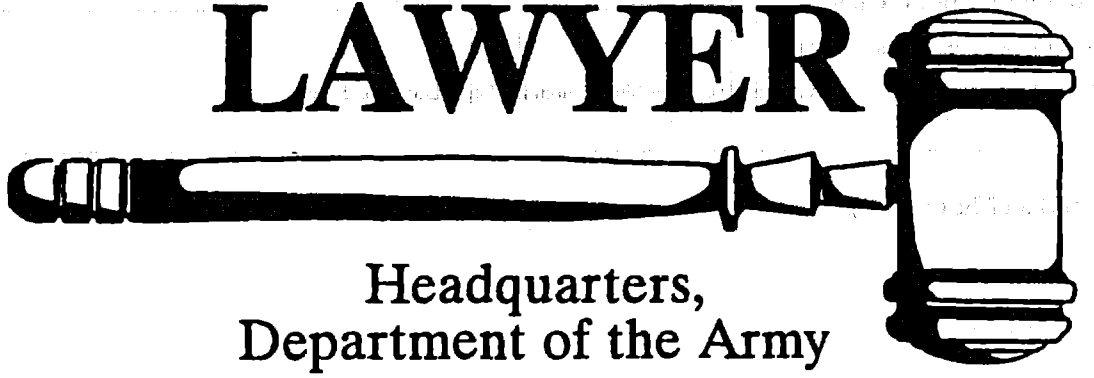
THE ARMY LAWYER



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The Fiscal Year 1996 Department of Defense Authorization Act: Real Acquisition Reform in Hiding?

Major Timothy J. Pendolino; Major Nathanael P. Causey;
Lieutenant Colonel John A. Krump; Major Karl M. Ellcessor, III;
Major Andy Hughes; Major Kathryn R. Sommerkamp;
Major M. Warner Meadows (United States Air Force)

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The Fiscal Year 1996 Department of Defense Authorization Act: Real Acquisition Reform in Hiding?

I. Introduction.

What a year! First, the 1996 Contract Law Symposium was struck by the Blizzard of 1996. Then, Congress and the President agreed on a Fiscal Year 1996 Department of Defense (DOD) Authorization Act[1] in February 1996. Although it was unusual that the Authorization Act came several months after the appropriations,[2] perhaps more unusual was that Congress included two pieces of legislation containing significant acquisition reform provisions affecting the entire government. While Congress made some real changes in this round of acquisition reform (for example, the repeal of the Brooks Act[3]), the compromise nature of the changes is clear in some well-meaning, but difficult to interpret, provisions that address increasing the efficiency of the procurement process.[4] This article begins with our analysis of the acquisition reform provisions of the Act. It then addresses some of the other significant provisions of the Act which impact on DOD acquisitions or operations.

II. The Federal Acquisition Reform Act of 1996.[5]

A. Competition.

1. Efficient Competition? The Federal Acquisition Reform Act (FARA) expresses the congressional policy regarding competition by requiring that "the *Federal Acquisition Regulation* shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements."[6] Unfortunately, like some of our counterparts in private practice, we have absolutely no idea what this provision means.[7]

2. Commerce Business Daily. The FARA clarifies that orders placed under task and delivery order contracts are exempt from the requirements to synopsize in the *Commerce Business Daily*.[8]

3. Justifications and Approvals. Congress significantly raised the approval levels for justifying the use of other than full and open competition. Contracting officers may now approve justifications and approvals for acquisitions valued up to $500,000. For acquisitions over $500,000, the following approval levels apply:

a. More than $500,000 but equal to or less than $10 million—the competition advocate;

b. More than $10 million but equal to or less than $50 million—the head of the procuring activity; and

c. More than $50 million—the agency's senior procurement executive.[9]

B. Negotiated Acquisitions.

1. Efficient Competitive Range Determinations? Contracting officers may now, in accordance with criteria specified in a solicitation, limit the number of offerors in the competitive range "to the greatest number that will permit an efficient competition among the [highest-rated] offerors."[10] Before using this authority, the contracting officer must determine that the number of offerors that would otherwise be included in the competitive range "exceeds the number at which an efficient competition can be conducted."

---

[1] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996) [hereinafter Authorization Act].

[2] The late passage of the Authorization Act caused some concern in Congress. A *Washington Post* article quotes Senator John McCain (R-Az) as stating:

> It's very embarrassing . . . . In the nine years I've been on the committee, we've never had these problems. As a consequence, the appropriators have become the ones setting the agenda, but they have neither the staff nor the charter to address policy issues. They're far more concerned about where the money goes than what the policies should be.

Bradley Graham, *Defense Conferees Narrow Differences; Agreement Elusive as Process Transforms Spending and Policy Roles*, WASH. POST, Nov. 4, 1995, at A7. The article also quotes a Democratic staff member as stating: "We're in danger of becoming known as little more than a debating society, much like the international relations committee." *Id.*

[3] *See infra* text accompanying notes 74-76.

[4] *See, e.g., infra* text accompanying notes 6-7.

[5] Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 642-79 (1996) (Federal Acquisition Reform Act of 1996) [hereinafter FARA].

[6] *Id.* § 4101 (amending 10 U.S.C. § 2304 and 41 U.S.C. § 253).

[7] *See, e.g., Congress Approves Procurement Reform Measures in DOD Authorization Bill*, 37 GOV'T CONTRACTOR ¶ 634 (Dec. 20, 1995) ("The problem, however, is that no one has any idea what these provisions mean.").

[8] FARA, *supra* note 5, § 4310 (amending 41 U.S.C. § 416(c)(1)(E)).

[9] *Id.* § 4102 (amending 10 U.S.C. § 2304(f)(1)(B) and 41 U.S.C. § 253(f)(1)(B)).

[10] *Id.* § 4103 (amending 10 U.S.C. § 2305(b) and 41 U.S.C. § 253b(d)).

2. Preaward Debriefings. The FARA provides an offeror excluded from the competitive range the right to request, in writing, a debriefing prior to award.[11] The offeror must make this request within three days of receipt of notice that it has been excluded. The contracting officer is to make every effort to conduct the debriefing as soon as practicable. The contracting officer may refuse a request for debriefing if it is not in the best interests of the government to conduct a debriefing at that time. The FARA contains guidance on the content of such debriefings. It also requires the inclusion of a provision in the *Federal Acquisition Regulation (FAR)* encouraging the use of alternative dispute resolution (ADR) techniques for an offeror excluded from the competitive range to consider prior to filing a preaward protest.

