tax returns for most military taxpayers are due on 17 April 1995 (the first business day after Saturday, 15 April). Nevertheless, you may request additional time to file a *Form 1040* or *Form 1040A*. The length of the delay available to you will depend on whether you live in the United States or overseas.[43]

If you live in the United States or Puerto Rico, you may receive an automatic four-month extension to file *Form 1040* or *Form 1040A*. However, this extension does not allow you

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[36] *See* I.R.C. § 170 (RIA 1994) which allows taxpayers to deduct qualifying charitable contributions; *see also* T.D. 8544, 59 Fed. Reg. 27,458 (1994) (announcing Temp. Treas. Reg. § 1.170A-13T (1994), substantiation requirement for certain contributions).

[37] Temp. Treas. Reg. § 1.170A-13T (1994). *See also* IRS Announcement 94-111, 1994-37 I.R.B. 36, 1994 WL 459330; I.R.S. PUB. 1771, SUBSTANTIATION AND DISCLOSURE REQUIREMENTS (1994). In general, the new tax law provides that no charitable deduction will be allowed for any charitable contribution of $250 or more unless the donor receives written substantiation from the organization receiving the donation. The substantiation must contain the donor's name and address and provide sufficient information to prove the amount of the deductible contribution. The substantiation must note the amount of any cash contribution but need only describe the nature of any donated property. Additionally, the substantiation must include a statement as to whether any goods or services were provided in return for the contribution. If no goods or services were provided to the donor in return for the contribution, the substantiation must state that no goods or services were provided. If goods or services were provided to the donor, the substantiation must include a statement of the value of any goods or services received by the donor.

[38] Temp. Treas. Reg. § 1.170A-13T(b) (1994).

[39] Internal Revenue Serv., Form 1040EZ, *Income Tax Return for Single and Joint Filers With No Dependents* (1994).

[40] Internal Revenue Serv., Form 1040A, *U.S. Individual Income Tax Form* (1994).

[41] Internal Revenue Serv., Form 1040, *U.S. Individual Income Tax Form* (1994).

[42] Internal Revenue Serv., Form 3903, *Moving Expenses* (1994).

[43] Another deadline extension provision is available to members who served, or are currently serving, in a combat zone. The deadline for filing federal income tax returns is extended for at least 180 days after the later of:

(1) The last day that a soldier is in a combat zone (or the last day that the area qualifies as a combat zone); or

(2) The last day of any continuous qualified hospitalization for injury from service in the combat zone.

For more information, consult I.R.S. PUB. 945, TAX INFORMATION FOR THOSE AFFECTED BY OPERATION DESERT STORM (1992).

to defer paying any federal income tax you may owe. If you ask for this extension, you must estimate your tax liability and pay any expected balance due by filing *Form 4868*[44] no later than 17 April 1995.

If you are living outside the United States or Puerto Rico on 15 April 1994, you are allowed an automatic extension of two months. You do not have to file a request to obtain this extension.[45] This automatic extension applies not only to filing your 1994 federal income tax return, but also to paying any tax due. The IRS will charge you interest, however, on your unpaid federal income tax, from 17 April 1995—the normal filing deadline—until you actually pay your taxes. If you use the automatic extension, you should attach a statement to your return, stating that you were living outside the United States and Puerto Rico on 15 April. You may obtain an additional two-month extension—until 15 August 1995—by filing *Form 4868* no later than 15 June 1994. To obtain this additional extension, you must pay any tax due when you file the *Form 4868*. You also must write "Taxpayer Abroad" in the top margin of the form.

Tax tip: You can save yourself some money by retaining a copy of your return. After 1 October 1994, the IRS will charge a $14 fee for a photocopy of your return or other related document.[46] You still can get transcripts of account information from the local service center for free. *Form 4506, Request for Copy or Transcript of Tax Form*,[47] was modified to offer the tax return transcript and to reflect the photocopy fee increase.

What Are the 1994 Tax Rates?

The tax rates for 1994 are 15%, 28%, 31%, 36%, and 39.6%. The following tables[48] show the adjusted tax rates by filing status for 1994:

Married Individuals Filing Jointly and Surviving Spouses:

If Taxable Income is:	*The Tax Is:*
Not over $38,000	15% of the taxable income
Over $38,000, but not over $91,850	$5700 plus 28% of the excess over $38,000
Over $91,850, but not over $140,000	$20,778 plus 31% of the excess over $91,850
Over $140,000, but not over $250,000	$35,704.50 plus 36% of the excess over $140,000
Over $250,000	$75,304.50 plus 39.6% of the excess over $250,000

Heads of Households:

If Taxable Income is:	*The Tax Is:*
Not over $30,500	15% of the taxable income
Over $30,500, but not over $78,700	$4575 plus 28% of the excess over $30,500
Over $78,700, but not over $127,500	$18,071 plus 31% of the excess over $78,700
Over $127,500, but not over $250,000	$33,199 plus 36% of the excess over $127,500
Over $250,000	$77,299 plus 39.6% of the excess over $250,000

Unmarried Individuals (Other Than Surviving Spouses and Heads of Households):

If Taxable Income is:	*The Tax Is:*
Not over $22,750	15% of the taxable income
Over $22,750, but not over $55,100	$3,412.50 plus 28% of the excess over $22,750
Over $55,100, but not over $115,000	$12,470.50 plus 31% of the excess over $55,100
Over $115,000, but not over $250,000	$31,039.50 plus 36% of the excess over $115,000
Over $250,000	$79,639.50 plus 39.6% of the excess over $250,000

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[44] Internal Revenue Serv., Form 4868, *Application for Automatic Extension of Time to File U.S. Individual Income Tax Return* (1994).

[45] This benefit no longer is available to taxpayers who are merely traveling outside the United States or Puerto Rico on the due date.

[46] Rev. Proc. 94-59, 1994-23 I.R.B., 1994 WL 191325.

[47] Internal Revenue Serv., Form 4506, *Request for Copy or Transcript of Tax Form* (1994). Taxpayers use this form to request a tax return transcript (no charge); a copy of their tax form and all attachments to return ($14 fee); a certification of nonfiling (no charge); and a copy of *Form(s) W-2* (no charge).

[48] *See* Rev. Proc. 93-49, 1993-42 I.R.B. 18; 1993-2 C.B. 581.

Married Individuals Filing Separate Returns:

If Taxable Income is:	*The Tax Is:*
Not over $19,000	15% of the taxable income
Over $19,000, but not over $45,925	$2850 plus 28% of the excess over $19,000
Over $45,925, but not over $70,000	$10,389 plus 31% of the excess over $45,925
Over $70,000, but not over $125,000	$17,852.25 plus 36% of the excess over $70,000
Over $125,000	$37,652.25 plus 39.6% of the excess over $125,000

What are 1994's Standard Deductions?