C. Simplified Acquisitions.

1. DOD Posting Requirement Raised. Prior to the FARA, the DOD was required to post in a public place notice of all acquisitions greater than $5000 but less than $25,000.[12] However, civilian agencies were required to give a similar public notice only for acquisitions greater than $10,000 but less than $25,000.[13] The FARA now amends this requirement by conforming the DOD posting requirement to the current civilian practice.[14]

2. The FARA Authorizes Three-Year Test of Using Simplified Acquisition Procedures to Purchase Commercial Items. In a change which could revolutionize the way we procure commercial goods and services, the FARA amended the Armed Services Procurement Act,[15] the Federal Property and Administrative Services Act,[16] and the Office of Federal Procurement Policy Act.[17] The FARA requires the use of simplified acquisition procedures for purchases of commercial items[18] with a value between $100,000 and $5 million if the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, prospective vendors to offer only commercial items.[19] The new guidance still requires contracting officers to synopsize in the *Commerce Business Daily* notice of commercial items acquisitions greater than $25,000 and prohibits contracting officers from making sole-source awards without appropriate justification.[20] Finally, the FARA limits this authority to a three year period beginning on the effective date of the *FAR* amendments implementing the authority.[21]

3. Use of Simplified Acquisition Procedures No Longer Linked to Interim FACNET Implementation. The Federal Acquisition Streamlining Act (FASA) of 1994[22] increased the simplified acquisition threshold from $25,000 to $100,000, but prohibited agencies from using simplified acquisition procedures for purchases between $50,000 and $100,000 until the contracting agency achieved "interim" certification to use the Federal Acquisition Computer Network (FACNET).[23] The FARA has now repealed this limitation.[24] As a result, contracting agencies may

---

[11] *Id.* § 4104 (amending 10 U.S.C. § 2305(b) and 41 U.S.C. § 253b). Current regulations make no provision for a preaward debriefing. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 15.10 (1 Apr. 1984) [hereinafter FAR].

[12] 41 U.S.C. § 416 (a)(1)(B)(i); FAR, *supra* note 11, 5.101(a)(2).

[13] 41 U.S.C. § 416 (a)(1)(B)(ii); FAR, *supra* note 11, 5.101(a)(2).

[14] FARA, *supra* note 5, § 4101(c).

[15] 10 U.S.C. § 2304(g).

[16] 41 U.S.C. § 253(g).

[17] *Id.* § 427.

[18] The Office of Federal Procurement Policy Act defines "commercial item," to include:

> [A]ny item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—
>
> (i) has been sold, leased, or licensed to the general public; or
>
> (ii) has been offered for sale, lease, or license to the general public.

This definition includes any item that is the result of technological advances or performance and is not yet available in the commercial marketplace--but soon will be. "Commercial items" also encompasses services offered and sold in commercial industry under "standard commercial terms and conditions." 41 U.S.C. § 403(12). *See also* FAR, *supra* note 11, 2.101.

[19] FARA, *supra* note 5, § 4202.

[20] *Id.* § 4202(c), (d).

[21] *Id.* § 4202(e).

[22] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, §§ 4001-03, 108 Stat. 3243, 3338 (1994) [hereinafter FASA].

[23] *Id.* § 4201(a). For the requirements of interim FACNET certification, *see id.* § 9001; FAR, *supra* note 11, 4.505-1.

[24] FARA, *supra* note 5, § 4302(b).

H. Procurement Integrity Act Is New and Different.

In one of its most sweeping changes, the FARA has completely rewritten the Procurement Integrity Act. It also eliminated several of the DOD-specific post-employment restrictions to those involved in the procurement business.

1. Protection of Proprietary and Source Selection Information. New provisions continue to prohibit disclosure of proprietary and source selection information. Arguably, the new provisions broaden the scope of protected contractor information.[48] The prohibition is no longer limited to the time-frame previously referred to as "during the conduct of a procurement;" instead, the prohibition applies "before award."[49] The disclosure prohibition no longer applies to "any person."[50] It now applies only to present or former United States officials and to those persons who acted on behalf of or advised the United States and obtained access to this information by virtue of their office, employment, or relationship.

All persons, however, are forbidden from knowingly obtaining contractor bid or proposal information or source selection information. Criminal penalties of imprisonment of up to five years and a fine are available for use against those who knowingly disclose or knowingly unlawfully obtain such information *if* the conduct is for the purpose of exchanging the information for a thing of value or for getting or giving a competitive advantage in the award.

2. Reporting Employment Contacts. The requirement for officers (grade 0-4 or above) and DOD civilians (GS-11 and above) to report employment contacts[51] has been repealed. The FARA requires[52] any agency official who participates personally and substantially in a contract over the simplified acquisition threshold to report employment contacts with any person who is a bidder or offeror in that procurement.[53] The report of employment contact must be made *in writing* to the supervisor *and* to the designated agency ethics official or designee. The individual must then either reject employment or disqualify themselves from the procurement. The agency may authorize resumption of participation, in accordance with 18 U.S.C. § 208 and applicable agency regulations, on the grounds that the person is no longer a bidder or offeror in that procurement or that the employment discussions have ceased without the prospect of employment of the agency official. Reports of employment contacts must be retained by the agency for at least two years. Agency officials and contractors face civil penalties of up to $50,000 ($500,000 for organizations) per violation plus twice the amount of compensation received or offered.

3. Postgovernment Employment—One-Year Ban for High Rollers.

Congress also repealed several other statutes dealing with post-employment restrictions on former DOD employees.[54] Additionally, the FARA replaces the Procurement Integrity Act's postgovernment employment provisions[55] with a one-year ban on employment with a contractor by a former agency official who performed any of a list of specific actions taken regarding that contractor. Such actions include the following:[56]

a. Serving as a procuring contracting officer or member of source selection board or financial or technical evaluation team for a contract in excess of $10 million. The restriction applies only to employment with the contractor which won the award;

b. Serving as program manager, deputy program manager, or administrative contracting officer for a contract in excess or $10 million;[57] or

[48] The new text refers to "contractor bid or proposal information" which *includes* proprietary information. *See* FARA, *supra* note 5, § 4304(f)(1).

[49] Whether the covered time period is essentially the same as it was under 41 U.S.C. § 423(p)(1) remains unclear. The beginning of the time period is not defined in the new statute as it was in the previous version. Additionally, the end of the covered time period appears to be at award, rather than award, modification, or extension as in prior language.

[50] 41 U.S.C. § 423(d) previously forbade "any person" from releasing protected information regardless of whether that person obtained the information through authorized or unauthorized means.

[51] 10 U.S.C. § 2397a.

[52] Although 10 U.S.C. § 2397a has been repealed, the reporting requirement of the FARA will not take effect until that date specified in implementing regulations but no later than 1 January 1997. *See* FARA, *supra* note 5, § 4401.

[53] It appears that the reporting requirements may apply only until award of the contract. The statutory language refers to participation in the procurement, which arguably would cease at time of award. Additionally, the statute refers not to contractors, but to "bidders or offerors." *Id.* § 4304(c).

[54] The repealed statutes are 18 U.S.C. § 281 (FASA had suspended the application of this provision through 31 December 1996) and 10 U.S.C. §§ 2397, 2397a, 2397b, and 2397c. Repeals became effective 10 February 1996. *See* FARA, *supra* note 5, § 4401. According to the conference report, Congress intended to eliminate agency specific postemployment restrictions in favor of "uniform standards applicable to all federal agencies." H.R. CONF. REP. No. 450, 104th Cong., 2d Sess. 969 (1996).

[55] 41 U.S.C. § 423(f).

[56] This explanation is paraphrased. Attorneys should refer to the exact language of the statute in applying the provisions to actual situations.