The following table shows the standard deduction[49] amounts for 1994:

Filing Status	*Amount*
Joint returns or surviving spouses	$6350
Heads of household	$5600
Unmarried individuals other than surviving spouses and heads of households	$3800
Married filing separately	$3175

The IRS allows the elderly and the blind to claim a higher standard deduction. Moreover, a minor child claimed as a dependent on another taxpayer's return is entitled to a standard deduction. A child who is claimed as a dependent by his or her parents, and who has only investment income, has a $600 standard deduction, no matter how much his or her investment income may be. On the other hand, a dependent child who earned wages exceeding $600 may claim a standard deduction equal to his or her wages, or the regular standard deduction for nondependents, whichever is less. Accordingly, the standard deduction for an eighteen-year old dependent who earned $3850 in wages in 1994 is $3800—the maximum for a single dependent who is under age sixty-five and who is not blind.

What is the 1994 Personal Exemption?

The personal exemption amount increased to $2450 this year.[50] You may not claim a person as your dependent if he or she may be claimed as a dependent on another taxpayer's return.[51] Personal exemption phaseouts begin at $167,700 for taxpayers filing joint returns and surviving spouses; $139,750 for taxpayers filing as heads of household; $111,800 for unmarried taxpayers, other than surviving spouse or heads of household; and $83,850 for married taxpayers filing separately.

Personal Interest

You may not deduct interest paid on personal loans, credit card bills, car loans, or educational loans; however, if you intend to itemize deductions, you may use a home equity loan to avoid this personal interest restriction and deduct some interest.[52]

Selected Case Highlights

Several recent cases illustrate the need for taxpayers to plan carefully (or at least consider the tax consequences) in the divorce, home ownership, and individual retirement arrangement areas.

Divorce Tax Cases

Legal assistance attorneys advising a divorcing or separating client on the tax consequences of the marital status change will find it helpful to provide the client a copy of *IRS Publication 504, Divorced or Separated Individuals*. This short publication will help the client understand the impact of most tax rules on the marriage termination. Several recent cases illustrate the need for care.

In *Bay v. CIR*,[53] the taxpayer and his spouse had agreed that unallocated family support (originally structured and treated as alimony) became child support when the ex-wife remarried. After the ex-wife's remarriage, the taxpayer sought to continue to deduct the payments as alimony under I.R.C. § 71. Not surprisingly, the Tax Court disapproved the deduction. Legal assistance attorneys should draft carefully on the issue of marital support and its conversion to child support,[54] taking care to establish the parties' specific desires on the tax consequences whenever possible.

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[49] *Id.*

[50] Rev. Proc. 93-49 § .07, 1993-42 I.R.B. 18; 1993-2 C.B. 581.

[51] If you wish to claim a personal exemption for a child aged one or over, you must report the child's social security number. *See* I.R.C. § 6109(e)(2) (RIA 1994). If your child has not been assigned a social security number, you should contact your local legal assistance office or social security office as soon as possible to obtain an application for a social security number. *See generally* TJAGSA Practice Note, *Social Security Numbers for Dependents*, ARMY LAW., Dec. 1991, at 51.

[52] *See* I.R.C. § 163(h) (RIA 1994).

[53] 68 Tax Ct. Mem. Dec. (CCH) 396 (1994).

[54] *See* TJAGSA Practice Note, *When is Alimony Not Alimony But Child Support?*, ARMY LAW., Mar. 1993, at 29.

Most legal assistance attorneys recognize that married taxpayers who file married filing jointly[55] are jointly and severally liable for the tax (and any subsequently determined tax deficiency). Frequently, taxpayers facing marital difficulties will jointly file their federal income tax return as a matter of convenience (hoping to reduce their total tax liability). Later, if the IRS determines that more tax is owed, the IRS may pursue either or both filers.

Sometimes, because of very specific facts, one of the spouses avoids this liability under the *innocent spouse doctrine*.[56] For example, in *Thomason v. CIR*,[57] the Tax Court afforded partial innocent spouse relief to the nonculpable spouse for deficiencies and additions to tax where she did not participate in her husband's business; her husband made all major financial decisions; she did not live a lavish lifestyle; and her husband did not discuss business or financial matters with her. Although allowing relief for two tax years, the Tax Court denied relief for a third year because the wife failed to exercise her duty of inquiry after federal authorities began investigating her husband's alleged embezzlement from a savings and loan.[58]

Divorce and Home Tax Case[59]

A recent case illustrates the tax consequences of filing jointly when the parties sold a home and then the parties divorced. In *Murphy v. CIR*,[60] the taxpayer and his wife sold their jointly owned residence in December 1988. When they filed their 1988 return, they elected to postpone tax on the gain (on *Form 2119*). The taxpayer and his wife separated in December 1989 and eventually divorced in May 1991. After the separation, but before the divorce, the taxpayer bought a replacement home that qualified to postpone tax on his portion of the gain from the joint residence under I.R.C. § 1034. His former wife did not purchase a replacement home. The taxpayer later properly filed an amended return reporting and postponing the tax on his portion of the gain. The IRS rejected this and sought to tax all of the gain, even the portion applicable to his wife's interest. The Tax Court agreed with the taxpayer, however, citing Revenue Ruling 74-250,[61] which dealt with a separating couple who sold their old residence and separately bought replacement residences. The IRS ruled there that I.R.C. § 1034's nonrecognition rule applied separately to each spouse's gains.

Legal assistance attorneys may find the following practice tips helpful when advising a client facing a similar situation:

(1) The taxpayer may be able to seek indemnification from his former spouse and recover the additional tax he paid. Many separation agreements include an indemnification provision.

(2) Taxpayers contemplating divorce can avoid this situation entirely by filing separate returns.

(3) The problem also can be avoided if each spouse purchases a replacement home with a purchase price at least as much as the amount of their one-half share of the sale proceeds and comply with I.R.C. § 1034's other requirements.

As always, early advice beats late corrective action.

Home Tax Case

Section 121 of the Internal Revenue Code allows certain taxpayers to avoid paying tax on all or part of a gain from the sale of their main home if the taxpayer meets certain age, ownership, and use tests at the time of the sale.[62] The taxpayer decides if, and when, to take the exclusion. The decision may be revoked in certain cases,[63] but taxpayers must be careful to do so within the allowed time. In *Robarts v. CIR*,[64] the taxpayer's preparer elected the one-time I.R.C. § 121 exclusion of gain from tax for a taxpayer over age fifty-five. This saved the taxpayer from paying tax on several thousand dollars of gain. Later, the taxpayer sold a home realizing substantial gain and she sought to use I.R.C. § 121 to avoid paying tax on $125,000 of that gain. She claimed she did not realize she had made the election earlier. The Tax Court

[55] I.R.C. § 6013 (RIA 1994).

[56] *Id.* § 6013(e) (RIA 1994). *IRS Publication 504* contains a good summary of the doctrine and its requirements.

[57] 68 Tax Ct. Mem. Dec. (CCH) 517 (1994).

[58] *See also* Dopps v. CIR, 68 Tax Ct. Mem. Dec. (CCH) 326 (1994). A wife who lacked knowledge of the substantial tax understatements on the joint returns that she filed with her husband for two years and who did not benefit from the omitted income qualified for innocent spouse relief.