[57] Note that this provision appears to exclude not only those involved in contracts for $10 million or less, but also appears to be inapplicable to numerous individuals such as program executive officers and product managers, who are not specifically included.

c. *Personally* making the following decisions for the agency: (1) the decision to award or modify a contract or subcontract or task order or delivery order in excess or $10 million, (2) the decision to establish overhead or other rates valued at over $10 million, (3) the decision to approve issuance of a payment or payments in excess of $10 million,[58] and (4) the decision to pay or settle a claim in excess of $10 million.

The one-year employment ban does not preclude the acceptance of compensation from a division or affiliate of the particular contractor if the division or affiliate produces different products or services. A civil penalty is enacted for violation of this provision in the amount of $50,000 per violation plus twice the amount of compensation received or offered.[59]

4. Administrative Sanctions for Violations.

Violations of the prohibitions of the new statute also may be grounds for cancellation of the procurement or recision of the contract if the contractor (or a person acting for the contractor) has been convicted[60] of a violation or if the agency head has determined, based on a preponderance of evidence, that such a violation occurred.

An additional provision makes a report of a possible violation to the agency (within fourteen days of its discovery) a prerequisite to filing a protest on the grounds of such violation. The statute specifically forbids consideration of such a protest by the Comptroller General unless this notice has been given.[61]

5. Say "Bye, Bye" to Procurement Integrity Certificates.

The FARA eliminates the requirement for submitting Procurement Integrity Certifications and the statutory requirement for a training program and certification of training. However, this change will not take effect until implementing regulations are promulgated.[62] Until implementation, the certification and training requirements remain in effect.

6. Effective Date.

The effective date of the procurement integrity provisions will be determined by agency implementing regulations, but shall be no later than 1 January 1997.[63] Repeals became effective on 10 February 1996.

I. Other Procurement-Related Matters.

1. International Competitiveness. The FARA provides additional authority to waive charges for nonrecurring research, development and production costs for foreign military sales.[64] However, this provision becomes effective only if the President's Fiscal Year 1997 budget request proposes legislation that would offset the revenues lost through use of this waiver authority and the Congress enacts such legislation.

2. Acquisition Workforce. The FARA requires civilian agencies to establish policies and procedures for the management and training of their acquisition workforce.[65] These provisions do not apply to executive agencies subject to chapter 87 of Title 10.[66] However, the FARA "encourages" the Secretary of Defense to implement demonstration projects with the goal of "improving the personnel management policies or procedures" that apply to the DOD acquisition workforce.[67]

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[58] The section dealing with the approval of payments appears to be the only section in which an aggregate value triggers application. For example, a literal reading of the statute would exclude from this prohibition a procuring contracting officer who awarded multiple contracts to the same contractor, provided that no contract exceeded $10 million.

[59] This method of determining the potential civil penalty applies to violations of the restrictions on release or receipt of proprietary or source selection information, the job contact reporting requirement, and the postgovernment employment ban.

[60] It would appear that the imposition of a civil fine would not be sufficient by itself to form a basis for recision or cancellation.

[61] Although the wording of this section is somewhat imprecise by its plain language, it appears to apply to all protests, but its application to protests in federal distract courts or in the Court of Federal Claims may be a source of future litigation. For more on this provision, *see infra* text accompanying notes 104-107.

[62] *See* FARA, *supra* note 5, § 4401.

[63] *Id.* §§ 4401-4402.

[64] *Id.* § 4303 (amending 22 U.S.C. § 2761(e)(2)).

[65] *Id.* § 4307 (adding a new section 37 to the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401-20).

[66] 10 U.S.C. §§ 1701-1764.

[67] FARA, *supra* note 5, § 4308. *See infra* text accompanying note 211, for more Authorization Act provisions regarding the size and structure of the acquisition workforce.

J. Effective Date of FARA Changes.

Section 4401 of the FARA delineates effective dates. Repeals became effective on 10 February 1996.[68] Amendments to existing laws remain in effect until the date specified in implementing regulations, but no later than 1 January 1997.[69] On regulatory implementation, amended statutes will apply to all subsequently issued solicitations, to any unsolicited proposals, and to contracts entered into as a result of these covered solicitations or unsolicited proposals.[70] Implementing regulations will specify changes to contracts already in effect, offers already under consideration, and other ongoing actions.[71]

III. The Information Technology Management Reform Act of 1996.

In a dramatic attempt to overhaul the federal information technology acquisition process, Congress passed the Information Technology Management Reform Act of 1996 (ITMRA).[72] The ITMRA makes sweeping changes in the procedures that the federal government uses to purchase information technology.

A. "Information Technology" Defined.

The ITMRA defines "information technology" as "any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information" by executive agencies. It also includes equipment used by government contractors when either expressly required to do so by the contract or when the contractor requires the significant use of such equipment to furnish goods and services to the government. The statute includes computers, ancillary equipment, software, firmware, and support services in the definition of "information technology," but excludes "incidental" contractor use of equipment on federal contracts.[73]

B. The Brooks ADP Act Is History.

The most dramatic facet of the ITMRA is that it repealed the Brooks Automatic Data Processing Act (Brooks ADP Act).[74] The Brooks ADP Act[75] made the General Services Administration (GSA) the only federal agency authorized to purchase automatic data processing equipment for the federal government. Additionally, the Brooks ADP Act gave to the General Services Board of Contract Appeals (GSBCA) jurisdiction to hear bid protest cases concerning automatic data processing equipment acquisitions.[76] With the repeal of the Brooks ADP Act, other federal agencies will no longer depend on the GSA for the acquisition of information technology, but will be free to make their own purchases subject to the broad guidance of the ITMRA. The repeal also makes the General Accounting Office (GAO) the sole administrative forum outside the agency for resolution of bid protests.

C. The Office of Management and Budget Has a New Oversight Role.

Under the ITMRA, the Office of Management and Budget (OMB) is charged with the oversight of federal information technology (IT) acquisitions. The ITMRA requires the Director of the OMB to promulgate guidance to encourage other agencies to acquire IT in a cost-effective manner and to monitor executive agency actions.[77] Furthermore, the ITMRA requires the Director to require heads of other federal agencies to determine, prior to purchasing new IT systems, whether the function to be performed by the new system should be performed by the private sector in lieu of purchasing the system.[78] The ITMRA gives OMB enforcement authority over other agencies.[79]

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[68] *Id.* § 4401(a).

[69] *Id.* § 4402(e)(3).

[70] *Id.* § 4401(b)(1).

[71] *Id.* § 4401(b)(2). On 21 February 1996, the *FAR* Council published an advance notice of proposed rulemaking listing the following sections of FARA as those which may require implementation in the *FAR* (*FAR*, *supra* note 11, §§ 4101-05, 4201-05, 4301(a)(3), 4301(b), 4302, 4304, 4306, and 4310-11). *See* 61 Fed. Reg. 6760 (1996).

[72] Pub. L. No. 104-106, §§ 5001-5703, 110 Stat. 186, 679-703 (Information Technology Management Reform Act of 1996) [hereinafter ITMRA].

[73] *Id.* § 5002. This definition is similar to the definition of "automatic data processing equipment" found in the Brooks ADP Act (40 U.S.C. § 759). However, unlike the Brooks ADP Act, the ITMRA does not exclude radar, sonar, radio, or television from its coverage.

[74] *Id.* § 5101.

[75] 40 U.S.C. § 759.

[76] For more on this aspect of the ITMRA, *see infra* text accompanying notes 108-109.

[77] ITMRA, *supra* note 72, § 5112.

[78] *Id.* § 5113(b).

[79] *Id.* § 5113(b)(5). For example, by creating formal subdivisions of funds, the OMB could reduce the amount of funds available for an agency to spend on IT.

D. Agencies May Chart Their Own IT Destiny.

The ITMRA gives heads of executive agencies the authority to procure IT for their agency.[80] It also requires agency heads to promulgate guidance concerning the determination of cost benefits, risks, and evaluative criteria for acquisitions.[81] Agency heads also must develop goals for using IT effectively in their agencies and must report to Congress, as part of the agency's budget submission, on the agency's progress towards its goals.[82] Also, agency heads, with OMB approval, are authorized to enter into multiagency acquisitions for IT, except for the FTS 2000 program and the follow-on program to FTS 2000, which the ITMRA leaves under the supervision of the GSA.[83] Finally, the ITMRA creates the position of Chief Information Officer (CIO) within each executive agency to assist agency heads in performing their IT management duties.[84]

E. Commerce to Set Security Standards.

The Department of Commerce, based on guidelines established by the National Institute of Standards and Technology, has the responsibility under the ITMRA to establish efficiency, security, and privacy standards for federal computer systems.[85] Although agencies may establish more stringent standards,[86] agencies may not have less stringent standards without Department of Commerce approval.[87]

F. "National Security Systems" Defined.

"National security systems" are exempt from most provisions of the ITMRA,[88] which defines "national security system" as any government-operated telecommunications or information system whose functions or operations involve intelligence and cryptologic activities, command and control of military forces, equipment that is an integral part of a weapons system, or is critical to the direct fulfillment of a military mission (except routine administrative functions).[89]

G. Specific Acquisition Guidance.

The ITMRA mandates that the *FAR* Council prescribe regulations that, to the maximum extent practicable, make the IT acquisition process "a simplified, clear, and understandable process that specifically addresses the management of risk, incremental acquisitions, and the need to incorporate commercial information technology in a timely manner."[90] Specifically, the ITMRA suggests the following reforms:

1. Development of "Modular Contracting." Under the "modular contracting" concept, an agency acquires a major IT system in successive acquisitions of interoperable increments that allow the agency to manage large acquisitions more efficiently. The ITMRA amends the Office of Federal Procurement Policy Act to specifically allow modular contracting for IT resources and to require the *FAR* to contain guidance for using modular contracting.[91]

2. Use of IT Pilot Programs. The ITMRA encourages agencies to embark on pilot programs to test new methods of acquiring IT services.[92] Specifically, the ITMRA describes a "share-in-savings program" under which the federal government contracts with private industry for an IT solution which enhances the agency performance and allows the contractor to be paid a share of the resulting savings.[93] The ITMRA also describes a

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[80] *Id.* §§ 5121, 5124(a).

[81] *Id.* § 5122.

[82] *Id.* § 5123.

[83] *Id.* § 5124.

[84] *Id.* § 5125.

[85] *Id.* § 5131(a).

[86] *Id.* § 5131(b).

[87] *Id.* § 5131(c).

[88] *Id.* § 5141.

[89] *Id.* § 5142. This definition is identical to the so-called "Warner Amendment" to the Brooks ADP Act (10 U.S.C. § 2315; 40 U.S.C. § 759(a)(3)(C)). However, this provision applies to all government agencies, not just the DOD.

[90] ITMRA, *supra* note 72, § 5301.

[91] *Id.* § 5202 (adding a new section 35 to the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401-420).

[92] ITMRA, *supra* note 72, §§ 5301-05.

[93] *Id.* § 5311.

solutions-based contracting program in which (1) the agency writes the statement of work using performance-based and results-oriented specifications, or both, and (2) the agency uses a streamlined proposal and evaluation process.[94]

3. Schedule Contracting On-Line. The ITMRA requires the GSA to put its IT schedule contracts into an on-line format for agencies to use as part of FACNET no later than 1 January 1998. The system would contain basic information on prices, features, and performance of items on a comparative basis. In the event that the GSA determines that the FACNET cannot be used, the GSA must create an alternative automated system to provide the information.[95]

H. New Guidance on Excess Computer Equipment.

Under the ITMRA, agency heads must inventory all computer equipment under the agency's control to determine the amount of excess or surplus equipment and must maintain records of such equipment.[96] The conference report suggests that the GSA, under its property disposal authority, should dispose of the excess property, in order of priority, to (1) elementary schools, secondary schools, and schools run by the Bureau of Indian Affairs, (2) public libraries, (3) public colleges and universities, and (4) other entities eligible to receive donations of federal surplus personal property.[97]

I. Effective Dates.

The ITMRA contains three major transition provisions. First, the ITMRA is effective 180 days after enactment.[98] Second, the GSA regulations and procedures promulgated under the Brooks ADP Act and the prior decisions of the GSBCA remain in effect until modified or repealed by the Director of OMB or other competent authority.[99] Finally, all actions pending before the GSBCA on the effective date of the ITMRA shall proceed to completion.[100]

IV. Bid Protests.

Both the FARA and the ITMRA made changes to bid protest practices and procedures.

A. General Accounting Office Bid Protest Time-Frames Tightened.

Reflecting Congress's interest in promoting a procurement system that efficiently meets the government's requirements,[101] the ITMRA reduced two important deadlines associated with the processing of GAO protests. First, the procuring activity must submit its "agency report" no later than thirty days following the agency's receipt of the notice of protest.[102] Second, Congress has shortened the time in which the GAO must render its decision from 125 days to 100 days after the filing of a protest.[103]

B. The FARA Establishes a Separate Protest Clock for Allegations Involving Procurement Integrity.

Tucked in the FARA's rewrite of provisions addressing procurement integrity concerns[104] is a potentially significant limitation on the ability of contractors to protest. For protests alleging procurement integrity violations, the protester must first report the alleged violation to the procuring agency before it can file a protest "against the award or proposed award of a Federal agency procurement."[105] Additionally, the protester also must notify the

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[94] *Id.* § 5312.

[95] *Id.* § 5401.

[96] *Id.* § 5402.

[97] H.R. CONF. REP. No. 450, 104th Cong., 2d Sess. 980 (1996).

[98] ITMRA, *supra* note 72, § 5701.

[99] *Id.* § 5702(a). On 21 February 1996, the *FAR* Council published an advance notice of proposed rulemaking, listing the following sections of the ITMRA as those which may require implementation in the *FAR*: §§ 5001-02, 5101, 5111-13, 5121-28, 5131-32, 5141-42, 5201-02, 5301-05, 5311-12, 5401-03, 5501-02, 5601-08, 5701-03. *See* 61 Fed. Reg. 6760 (1996).

[100] *Id.* § 5702(b).

[101] *See* H.R. CONF. REP. No. 450, 104th Cong,. 2d Sess., at 965 (1996).

[102] ITMRA, *supra* note 72, § 5501 (amending 31 U.S.C. § 3553(b)(2)(A)). Under the earlier rules, the agency was required to file its administrative report to the GAO and protester(s) no later than thirty-five days after notice of protest.