[59] *See generally*, TJAGSA Practice Note, *Tax Consequences of Selling the Principal Residence Upon Divorce*, ARMY LAW., Aug. 1990, at 39.

[60] No. 8, 1994 WL 397309 (U.S. Tax Ct.).

[61] Rev. Rul. 74-250, 1974-1 C.B. 202.

[62] I.R.C. § 121 (RIA 1994). *See* I.R.S. PUB. 523, SELLING YOUR HOME, *Exclusion of Gain* (1994) [hereinafter I.R.S. PUB. 523], for more information.

[63] *See* I.R.S. PUB. 523, *supra* note 62, *How to Make and Revoke a Choice to Exclude Gain.*

[64] 103 T.C. No. 5, 1994 WL 388965 (U.S. Tax Ct.).

denied the election on the second home sale, holding the taxpayer did not revoke the first election within the allowed time. Legal assistance attorneys should remind taxpayers that the election is good only once after the taxpayer reaches age fifty-five. The taxpayer may only use it once (even if only partially used).

Individual Retirement Arrangement (IRA) Tax Cases

Two recent cases demonstrate the need to carefully observe the technical I.R.C. and Treasury Regulation requirements for IRAs.

In *Clarke v. CIR*,[65] the taxpayers, *relying on the advice of an IRS representative*, withdrew money from their IRA to purchase a home. The IRS, and later the Tax Court, determined that the distribution was subject to ordinary income tax treatment. Deferral of tax is available only if an IRA distribution is rolled over within sixty days. Legal assistance attorneys and taxpayers should remember that the IRS and the courts are not bound by erroneous advice of IRS employees.

In *Shelley v. CIR*,[66] the taxpayer, a church pastor, took IRA adjustments for contributions to his wife's IRA, claiming that she was his church employee. The IRS imposed the six percent excise tax for excessive contributions made to the wife's IRA ruling the couple failed to establish the wife worked for the pastor in an employer-employee relationship or that wages were actually paid. Consequently, they were not entitled to an IRA adjustment for the contributions beyond the worker-spouse IRA limit ($2250 for both).

For more information on the tax aspects of IRAs, consult *I.R.S. Publication 590, Individual Retirement Arrangements.*

Involuntary Allotment—Draft Department of Defense (DOD) Directive 1344.9

Pursuant to the "Hatch Act Reform Amendments of 1993,"[67] the DOD undertook revision of DOD Directive 1344.9, "Indebtedness of Military Personnel" to include provisions for involuntary allotment of pay from a member of the Armed Forces to satisfy a civil judgment. The following note briefly describes the involuntary allotment provisions of the draft directive as originally published for public comment.[68]

The draft directive requires judgment creditors to submit an application packet to the Defense Finance and Accounting Service (DFAS) in Cleveland. The draft directive requires the creditor to submit a certified copy of a final court order along with proof of actual service of process on the service member. The final order must state a sum certain. The draft directive does not allow award of postjudgment interest without a separate judgment. Finally, the draft directive does not allow applications for judgments more than two years old.

The draft directive requires numerous certifications. These include the following:

(1) The creditor followed the Soldiers' and Sailors' Civil Relief Act (SSCRA) in the underlying judgment;

(2) The creditor made actual service of the final judgment on the service member;

(3) State law allow garnishment of a similarly situated civilian;

(4) The creditor is not off limits (and was not off limits at the time of the underlying contract); and

(5) The creditor complies with the DOD Standards of Fairness.

The draft directive limits the amount available to base pay only. Under the draft directive, "base pay" excludes debts to the United States, payments for United States Soldiers' and Airmen's Home, fines and forfeitures, employment and income tax withholdings, Servicemen's Group Life Insurance, dental insurance premiums, and family support payments.

Under the draft directive, the DFAS will mail a notice to the service member and two additional copies to the "immediate commander" of the service member.

The immediate commander will serve the member with a copy of the notice and the application package, and advise the member of his or her rights, including the right to request an extension of time to respond. The service member may consent to the involuntary allotment or contest it. Additionally, the immediate commander will give the service member the opportunity to seek legal assistance before making a decision.

The available defenses in the original draft are: the judgment creditor did not follow the SSCRA in the underlying judgment; military exigency caused the absence of the service member from appearance in the judicial proceeding which resulted in the judgment; a legal impediment (*e.g.* bankruptcy) prevents processing the allotment; the creditor is now off limits, or was off limits at the time of the underlying judgment; the creditor does not comply with the DOD Standards of Fair-

[65] 68 Tax Ct. Mem. Dec. (CCH) 398 (1994).

[66] *Id.* at 584.

[67] Pub. L. 103-94, 107 Stat. 101 (1993).

[68] 59 Fed. Reg. 21,713 (1994) (to be codified at 32 C.F.R. pt. 50).

ness, or "other appropriate reasons." "Other appropriate reasons" could include a broad range of defenses to the underlying judgment. These could potentially include violations of both federal and state consumer protection laws.

The immediate commander will rule on the military exigency defense only. The standard of review is by a preponderance of the evidence. The draft directive defines military exigency as a

> military assignment or mission essential duty that, because of its urgency, importance, duration, location or isolation, necessitates the absence of a member of the military service from appearance at a judicial proceeding. Absence from an appearance in a judicial proceeding is normally to be presumed to be caused by exigencies of military duty during periods of war, national emergency, or when the member is deployed.[69]

The immediate commander will forward the response with his or her ruling on the military exigency defense, if raised, to the DFAS. Under the original draft, the DFAS decides all other defenses. The draft directive does not contain appeal procedures. The DOD is currently revising the draft directive. The following note outlines anticipated changes to the draft directive. Judge advocates serving in legal assistance or administrative law must stay abreast of changes in the draft directive as the DOD proceeds towards final implementation. Major McGillin.

Involuntary Allotment—Status and Notice of Anticipated Changes

The purpose of this note is to advise you on the status of draft DOD Directive 1344.9 "Indebtedness of Military Personnel," that incorporates provisions for implementing involuntary allotments under Public Law 103-94, "The Hatch Act Reform Amendments of 1994."

On April 26, 1994, the DOD published in the *Federal Register* a "proposed rule" to establish procedures for implementing involuntary allotments under Public Law 103-94.[70] The DOD received several public comments regarding the involuntary allotment procedures under the proposed rule. Those who responded were primarily concerned with sections of the proposed rule that appeared to "relitigate" the validity of the underlying judgement or were unduly burdensome. Additionally, one of the sponsors of the legislation on involuntary allotments submitted comments that mirrored many of the same concerns raised by members of the public, and also noted that the proposed rule needed to balance more fairly the rights of the creditor with those of the military member. Finally, an opinion from the DOD General Counsel's Office affirmed many of the concerns raised.