[103] *Id.* § 5501.

[104] The amendments to the procurement integrity provisions of the Office of Federal Procurement Policy Act can be found at FARA § 4304. *See also supra* text accompanying notes 48-63.

[105] The revised provision specifically identifies protest allegations involving the: (a) prohibition on disclosing procurement information, (b) prohibition on obtaining procurement information, (c) actions required of procurement officers when contacted by offerors regarding non-federal employment, and (d) prohibition on former official's acceptance of compensation from a contractor. FARA, *supra* note 5, § 4304.

procuring agency of the information or evidence that constitutes the basis of the allegation no later than fourteen days after initial discovery of the alleged violation. Failure to do either of the above will foreclose the protester from subsequently asserting that particular allegation involving procurement integrity.[106] Consequently, protesters must now be conscious of this additional protest clock when filing a protest alleging suspected procurement integrity violations.[107]

C. General Services Board of Contract Appeals Protest Authority Repealed.

With the stroke of the proverbial pen, Congress eliminated the jurisdictional authority of the GSBCA to hear IT protests.[108] Thus, after almost twelve years of hearing IT protests,[109] the GSBCA will now devote its attention solely to postaward contract disputes arising under the Contract Disputes Act.

D. Congress Clarifies the Availability of Funds Following Protests.

The FARA made two revisions to 31 U.S.C. § 1558, which extends the period of availability of funds that are earmarked for procurements tied up in a protest. First, the period of availability is converted from 90 **working** days to 100 **calendar** days from the date a decision on the protest is final.[110] Second, the FARA eliminates any confusion regarding the applicability of this statute to other-than-GAO protests. Now 31 U.S.C. § 1558 specifically encompasses any GAO protest as well as any "action commenced under administrative procedures or for a judicial remedy" involving contract solicitations, proposed awards, the actual award, or competitive range and responsiveness determinations which prevent the agency from proceeding with the procurement.[111]

V. General Provisions.

A. Introduction.

As in past years, the National Defense Authorization Act for Fiscal Year 1996 contained many general provisions affecting acquisition law and policy. While there was broad agreement between Congress and the Executive on the overwhelming majority of these provisions, several passages in the original bill triggered the President's veto.[112] Then, while the acquisition community held its breath, Congress surprised its doubters by quickly revising the bill to make it more palatable to the President. Although still objecting to several controversial provisions concerning the discharge of HIV-positive service members[113] and the restriction on the use of DOD medical treatment facilities to perform abortions,[114] President Clinton signed the Authorization Act into law on 10 February 1996.

B. The Details.

1. Ballistic Missile Defense Act of 1995: Star Wars Without the Stars. One of the visions of the new Republican Congress was to establish a National Missile Defense System capable of protecting the territory of the United States against a limited ballistic missile attack.[115] Such a system would consist of ground-based interceptors, fixed ground-based radars, and

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[106] Interestingly, although this amendment specifically prohibits the Comptroller General from deciding "such an allegation," the revision does not acknowledge the other remaining protest forums. *Id.*

[107] Current GAO Bid Protest Regulations contain strict time tables regarding the filing of both pre-award and post-award protests. *See* 4 C.F.R. § 21.2 (1995).

[108] ITMRA, *supra* note 72, § 5101. Congress eliminated with the GSBCA as a protest forum by simply stating: "Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) is repealed."

[109] Congress initially provided the GSBCA protest authority over IT acquisitions for a three-year period in the Competition in Contracting Act of 1984. The Paperwork Reduction Reauthorization Act of 1986 permanently established the GSBCA's jurisdictional authority over IT protests, which it shared with the GAO. Now, the GAO remains the only formal forum other than the federal courts to hear such protests.

[110] ITMRA, *supra* note 72, § 5502. A protest decision is considered "final" when the time permitted for the filing of an appeal or a request for reconsideration has expired, or when a decision is rendered on the appeal or request for reconsideration—whichever is later. 31 U.S.C. § 1558(a).

[111] ITMRA, *supra* note 72, § 5502. The earlier version of 31 U.S.C. § 1558 arguably applied only to GAO or GSBCA protests. *But see* UNITED STATES GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 5, at 5-74 (2d ed. 1991) (GAO Redbook asserts that this provision applies to agency protests and protests filed with a federal court).

[112] *See* H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 301 (1995) (prohibiting obligation or expenditure of funds for activities of the armed forces while under the operational or tactical control of the United Nations, absent Presidential certification); *Id.* at 46 (stating policy of United States to deploy a National Missile Defense system). The President stated in his veto message that these provisions would unduly restrict his ability to carry out national security objectives, waste billions of dollars, and possibly violate the Anti-Ballistic Missile Treaty with the former Soviet Union. *See* Todd S. Purdum, *Clinton Vetoes Military Authorization Bill*, N.Y. TIMES, Dec. 29, 1995, at A26.

[113] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567, 110 Stat. 186, 328 (1996) (amending 10 U.S.C. § 1177).

[114] *Id.* § 738, 110 Stat. 186, 383 (amending 10 U.S.C. § 1093).

[115] *See* H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 45-54, 730-35 (1995).

space-based sensors.[116] Forced to down scale its dreams after the President's veto, Congress nevertheless included a Ballistic Missile Defense Act of 1995 in the Authorization Act.[117]

In a remarkable display of candor, Congress addressed the reasons why it believed ballistic missile defenses was necessary for the United States. Finding the threat posed by the proliferation of ballistic missiles significant and growing, Congress specifically noted that, within five years, North Korea may deploy an intercontinental ballistic missile capable of reaching Alaska.[118] In Congress's view, the concept of Mutual Assured Destruction is questionable as a basis for stability in the post-Cold War world of multipolar relationships. Moreover, Congress determined that technology has rendered obsolete the Cold War distinction between strategic ballistic missiles and nonstrategic ballistic missiles as reflected in the Anti-Ballistic Missile Treaty.[119]

To counter the growing threat to the United States—while conforming to President's objections—Congress directed the Secretary of Defense to restructure the core theater missile defense program to be operational in stages through Fiscal Year 2001.[120] To assist the Secretary in this endeavor, Congress authorized him to use streamlined acquisition procedures[121] while developing and deploying the theater missile defense systems to reduce cost and increase efficiency.[122] Additionally, Congress required the Secretary to develop plans for follow-on theater missile defense systems, while filing annual program accountability reports to Congress.[123]

2. *Congress Continues Push for Privatization: Sacred Cows Continue to Be Led to the Market.* Perhaps the most significant theme running throughout the Authorization Act is Congress's push for more privatization of DOD activities. First, Congress directed the Secretary of Defense to submit a plan for private-sector sources to perform payroll functions for DOD civilian employees.[124] The plan must be implemented if the private-sector can perform as cheaply as the federal government. Additionally, in an apparent reaction to the DOD's problem of "unmatched disbursements,"[125] Congress directed the Secretary of Defense to conduct a demonstration program using private contractors to audit the DOD's accounting and procurement functions to identify overpayments made to vendors.[126] Congress also required the Secretary to submit a report on the feasibility of using private sources for air transportation,[127] and authorized a pilot program using private contractors to operate DOD dependents' schools.[128] In case the DOD failed to get the message, Congress directed the Secretary of Defense to "endeavor" to use private sources for any commercial product or service if private sources are adequate and a competitive environment exists.[129]

Congress also turned to market-type reforms in an attempt to resolve the seemingly intractable problem of military family hous-

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[116] *Id.* at 49.

[117] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, §§ 231-38, 110 Stat. 186, 228-33 (1996).

[118] *Id.* § 232, 110 Stat. 186, 228 (1996).

[119] *Id.* The Anti-Ballistic Missile treaty, signed by the United States and the former Soviet Union on 26 May 1972, limited the deployment of certain Anti-Ballistic Missile Systems.

[120] *Id.* § 234, 110 Stat. 186, 229 (1996).

[121] This term is not defined.

[122] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 234, 110 Stat. 186, 229 (1996).

[123] *Id.*

[124] *Id.* § 353, 110 Stat. 186, 267 (1996).

[125] *See* Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8102, 109 Stat. 636, 672 (1995) (requiring the DOD to match each disbursement in excess of $5 million with a particular obligation before payment); H.R. REP. No. 131, 104th Cong., 1st Sess. 156 (noting October 1994 GAO report stating that the DOD had $30 billion in "problem disbursements," and paid its contractors about $1 billion more than the amount of their contracts).

[126] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 354, 110 Stat. 186, 268 (1996).

[127] *Id.* § 365, 110 Stat. 186, 275 (1996).

[128] *Id.* § 355, 110 Stat. 186, 269 (1996).

[129] *Id.* § 357, 110 Stat. 186, 271 (1996). Congress authorized the Secretary to exempt products or services if their production, manufacture, or provision by the government is necessary for reasons of national security. *Id.*

ing. Concerned about the substandard quality of many military housing units and the impact that this condition may have on readiness and retention rates,[130] Congress initiated a privatization program for construction of military housing units on or near military installations.[131] Under this program, the Secretaries of the military departments have authority to make direct loans and loan guarantees to private entities,[132] lease housing units from the private sector,[133] make investments in entities which will acquire or construct military housing units,[134] provide rental guarantees,[135] make differential lease payments,[136] and convey or lease property to private parties to support the program.[137] Congress also created a Family Housing Improvement Fund and a Military Unaccompanied Housing Improvement Fund, to which the Secretary of Defense may transfer proceeds derived from conveying or leasing property or income derived from other authorized activities under the privatization initiative.[138] The Secretary may use the balances in the fund to carry out activities under the program in amounts provided in appropriation acts.

3. Defense Dual Use Technology Initiative Takes a Hit. For the past several years, Congress has required the DOD to establish partnerships with private companies, federal laboratories and facilities, and other entities to encourage and provide research, development, and application of dual-use critical technologies.[139] The President requested $500 million for this effort for Fiscal Year 1996.[140] Looking for opportunities to cut the budget, however, Congress appropriated only $195 million for the Dual Use Technology Initiative,[141] and restricted the use of these funds to continuing or completing technology reinvestment projects initiated before 1 October 1995.[142] Congress also repealed various statutory authorities regarding the national defense technology and industrial base.[143]

4. A Kinder, Gentler Military? Noting that our armed forces have become increasingly engaged in operations other than war, Congress determined that nonlethal weapons have the potential for widespread operational utility.[144] Therefore, Congress directed the Secretary of Defense to assign centralized responsibility for the development of nonlethal weapons technology,[145] and to report back to Congress on the time-frame for the development and deployment of such weapons and the doctrinal, legal, operational, and policy issues involved in their use.[146]

5. Belt-Tightening for Federally Funded Research and Development Centers. Expressing its desire that the DOD establish stricter management goals for its Federally Funded Research Development Centers (FFRDCs) and University-Affiliated Research Centers (UARCs), Congress reduced funding for these entities

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[130] *See* H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 883 (1995); S. REP. No. 112, 104th Cong., 1st Sess. 328 (1995).

[131] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801, 110 Stat. 186, 544 (1996) (adding 10 U.S.C. §§ 2871-85).

[132] *Id.* (adding 10 U.S.C. § 2873).

[133] *Id.* (adding 10 U.S.C. § 2874).

[134] *Id.* (adding 10 U.S.C. § 2875). Authorized investments include acquisition of limited partnerships, stocks, or bonds.

[135] *Id.* (adding 10 U.S.C. § 2876).

[136] *Id.* (adding 10 U.S.C. § 2877). Differential lease payments are amounts paid to the lessor above the rental payments paid by servicemembers residing in the units.

[137] *Id.* (adding 10 U.S.C. § 2878).

[138] *Id.* (adding 10 U.S.C. § 2883).

[139] *See* 10 U.S.C. § 2511.

[140] H.R. REP. No. 406, 104th Cong., 1st Sess. 712 (1995).

[141] Congress renamed this program for Fiscal Year 1996. Formerly it was called the "Defense Reinvestment Program." *See Id.*

[142] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 204, 110 Stat. 186 (1996).

[143] *Id.* § 1081(f), (g) (repealing 10 U.S.C. §§ 2512, 2513, 2516, 2520, 2521, 2522, 2523, 2524).

[144] *Id.* § 219, 110 Stat. 186, 223 (1996).

[145] *Id.* The conferees recommended the designation of either the Department of the Army or the Marine Corps as executive agent for this program, recognizing that both services will be the primary users of these technologies. H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 720 (1995).

[146] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 219, 110 Stat. 186, 223 (1996).

by $90 million[147] and directed the Secretary of Defense to develop a five year plan to reduce and consolidate their activities.[148] The plan must set forth the manner in which FFRDCs and UARCs will perform only those core activities that require their unique capabilities and arrangements.[149] In a similar vein, Congress directed the Secretary of Defense to develop a five-year plan to consolidate and restructure the DOD's laboratories and test and evaluation centers into "as few laboratories and centers as is practical and possible."[150]

6. Research Dollars—Color Mine Purple? Currently, the DOD and the military departments receive separate appropriations for basic and scientific research, development, testing, and evaluation.[151] In what may be a portent for future jointness, Congress directed the Secretary of Defense to analyze the cost and effectiveness of consolidating the basic research accounts of the military departments.[152] The Secretary's analysis must determine potential infrastructure savings and other benefits of collocating and combining the management of basic research.

7. Days May Be Numbered for 60/40 Depot Maintenance Split. Congress continued to express its view of the necessity of retaining "core" depot level workload requirements within the DOD.[153] Referring to the "constant debate over how to apportion work between the public and private sectors,"[154] Congress directed the Secretary of Defense to develop a comprehensive policy on the performance of depot level maintenance and repair, consistent with the national security requirements of the United States.[155] To sweeten the pot for the Secretary, Congress repealed the statutory 60/40 split[156] and the competition requirement for contracting out depot-level maintenance and repair,[157] but withheld the effective date of the repeal until it passes legislation approving the Secretary's policy.[158]

8. "Economy Act"[159] for Environmental Restoration Modified. The DOD has statutory authority to form reimbursable agreements with federal, state, or local agencies for the identification, investigation, and clean-up of off-site contamination caused by DOD-generated hazardous substances.[160] To ensure proper accountability of reimbursements paid by the DOD, Congress modified this provision to prohibit the DOD from reimbursing another agency's regulatory enforcement activities.[161] Driving home the point, Congress limited funds available for reimbursements under these agreements to $10 million for Fiscal Year 1996, absent Secretarial certification to Congress.[162]

9. Laundering Funds Legally. In a classic example of "thinking outside the box," Congress directed the Secretary of Defense to conduct a demonstration project to assess the viability of using only nonappropriated fund procedures for morale, welfare, and recreation (MWR) activities at military installations.[163] Under this project, appropriated funds are essentially transformed

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[147] H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 721 (1995).