After distributing the comments received to the Services, the DFAS, the DOD General Counsel's Office, and other Directorates within the Office of the Under Secretary of Defense for Personnel and Readiness, a resolution meeting was held in August. At that time, the provisions of the proposed rule commented on by the sponsor and the public, as well as anticipated changes, were discussed. Additionally, the attendees at the meeting were apprised of new DOD guidance concerning proper content for directives that would require the proposed rule, as revised, to be formally published in two documents rather than one—a DOD directive and a DOD instruction. As revised, the directive will contain broad policy guidance, define areas of responsibility, and establish an implementation date for processing of involuntary allotments. The instruction will reiterate the directive and provide the "nuts and bolts" procedures for processing—except that the Services and DFAS will have to establish specific procedures necessary for internal processing within their respective areas of responsibility.

Most of the anticipated changes to the involuntary allotment procedures under the proposed rule will give greater effect and recognition to the validity of state court judgments. Included among these changes are deletion of provisions that: (1) require compliance with the Standards of Fairness; (2) require that applicants were not "off limits" or determined to be practicing unfair consumer or commercial practices detrimental to the morale of service members as determined by Service directives; (3) permit only one involuntary allotment at a time (there may be more than one, provided that the maximum percentage allowed is not exceeded); (4) limit a judgment to only two years (any valid judgment in accordance with state law will be allowed); and (5) demand "proof of actual service" (a certification by the applicant that the protections of the SSCRA were afforded the member still will be required). Furthermore, the maximum percentage of pay subject to involuntary allotment likely will be changed to the lesser of twenty-five percent or the maximum authorized by state law and the definition of pay probably will change from "disposable" pay to "taxable" pay (allowances and VSI and SSB will not be included). Additionally, the time period in which to see a legal assistance attorney will probably not be open-ended. Finally, the Services likely will be required to establish appeal procedures for decisions concerning a commander's determination of exigencies of military duty. While such procedures will afford more rights to applicants, they also may help reduce litigation in the military departments.

Notice of the final rule should appear in the *Federal Register* during November. Actual processing of involuntary allotment applications, as mandated by the draft directive, will

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[69] *Id.* at 21,715.

[70] *Id.* at 21,713-20.

probably begin in December or early January at the latest. The delay in implementation is necessary to ensure that appropriate consideration is given to all public comments and that the final regulations are both effective and fair. Major Cook, Office of the Under Secretary of Defense (Personnel & Readiness) Requirements & Resources—Legal Policy.

Contract Law Notes

Performance-Based Service Contracting: Here It Comes Again?

By some estimates, service contracting accounts for $105 billion of the $200 billion that the federal government spends on contracts.[71] It is not surprising, therefore, that the methods the government uses to award service contracts are under scrutiny. Some of this attention focuses on the manner in which the government defines its contract requirements.

When dealing with service contracts, deciding how to draft a statement of work (SOW) often is difficult. Should the SOW provide detailed instructions on how to accomplish the desired task? Or should the SOW simply tell the contractor to accomplish the task to a stated level of quality? The latter approach demonstrates the concept of "performance-based" contracting. The Office of Federal Procurement Policy (OFPP) recently began another effort to convince agencies to adopt the use of performance-based service contracting whenever possible. This note discusses the background on this issue, the current state of affairs, and some of the implications of the OFPP's efforts for those who deal with service contracts.

Background

On April 15, 1991, the OFPP issued Policy Letter 91-2, Service Contracting.[72] The OFPP defined "performance-based contracting" as "structuring all aspects of an acquisition around the purpose of the work to be performed as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work."[73] It went on to state that "[i]t is the policy of the federal government that . . . agencies use performance-based contracting methods to the maximum extent practicable when acquiring services . . . . In addition, *agencies shall justify the use of other than performance-based contracting methods when acquiring services, and document affected contract files.*"[74]

In July 1992, proposed changes to the *Federal Acquisition Regulation* (*FAR*) implementing Policy Letter 91-2, were published.[75] These proposed changes included the addition of a new *FAR* subpart 37.2, Performance-Based Contracting.[76] The proposal retained the requirement to justify the use of any other method for the acquisition of services.[77]

In September 1994, a notice was published withdrawing this proposal.[78] The notice stated that the proposal was being withdrawn at the request of the Administrator of the OFPP and that "[s]ervice contracting will be addressed as part of the FAR rewrite."[79]

The OFPP's Pledge Drive

Apparently noting the lack of implementation of its policy by other agencies, the OFPP decided to attack the problem from a different angle. In May 1994, the OFPP announced the "establishment of a pilot program to increase the use of performance-based contracting methods in the acquisition of services."[80] This notice states, in part

> A major contract reform initiative of OFPP is to reform the manner by which the government contracts for services by introducing performance-based contracting methods.
>
> . . . .

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[71] 61 Fed. Cont. Rep. (BNA) 719 (May 30, 1994).

[72] 56 Fed. Reg. 25,522 (1991).

[73] *Id.*

[74] *Id.* (emphasis added).

[75] 57 Fed. Reg. 33,702 (1992).

[76] *Id.*

[77] *Id.* at 33,707. The proposal included the following statement: "When any method other than performance-based contracting is used, the contracting officer shall document the contract file with the justification for use of other methods in accordance with agency procedures."

[78] 59 Fed. Reg. 47,112 (1994).

[79] *Id.*

[80] 59 Fed. Reg. 26,679 (1994).

To stimulate the government's conversion to performance-based service contracting, OFPP has developed a government-wide pilot project which relies on voluntary pledges by individual agencies to convert specified contracts for services to performance-based contracting methods.[81]

The administrator of the OFPP, Steven Kelman, believes that these voluntary pledges "will commit agencies to developing better statements of work that focus on the mission to be accomplished (output)."[82] The OFPP also plans to obtain the voluntary support of contractors for this program.[83]

What Does All This Mean?

Contracting personnel who deal with service contracts should prepare for the coming changes. The National Aeronautics and Space Administration (NASA) already has revised the *NASA FAR Supplement* to incorporate requirements for the use of performance-based contracting to the "maximum extent practicable."[84] It is likely that other agencies, including the DOD, will take similar steps to support the OFPP's initiative.

Contract attorneys who review specifications or SOWs for service contracts should educate contracting personnel on the effects of these changes. In particular, contract attorneys should explain the changes, and how they may be implemented, to requiring activity personnel, who normally must write statements of work. A good starting point in determining how to convey the new requirements to contracting personnel is the rule originally proposed to implement OFPP Policy Letter 91-2.[85]

The concept of performance-based service contracting has been around for some time. For numerous reasons, however, agency contracting personnel are reluctant to use performance-based methods.[86] In the current climate of acquisition reform, most agencies will likely sign on to the OFPP program and implement changes in their regulations. Because of the voluntary nature of the OFPP program, agencies may not encounter mandatory requirements, such as the proposed requirement for written justification for the use of other than performance-based methods.[87] The acquisition community should, however, expect to see strong encouragement for the use of performance-based contracting methods in agency-level acquisition regulations and audits as well as other compliance reviews. Major Pendolino.