[148] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 220, 110 Stat. 186, 224 (1996).

[149] *Id.*

[150] *Id.* § 277, 110 Stat. 186, 242 (1996).

[151] Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, tit. IV, 109 Stat. 636, 647-48 (1995).

[152] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 263, 110 Stat. 186, 237 (1996).

[153] H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 773-74 (1995); S. REP. No. 112, 104th Cong., 1st Sess. 209-10 (1995). *See also* 10 U.S.C. § 2464.

[154] H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 774 (1995).

[155] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 311, 110 Stat. 186, 246 (1996).

[156] *See* 10 U.S.C. § 2466 (providing that not more than forty percent of the funds available for depot-level maintenance and repair may be used to contract for the performance by non-federal government personnel).

[157] *See* 10 U.S.C. § 2469 (requiring changes in performance of depot-level maintenance in excess of $3 million from the DOD to a contractor to be made using competitive procedures for competitions among private and public sector entities).

[158] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 311, 110 Stat. 186, 246 (1996).

[159] 31 U.S.C. § 1535 (authorizing federal agencies to order goods and services from other federal agencies).

[160] 10 U.S.C. § 2701(d). Forty-four states and four territories have signed agreements with the DOD making them eligible to receive reimbursement for environmental clean-up activities. *See* S. REP. No. 112, 104th Cong., 1st Sess. 210 (1995).

[161] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 321, 110 Stat. 186, 251 (1996).

[162] *Id.*

[163] *Id.* § 335, 110 Stat. 186, 262 (1996).

into nonappropriated funds. Military installations selected for the project may use appropriated funds to procure property and services for MWR programs following only the laws applicable to expenditures of nonappropriated funds.

10. Defense Business Operations Fund Here To Stay. In 1994, Congress removed the Defense Business Operations Fund (DBOF) sunset provision, firmly planting the fund in the DOD's celestial orb.[164] This year, Congress codified the DBOF as an entity, while limiting its potential growth.[165] The new law provides that, except for those activities specified in the statute,[166] no new functions, activities, funds, or accounts may be converted to management through the fund.[167] The statute also requires separate accounting, reporting, and auditing of funds and activities managed through the fund. Interestingly, Congress declined to adopt the new investment/expense threshold of $100,000[168] for the DBOF—capital assets of DBOF are financed from a capital asset subaccount and are defined to include equipment items costing $50,000 or more.[169] Congress also continued its push to make the DBOF perform as a business entity, requiring the DBOF to charge the full cost of its goods and services while authorizing DOD activities to order from non-DBOF sources offering a more competitive rate.[170]

Congress also expressed concern about the DOD's decision in 1995 to return the DBOF's cash management and related Antideficiency Act controls to the military service and component level.[171] Rather than reversing the DOD's decision, however, the conferees directed the Comptroller General to determine the advisability of managing the DBOF at the DOD level and report back to the defense committees.[172]

11. New Authorities to Retain Receipts. Generally, federal agencies must return to the Treasury as miscellaneous receipts all proceeds received from any source other than Congress.[173] For the past several years, however, Congress has carved out a number of exceptions to this rule, allowing the DOD greater authority to retain proceeds recovered from various activities rather than returning them to the Treasury.[174] Continuing with this trend, Congress gave the DOD permanent authority to retain the proceeds from the sale of lost, abandoned, or unclaimed personal property found on a military installation.[175] The proceeds may be credited to the operation and maintenance account of the installation and used to pay for the cost of collecting, storing, and disposing of the property. If any proceeds remain, the installation may use them for MWR activities.

In a related provision, Congress authorized the DOD and the military departments to retain amounts recovered for damage to real property.[176] All proceeds recovered must be credited to the account available for the repair and replacement of the real property at the time of recovery. Congress also directed the Secretary of Defense to report on the feasibility of allowing the DOD to retain up to three percent of contractor fraud recoveries.[177]

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[164] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 311(a), 108 Stat. 2663 (1994).

[165] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 371, 110 Stat. 186, 277 (1996) (adding 10 U.S.C. § 2216, Defense Business Operations Fund).

[166] Funds and activities included in the DBOF are working capital funds, the Defense Finance and Accounting Service, the Defense Commissary Agency, the Defense Reutilization and Marketing Service, and the Joint Logistics Systems Center.

[167] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 371, 110 Stat. 186, 277 (1996).

[168] *See* Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8065, 109 Stat. 636, 664 (1995) (increasing threshold from $50,000 to $100,000).

[169] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 371, 110 Stat. 186, 277 (1996). Surprisingly, the House National Security Committee sought to reduce the threshold to $15,000. The $50,000 rate was retained in conference. *See* H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 784 (1995).

[170] A few exceptions to the full cost recovery rule exists, the most significant of which is the cost of major military construction projects. *Id.* The House Committee on National Security expressed its disagreement with DBOF policy of assessing the costs of military personnel at the civilian equivalent rate, rather than the actual cost of military personnel, believing that this understates the costs of the 27,000 military personnel working in DBOF operations. *See* H.R. REP. No. 131, 104th Cong., 1st Sess. 158 (1995).

[171] H.R. REP. No. 131, 104th Cong., 1st Sess. 157 (1995).

[172] H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 785 (1995).

[173] 31 U.S.C. § 3302(b).

[174] *See, e.g.*, 10 U.S.C. § 1095(g) (authorizing DOD medical facilities to retain amounts collected from third-party payers for health care services); 10 U.S.C. § 2667(d)(1) (authorizing military departments to retain rental receipts for use in maintenance, repair, or environmental restoration).

[175] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 374, 110 Stat. 186, 281 (1996) (amending 10 U.S.C. § 2575).

[176] *Id.* § 2821, 110 Stat. 186, 556 (1996).

[177] *Id.* § 1052, 110 Stat. 186, 440 (1996). The Senate Armed Services Committee recommended authorizing the DOD to retain three percent of single damage funds, or $500,000 (whichever is less), recovered in contract fraud matters. The amount retained would be credited to the O&M accounts of the installations responsible for the recoveries. *See* S. REP. No. 112, 104th Cong., 1st Sess. 218 (1995).

In addition to the above provisions, Congress gave the Secretary of Defense new authority to accept contributions from host nations to support the relocation of our armed forces within the host nation.[178] The Secretary may use the contributions to pay costs incurred as a result of the relocation, including costs for design and construction services, transportation, communications, supply and administration, and personnel costs.