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[81] *Id.*

[82] 62 Fed. Cont. Rep. (BNA) 96 (July 25, 1994).

[83] 59 Fed. Reg. 26,680 (1994). The OFPP has asked contractors to, among other things: endorse the project; assist in identifying obstacles to the implementation of performance-based contracting; and voluntarily refrain from bid protests and disputes related to contracts covered by the agency pledges.

[84] 59 Fed. Reg. 29,962 (1994), effective June 30, 1994 (to be codified at 48 C.F.R. parts 1807 and 1810). For example, 48 C.F.R. § 1810.002-71 states: Use of performance-based specifications, where feasible, is the preferred method for establishing contract requirements. Requiring activities shall, to the maximum extent practicable, use performance-based specifications, purchase descriptions, and statements of work . . . .

[85] Fed. Reg. 33,702 (1992). For example, proposed FAR 37.202-1 stated, in part:

> When preparing statements of work, agencies shall, to the maximum extent practicable . . . :
>
> (a) Describe the work in terms of 'what' is to be the required output rather than either 'how' the work is to be accomplished or the number of hours to be provided;
>
> (b) Enable assessment of work performance against measurable performance standards . . . .

Id. at 33,707. Additionally, the United States Army Materiel Command's recently published *Guide for the Preparation and Use of Performance Specifications, AMC Pamphlet 715-17*, may be helpful.

[86] In the author's experience, the primary reason for this reluctance is the difficulty in writing performance-based specifications which are clear and enforceable against the contractor.

[87] *See supra* note 77.

Claims Report

United States Army Claims Service

Complying with the Statute of Limitations for Affirmative Claims

Failure to take appropriate action before the statute of limitations runs can result in the loss of thousands of dollars in recoveries for our military treatment facilities (MTFs) and the United States Treasury. Consequently, an Affirmative Claims Section must closely monitor the statute of limitations in every case.

To collect its costs for medical care, the government must bring an action founded on a tort within three years after the right of action first accrues[1] or the action will be barred. The statute of limitations applies to most affirmative claims, such as those arising from automobile accidents; however, other claims may have different statutes of limitations. For example, claims based on contracts have a six-year statute of limitations.[2] Statutes of limitations for worker's compensation actions may vary from state to state.

A government claim normally accrues on the date that the injured party first receives medical treatment. Section 2416(c) of Title 28 of the *United States Code* tolls the statute of limitations until "an official of the United States charged with the responsibility to act in the circumstances" knows or could reasonably be expected to know that a basis for a claim exists.[3] This "official" generally is the recovery clerk at the MTF or the claims office; however, the best approach is to conservatively calculate the statute of limitations. Claims personnel should suspense their files based on the date Army or CHAMPUS fiscal intermediary personnel became, or should have become, aware of the government's claim and assert claims before the statute of limitations runs from that date.

Staff Judge Advocates and recovery judge advocates/recovery attorneys should ensure that their Affirmative Claims sections have suspense systems in place to review the status of all affirmative claims files every sixty days at a minimum. This will guarantee that action is taken on cases before the expiration of the statute of limitations. This is especially important in cases where the civilian attorney or insurance company does not cooperate with the claims office.

If a claim has not been resolved within six months of expiration of the statute of limitations, the recovery judge advocate/recovery attorney must take appropriate action. The action taken will depend on the amount of the claim and the settlement authority of the field claims office. If the claim is within the settlement authority of the field claims office, the recovery judge advocate/recovery attorney may determine the appropriate course of action: settle the case, terminate collection efforts, or refer the case for litigation. If the claim exceeds local monetary limits, the recovery judge advocate/recovery attorney must coordinate with the Affirmative Claims Branch at the USARCS and the local assistant United States attorney.

When local recovery efforts on a meritorious claim have been unsuccessful, the local recovery judge advocate/recovery attorney must prepare and forward an investigative report through the USARCS to the Litigation Division. This report will contain complete details about the accident, an analysis of potential liability, defenses, counterclaims, copies of any pleadings filed, a list of witnesses, collection efforts by the claims office, information about the injured party's injuries, and copies of all medical records and bills.[4] The report must clearly note the date the statute of limitations expires. This report may require extensive investigation and research; successful recovery in court may hinge on the research provided in the investigative report.

By monitoring all affirmative claims files, field offices will ensure timely action is taken on every claim. This will greatly improve the Army's Affirmative Claims Program. Captain Park.

Tort Claims Note

Insurers Claims for Deductible

A recent question from the field concerned the documentation required by the Government Accounting Office (GAO) before payment to a claimant's insurance company for the value of the claimant's insurance policy deductible. Such payments are appropriate in torts claims if the insurer's agency is established by the insurance policy, state law, or other authority to act.

If an insurer pays the deductible portion to the insured and files a claim for the entire loss, the insurer may be paid the

[1] 28 U.S.C. § 2415(b) (1988).

[2] *Id.* § 2415(a).

[3] *Id.* § 2416(c).

[4] *See* DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION, ch. 5 (2 Dec. 1987).

proper amount, including the deductible, if the insurer documents that it is acting as the agent of the insured. This agency status is necessary because the claim for the deductible is separate from the insurer's claims—no subrogation occurs. The payment of the deductible to the insured does not make the insurer the subrogee of the insured. Subrogation only exists when the payment is based on an obligation, statutory or contractual, which preexisted the incident giving rise to the loss.

The documentation to show that the insurer is acting as agent or representative of the insured should be contained in any claim forwarded to the GAO for payment or retained in the file if the payment is made by a local disbursing office. This documentation may be in the form of a power of attorney, a copy of the policy clause authorizing this collection, or a copy of the state law authorizing this payment. Proof of the insurer's actual payment to the insured also must be presented and transmitted to GAO. Mr. Rouse

Requirements for Vouchers on Tort Claims

Review of recent paid tort files under *Army Regulation (AR) 27-20,* chapters 3 and 4, indicates noncompliance with paragraph 2-24a(1) in claims paid by electronic payment.[5]

Claims paid from Army claims funds pursuant to *AR 27-20* under chapters 3, 4, 5, 6 and 10 require certification on either a *Standard Form (SF) 1034* or an *SF 1145* by an authorized claims judge advocate (CJA) or claims attorney (CA) who has been delegated authority to pay claims. When an *SF 1034* is used, the certification block on the form will be executed by the CJA or CA as stated above. When an *SF 1145* is used, the certification block on the right side is used; no signature is needed for the approval block. Where the claim is paid under chapter 4, the CJA or CA can certify payments in the amount of $2500 or less. Above that amount, the CJA or CA signs the approval block and forwards the claim to the GAO for payment over $2500.

The original November 1989 message from the Director of Finance and Accounting, Indianapolis, Indiana, which authorized the use of electronic payments, is misleading insofar as the statement that a manual voucher—that is, *SFs 1034* or *1145*, need not be prepared. An appropriate voucher must be prepared to comply with the statute or implementing regulation; however, the voucher need not be forwarded to the military disbursing office, but it must be retained in the claim file. Only the payment report outlined in *AR 27-20*, paragraph 2-24 a(1), need be sent to the disbursing office, plus any additional form developed locally between the claims and disbursing office. The claim file will not be closed until receipt of a return copy of the payment report properly marked by the disbursing office. Mr. Rouse.

[5] *See* DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (28 Feb. 1990).

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office

Change in Merit Systems Protection Board Time Limits

The Federal Register has published changes to the Merit Systems Protection Board (MSPB or Board) time limits.[1] The changes are as follows:

	Old	New
Action with effective date time to file appeal	20 days	30 days
Action from a final or reconsideration decision without effective date—time to file appeal	25 days	35 days
Denial of appeal by class of employees—time to file individual appeal	25 days	35 days
Request for payment of attorney fees—time to file motion after initial decision becomes final	20 days	30 days
Request for payment of attorney fees—time to file motion after date of issuance of final decision	25 days	35 days

[1] 59 Fed. Reg. 116 (1994).

	Old	New
Issue of prohibited discrimination in connection with matter otherwise appealable—time to file appeal	20 days	30 days
Final negotiated grievance decision on case involving allegation of prohibited discrimination—time to request review	25 days	35 days
Stay request of personnel action allegedly based on whistleblowing—time to file appeal after order ruling on stay request	20 days	30 days

These changes bring Board practice and procedure more in line with federal courts, the Equal Employment Opportunity Commission, and Board appellate jurisdiction cases. The changes also will make the Board's appellate processes more accessible to federal employees. Ms. Harvey.

MSPB Extends Administrative Judges' Jurisdiction

The MSPB issued a final rule on 29 April 1994 allowing administrative judges to retain jurisdiction over cases after the issuance of an initial decision for the purpose of vacating the initial decision to accept a settlement agreement into the record. This change allows the parties to enter into the record a settlement agreement reached after the issuance of the initial decision without filing a petition for review with the full Board.

The amended regulation[2] provides administrative judges the authority to accept settlement agreements into the record after the issuance of the initial decision, but before full Board consideration. This amendment does not change the current time limits prescribed in 5 C.F.R. § 1201.113 for determining the finality of a Board decision, or for filing a petition for review. Captain Titus.

Extension of Reprisal Claims Under Title VII

Title VII of the 1964 Civil Rights Act does not specifically cover retaliation taken against one employee for the protected activities of another. However, the Equal Employment Opportunity Commission (EEOC) successfully argued that position before the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *EEOC v. Ohio Edison*.[3]

In 1988, Johnnie Whitfield, a black employee of Ohio Edison, was discharged from his job. A company offer to reinstate him was withdrawn following a meeting where another employee complained that Whitfield had been treated more harshly than similarly situated white employees and indicated that legal action was contemplated.

The EEOC brought suit on Whitfield's behalf in federal court alleging that the withdrawal of the reinstatement offer was in retaliation for the coworker's actions. The district court dismissed the action for failure to state a claim.

The Sixth Circuit reversed. It acknowledged that § 704(a) of Title VII does not expressly address third-party reprisals. It agreed with the EEOC, however, that the clear congressional intent would be undermined by tolerating such reprisals. The court held that § 704(a) proscribes retaliation against one employee for the protected activities of another. Ms. Harvey.

The Whistleblower Protection Act and the Federal Tort Claims Act[4]

The United States Court of Appeals for the Eighth Circuit has joined the Ninth Circuit in holding that the Whistleblower Protection Act (WPA) does not authorize Federal Tort Claims Act (FTCA) claims based on conduct for which relief is available under the Civil Service Reform Act (CSRA).[5]

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[2] 5 C.F.R. § 1201.112 (1994), revised to read as follows:

> 1201.112 Jurisdiction of judge.
>
> (a) After issuing the initial decision, the judge will retain jurisdiction over a case only to the extent necessary to:
> (1) Correct the transcript, when one is obtained;
> (2) Rule on motions for exception to the requirement that a party seeking a transcript must pay for it;
> (3) Rule on a request by the appellant for attorney fees;
> (4) Process any petition for enforcement filed under subpart F of this part;
> (5) Vacate an initial decision before that decision becomes final under section 1201.113 in order to accept a settlement agreement into the record.
> (b) Nothing in this section affects the time limits prescribed in section 1201.113 regarding the finality of an initial decision or the time allowed for filing a petition for review.

[3] 7 F.3d 541 (6th Cir. 1993).

[4] 5 U.S.C. 1221(a) (1989); 28 U.S.C.A. 1346(b), 2672, 2679 (1992).

[5] Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.A.).

Clarence Gergick, a General Services Administration (GSA) employee successfully prosecuted two whistleblower reprisal claims before the Merit Systems Protection Board. Mr. Gergick also filed an action against the United States and the GSA's Acting Administrator seeking, among other things, damages under the FTCA for mental anguish and other tort damages resulting from the conduct that gave rise to his whistleblower reprisal claims.

The district court granted summary judgment to the agency on the FTCA claims. The circuit court affirmed.[6] The CSRA provides the exclusive remedies for actions brought under its umbrella. The WPA, passed subsequent to, but as part of, the CSRA, "does not authorize government employees to bring FTCA claims based on conduct for which redress is available under the CSRA. . . . An exclusive remedial regime such as the CSRA may neither be supplemented nor replaced by other remedies."[7] Ms. Harvey.

Reserved Management Rights: Relation of *Montana Air v. Federal Labor Relations Authority* and Executive Order 12871

In a case involving a collective bargaining agreement provision allowing civilian National Guard technicians to wear civilian clothes instead of uniforms, the United States Court of Appeals for the District of Columbia found, "Once an agreement pertaining to a permissible subject of negotiation is reached by local agency negotiators and a union, this election to negotiate is binding upon the agency."[8]

After the parties at the installation level thought that they had an arrangement, the head of the National Guard Bureau (NGB) disapproved the agreement as violative of the reserved management right of "internal security." The General Counsel for the Federal Labor Relations Authority (FLRA) issued an unfair labor practice complaint at the union's urging, but the FLRA dismissed the complaint on the ground that the agreement infringed on management's right to determine internal security practices.[9] The court of appeals agreed with the union, however, and remanded the case based on the plain language of 5 U.S.C. § 7106.

The court found that the nonnegotiability of management rights enumerated in 5 U.S.C. § 7106(a) (reserved management rights where bargaining is not required) is "expressly subject" to 7106(b) (permissive rights—that is, management only bargains if it wants to). Therefore, if management chooses to bargain where it does not have to, the agency loses the ability to later say that bargaining is not required.

With Executive Order 12,871 on 1 October 1993, President Clinton ordered the Executive Branch to bargain over permissive subjects.[10]

Many permissive rights are similar to reserved management rights. Compare the lists of each at 5 U.S.C. § 7601(a) and (b).[11]

In light of the executive order, the court's decision may result in a significant erosion of management rights. Major Davis.

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[6] Gergick v. General Services Administration, 997 F.2d 1237 (8th Cir. 1993).

[7] *Id.* at 1239.

[8] Association of Civilian Technicians, Montana Air Chapter No. 29 v. Federal Labor Relations Authority (No. 92-1379), 22 F.3d 1150 (D.C. Cir. 1994).

[9] *See* National Guard Bureau Alexandria, Virginia, 45 F.L.R.A. 506 (July 15, 1992).

[10] Exec. Order 12,871, Labor-Management Partnerships, 58 Fed. Reg. 192 (1993).

[11] 5 U.S.C. § 7106 (1978) Management rights, states as follows:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
(2) in accordance with applicable laws—
(A) to hire, assign, direct, lay-off, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
(C) with respect to filling positions, to make selections for appointments from—
(i) among properly ranked and certified candidates for promotion; or
(ii) any other appropriate source; and
(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Office of Management and Budget (OMB) Circular A-76 and the Duty to Bargain

The OMB Circular A-76 covers the commercial activities cost comparison process. The National Treasury Employees' Union (NTEU) proposed that the internal appeals procedure mentioned in the circular be defined as their contractual grievance and arbitration provisions. The FLRA ordered the Internal Revenue Service (IRS) to bargain over the proposal. The IRS appealed.

In *U.S. Department of the Treasury v. Federal Labor Relations Authority*, the Court of Appeals for the District of Columbia declined to enforce the FLRA's order.[12] The court disagreed with the FLRA's interpretation of the circular as an "applicable law" for purposes of 5 U.S.C. § 7106(a)(2) and (b)(3) and thus negotiable. The court stated that while it might give deference to the FLRA's interpretation of the circular as an applicable law, that same deference would not extend to its interpretation of the circular that ignores the plain meaning of the document and the OMB's clear intent. The FLRA had contended that because the circular was an "applicable law," employees could grieve alleged violations of it under 5 U.S.C. §§ 7121(a)(1) and 7103(a)(9)(C)(ii). The court pointed out, however, that the "assertion that the terms of the regulation cannot undermine a right to grieve granted by the statute, fails to recognize that the statute itself, in section 7117(a), provides the exemption from the duty to bargain."

Therefore, the court held that

> if a government-wide regulation under section 7117(a) is itself the only basis for a union grievance—that is, if there is no pre-existing legal right upon which the grievance can be based—and the regulation precludes bargaining over its implementation or prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation. When the government promulgates such a regulation, it will not be hoisted on its own petard.[13]

In *Fort Carson*,[14] the FLRA adopted the court's conclusion that the circular is a government-wide regulation and that proposals subjecting disputes over compliance with the circular to resolution under the negotiated grievance procedure are not negotiable. The FLRA stated that its previous decisions to the contrary will no longer be followed. Ms. Harvey.

[12] 996 F.2d 1246 (D.C. Cir 1993).

[13] *Id.* at 1252.

[14] 48 F.L.R.A. No. 168 (1993).

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Fiscal Year 1995 JAGC Major Promotion Selection Board

On or about 13 December 1994, a promotion selection board will convene to consider eligible JAGC captains for promotion to major. The announced zones of consideration are as follows:

Above the zone:	31 July 1988 and earlier
In the zone:	1 August 1988 through 31 May 1989
Below the zone:	1 June 1989 through 31 December 1989

The key items that the board considers include: the performance fiche of the Official Military Personnel File (OMPF); the Officer Record Brief (ORB); and the official Department of the Army (DA) photograph. These items should be current and complete. Please note that photographs[1] and physicals[2] older than five years are considered out of date.

Officers who have not reviewed their OMPF performance fiche lately should obtain a copy from PERSCOM. A written request containing the officer's full name, rank, social security number, and mailing address should be sent to:

> Commander
> U.S. Total Army Personnel Command
> ATTN: TAPC-MSR-S
> 200 Stovall Street
> Alexandria, Virginia 22332-0444

[1] DEP'T OF ARMY, REG. 640-30, PERSONNEL RECORDS AND IDENTIFICATION OF INDIVIDUALS: PHOTOGRAPHS FOR MILITARY IDENTIFICATION FILES (1 Oct. 1991).

[2] DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (15 May 1989).

Alternatively, requests can be faxed directly to PERSCOM at commercial: (703) 325-0742; or DSN: 225-0742.

Officers also should contact their supporting Personnel Service Center (PSC) to review their board ORB. The PSC will forward the signed board ORB through personnel channels to PERSCOM for inclusion in the officer's promotion board file.

Updated DA photographs (a color photograph is preferred, but not required), a back-up copy of the signed board ORB, and any documentation missing from the OMPF performance fiche should be mailed directly to:

Office of The Judge Advocate General
ATTN: DAJA-PT (MAJ Poling)
2200 Army Pentagon
Washington, DC 20310-2200

For the board to consider an academic evaluation report (AER) or officer evaluation report (OER), the original report must be received by the Evaluation Reports Branch (TAPC-MSE-R) at PERSCOM not later than 6 December 1994. If a report is late, a waiver can be obtained in accordance with *Army Regulation (AR) 624-100*.[3] Complete-the-record OERs must comply with *AR 623-105*[4] and have a "Thru Date" of 7 October 1994. They also are due at PERSCOM not later than 6 December 1994.

Address questions about this board to Major Poling (DAJA-PT), DSN: 225-1353.

[3] DEP'T OF ARMY, REG. 624-100, PROMOTION OF OFFICERS ON ACTIVE DUTY, para. 2-7 (21 Aug. 1989).

[4] DEP'T OF ARMY, REG 623-105, OFFICER EVALUATION REPORTING SYSTEM, para. 5-21 (31 Mar. 1992).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

National Guard Military Justice

All Army National Guard units are organized and resourced for deployment to support United States national security objectives. For many Army National Guard units the time from mobilization to deployment will be even more rapid than in the past. During the Persian Gulf War, sixty-three Army National Guard colonel and lieutenant colonel commands deployed to the Central Command area of operations. Average deployment time for these units—from mobilization to deployment—was thirty-one days. The Guard must be ready before the call up.

Working familiarity with the active duty military justice system is essential for commanders and judge advocates. In April 1992, the Report of the Desert Storm Assessment Team (DSAT) stated that many of the mobilized Reserve Component (United States Army Reserve and National Guard) commanders were "unfamiliar with the UCMJ." Some Reserve Component commanders "did not understand the role of Judge Advocates and did not know how to use Judge Advocates." No one contested the accuracy of these DSAT observations in 1992. Unfortunately, these same observations remain true today in many Guard units.

Recently the Office of the National Guard Bureau, Judge Advocate, circulated a "National Guard Military Justice Survey" to at least one senior judge advocate in each of the fifty-four separate states, territories, and the District of Columbia and fifty of the jurisdictions responded. The survey results indicate that neither commanders nor judge advocates are adequately familiar with the Uniform Code of Military Justice (UCMJ).

The survey asked "On a scale of 1 to 10, would you rate the ability of your commander to administer military justice (NJP and courts-martial)?" Army Guard responses ranged from 1 to 10 with an average of 5.4 and a mean of 6.0. Air Guard responses ranged from 1 to 10 with an average of 5.0 and a mean of 5.0.

Forty-six of the fifty jurisdictions responding have a military justice code. Only thirty-five are patterned after the UCMJ. Twenty-one have manuals for courts-martial of which seventeen are patterned after the federal *Manual for Courts-Martial*.

In the operation of the various military justice systems, only twenty-eight jurisdictions conduct any form of courts-martial. Surprisingly, only thirty-four report using nonjudicial punishment. In 1993, just one state tried a case by general courts-martial. The numbers of summary courts-martial conducted in 1993 in any one jurisdiction ranged from 0 to 200, perhaps reflecting differing approaches for the offense of absent without leave (AWOL). Confinement was adjudged in eight states.

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
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 Magers BG Sagsveen MAJ Barto MAJ Pearson LTC Hamilton	LTC Edward O. Ogilvie 1584 East Parkridge Dr. Salt Lake City, UT 84121 (801) 575-1650
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 COL Reyna	LTC Karl E. Hansen P.O. Box 6124 Aurora, CO 80045-6124 (303) 361-1208
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	MG Gray BG Sagsveen MAJ Winn MAJ Hernicz LTC Menk/CPT Storey	MAJ Dana Wendt 120th ARCOM Bldg. 9810, Lee Rd. Fort Jackson, SC 29207 (803) 751-6152
10-12 Mar 95	Dallas/Fort Worth 1st LSO	AC GO RC GO Int'l-Ops Law Crim Law GRA Rep	MG Gray 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-Ops Law Contract Law GRA Rep	BG Huffman BG Cullen MAJ Martins MAJ Ellcessor LTC Menk/CPT Storey	CPT Robert J. Moore 10th LSO 550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
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	MG Nardotti BG Sagsveen, BG Lassart, BG Cullen MAJ Peterson LTC Bond COL Reyna	MAJ Joe Piasta 717 College Avenue Second Floor Santa Rosa, CA 95404 (707) 544-5858
1-2 Apr 95	Indianapolis, IN National Guard	AC GO RC GO Ad & Civ Crim Law GRA Rep	BG Huffman BG Cullen MAJ Diner MAJ Kohlman LTC Hamilton	COL George A. Hopkins 2002 South Holt Road Indianapolis, IN 46241 (317) 457-4349
7-9 Apr 95	Orlando, FL 174th LSO Airport Marriott 7499 Augusta National Dr. Orlando, FL 32822	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	MG Nardotti BG Lassart MAJ DeMoss LTC Winters Dr. Foley	MAJ John J. Copelan, Jr. Broward County Attorney 115 South Andrews Avenue 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 COL Reyna	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434

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
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	MG Nardotti BG Cullen MAJ Hughes MAJ A. Frisk COL Reyna	LTC Bernard B. Downs, Jr. HHC, 3d Trans Bde 3415 McClellan Blvd. Anniston, AL 36201 (205) 939-0033
12-13 May 95	Gulf Shores, AL AL ARNG	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	BG Cullen MAJ Hughes MAJ Whitaker Dr. Foley	COL Larry Craven Office of the Adj General ATTN: AL-JA P.O. Box 3711 Montgomery, AL 36109
19-21 May 95 (Armed Forces Day 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	MG Gray 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

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: 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-F13).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

February 1995

1-2, ABA: Dispute Resolution/Mediation, Miami, FL.

2-3, GWU: Defective Pricing: Hazards and Defenses, Washington, D.C.

2-6, ESI: Managing Projects in Organizations, London, England.

6-7, GWU: Procurement Law Research Workshop, Washington, D.C.

6-9, ESI: Negotiation Strategies and Techniques, Washington, D.C.

7-9, ESI: International Business and Project Management, Dallas, TX.

7-10, ESI: Advanced Source Selection: Evaluation Factors, Scoring Procedures, and Proposal Evaluation Techniques, San Diego, CA.

7-10, ESI: Preparing and Analyzing Statements of Work and Specifications, Washington, D.C.

7-10, GWU: Source Selection Workshop, San Diego, CA.

13-17, ESI: Risk Management, Washington, D.C.

13-17, GWU: Administration of Government Contracts, Washington, D.C.

15-17, ESI: Contracting for Services, Washington, D.C.

21-22, GWU: Government Contract Claims, San Diego, CA.

22-23, GWU: A Practical Introduction to Government Contracting, Washington, D.C.

23-24, ESI: Electronic Commerce, Washington, D.C.

22-24, GWU: Schedule Contracting: Selling Commercial Products and Services, Washington, D.C.

27-3 March, ESI: Project Leadership, Management, and Communications, London, England.

28-3 March, ESI: Subcontracting, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the September 1994 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
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 triannually
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 A283734 Consumer Law Guide/JA 265(94) (613 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 A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

*AD A283503 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 judge advocates 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 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 currently is 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 asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the

ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	*UPLOADED*	*DESCRIPTION*
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 WordPerfect 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.
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	August 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 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, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.

FILE NAME	UPLOADED	DESCRIPTION
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, 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.
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.

FILE NAME	*UPLOADED*	*DESCRIPTION*
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, Vol ume 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.
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)

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.

5. Articles

The following law review article may be of use to judge advocates in performing their duties:

Harry L. Heintzelman, IV & Edmund S. Bloom, *A Planning Primer: How to Provide Effective Legal Input Into the War Planning and Combat Execution Process*, 37 A.F. L. REV. 5 (1994).

Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F. L. REV. 41 (1994).

John G. Humphries & Dorothy K. Cannon, *JA Wartime Planning: A Primer*, 37 A.F. L. REV. 69 (1994).

Ronnie D. James, *Guard and Reserve Issues in Deployment*, 37 A.F. L. REV. 95 (1994).

Thomas S.M. Tudor & Mark E. Garrand, *The Military and the War on Drugs*, 37 A.F. L. REV. 267 (1994).

6. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to: "postmaster@jags2.jag.virginia.edu".

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

7. The Army Law Library 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, United States 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:

United States Army Garrison/Fort Richie, Office of the Staff Judge, Attn: Connie Bombardier, 330 Banfil Avenue, Fort Richie, Maryland 21719-1616, DSN 277-5731, commercial (717) 878-5731, has the following material:

Federal Reporter 2d, volumes 276-999;
3d, volumes 1-23

United States Army Chemical and Biological Defense Command, Attn: Robert W. Poor, Aberdeen Proving Ground, Maryland 21010-5423, DSN 584-1290/4270, commercial (410) 1290/4270, has the following material:

Federal Supplement, volumes 1-492

Federal 2d Series, volumes 1-935

Federal Practice Digest 2d, volumes 1-92

United States Statutes at Large, volumes 1-106

Decisions of the Comptroller General, through 1973-74

*U.S. Government Printing Office: 1994 — 300-675/00008

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