Of course, what Congress giveth, it can taketh away. Congress deleted a provision of the Arms Export Control Act[179] that allowed the DOD to use funds from the sales of tanks, infantry fighting vehicles, and armored personnel carriers for upgrades to those vehicles.[180] This authority had been granted by Congress in 1992 as an exception to the Miscellaneous Receipts Statute.

12. No ROTC—No Bucks. In the battle against political correctness on campuses, Congress again closed its purse strings to those colleges pursuing an antimilitary agenda. In clear and unmistakable language, Congress prohibited the DOD from obligating any funds by contract or grant (including student aid grants) to any institution of higher learning that maintains a policy preventing the DOD from establishing a Reserve Officer Training Corps program.[181] This provision follows a restriction in last year's Authorization Act which prohibited the DOD from providing funds through contract or grant to institutions which bar military recruiting on campus.[182] The Secretary of Defense must publish a list in the *Federal Register* of those institutions ineligible for DOD grants or contracts under the new law.[183]

13. New Authority to Support Non-DOD Organizations. Congress authorized the Secretary of Defense to prescribe regulations permitting units or members of the armed forces to provide support and services to federal, state, or local governmental entities, youth and charitable organizations, or other entities as approved by the Secretary.[184] Several prerequisites must be met before the military departments provide assistance under this provision. The assistance must be specifically requested by the organization, and must not be reasonably available from commercial sources. Additionally, providing the assistance must accomplish valid training requirements while not resulting in a significant increase in training cost.

14. Restrictions on Contractor Gratuities Inapplicable to Simplified Acquisitions. Congress requires DOD contracts to allow termination for default and the recovery of exemplary damages if the contractor offers or gives any gratuity to obtain favorable treatment regarding a contract.[185] The *FAR* implements this provision in a gratuities clause.[186] In the spirit of acquisition streamlining, Congress exempted simplified acquisitions from the coverage of this statutory requirement.[187]

15. New Attempts to Sustain the Industrial Base. In contrast to its general push for acquisition streamlining and enhanced competition, Congress sought to sustain the industrial base by adding certain components for naval vessels to the list of goods required to be purchased from domestic sources.[188] Vessel propellers with a diameter of six feet or more, gyrocompasses, electronic navigation chart systems, steering controls, pumps, propulsion and machinery control systems, totally enclosed lifeboat systems, and welded shipboard anchor and mooring chains with a diameter of four inches or less, must now be purchased from domestic sources.[189] Congress also removed the simplified acquisition exception to domestic source requirements[190] for DOD ball and roller bearings.[191] Reluctant to create significant addi-

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[178] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1332, 110 Stat. 186, 482 (1996) (adding 10 U.S.C. § 2350k).

[179] 22 U.S.C. § 2761(j).

[180] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 112, 110 Stat. 186, 206 (1996).

[181] *Id.* § 541, 110 Stat. 186, 315 (1996) (adding 10 U.S.C. § 983).

[182] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994).

[183] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 541, 110 Stat. 186, 315 (1996).

[184] *Id.* § 572, 110 Stat. 186, 353 (1996) (adding 10 U.S.C. § 2012). Congress intended to provide the DOD authority to perform "customary community relations and public affairs activities," including honor guards, static displays, bands, and demonstrations. *See* H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 812 (1995).

[185] 10 U.S.C. § 2207.

[186] FAR, *supra* note 11, 52.203-3.

[187] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 801, 110 Stat. 186, 389 (1996).

[188] *See* 10 U.S.C. § 2534.

[189] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 806, 110 Stat. 186, 390 (1996) (amending 10 U.S.C. § 2534).

[190] *See* 10 U.S.C. § 2534(g).

[191] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 806(d), 110 Stat. 186, 391 (1996).

tional hardships, however, Congress prohibited the Secretary of Defense from using contract clauses or certifications when implementing these new restrictions.[192]

Congress also showed an interest in using the international defense market as a way to sustain the industrial base.[193] Noting that most foreign defense suppliers have access to government-subsidized loan guarantees, Congress established the Defense Export Loan Guarantee program, authorizing the Secretary of Defense to protect lenders against losses from the financing of the sale or lease of defense articles or services to specified countries.[194] For each guarantee issued, the Secretary must charge both an administrative fee and an exposure fee sufficient to meet the potential liabilities of the United States. Further, the Secretary is precluded from offering terms and conditions more beneficial than those provided to a recipient by the Export-Import Bank of the United States.

To further demonstrate its commitment to sustaining the industrial base,[195] Congress authorized the Secretary of Defense to enter "Defense Capability Preservation Agreements"[196] with private contractors. These agreements apply modified cost accounting rules to the allocation of indirect costs associated with the contractor's private-sector work.[197] Although unartfully worded, Congress appears to be authorizing the Secretary to limit the amount of indirect costs which a contractor must allocate to its private-sector contracts, thereby allowing the DOD to pay a greater share of the contractor's indirect costs.[198]

16. Why Buy When You Can Lease? To encourage the use of leasing, Congress amended 10 U.S.C. § 2401a to permit the Secretary of Defense to lease commercial vehicles and equipment whenever he determines it is "practicable and efficient."[199] Although the statutory lease limit of eighteen months remains,[200] Congress authorized the Secretary to conduct a pilot program to enter leases of commercial utility cargo vehicles for a period not to exceed the duration of the warranty.[201]

17. Test Program for Comprehensive Subcontracting Plans Expanded. In 1989, Congress directed the Secretary to establish a test program to determine whether the negotiation and administration of comprehensive small business subcontracting plans would increase contract opportunities for small business concerns.[202] The Secretary implemented this program in the *Defense Federal Acquisition Regulation Supplement (DFARS)*, allowing designated contract activities to negotiate plant, division, or company-wide comprehensive subcontracting plans in lieu of individual plans.[203] Seeking to "more fully validate the test program,"[204] Congress revised the program to authorize all contracting activities in the military departments and defense agencies to participate, and to provide eligibility for contractors having as few as three DOD contracts with an aggregate value of $5 million.[205] Congress also directed the Secretary to ensure that a broad range of supplies and services are included in the program.[206]

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[192] *Id.* § 806(a)(4), 110 Stat. 186, 391 (1996).

[193] S. REP. No. 112, 104th Cong., 1st Sess. 286-87 (1995).

[194] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1321, 110 Stat. 186, 475 (1996) (adding 10 U.S.C. §§ 2540-2540d). The countries included in the program are NATO countries, major non-NATO allies, Central-European countries with democratic governments, and noncommunist countries who are members of the Asia Pacific Economic Cooperation.

[195] *See* 10 U.S.C. § 2501 (stating congressional defense policy for sustaining the industrial base).

[196] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 808, 110 Stat. 186, 393 (1996).

[197] H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 833 (1996).

[198] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 808(b), 110 Stat. 186, 393 (1996).

[199] *Id.* § 807, 110 Stat. 186, 391 (1996).

[200] 10 U.S.C. § 2401a.

[201] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 807(c), 110 Stat. 186, 392 (1996).

[202] National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 834, 103 Stat. 1509 (1989).

[203] DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 219.702(a)(i)(B) (31 Dec. 1991).

[204] S. REP. No. 112, 104th Cong., 1st Sess. 269 (1995).

[205] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 811, 110 Stat. 186, 394 (1996). Previously, only one contracting activity in each department or activity could establish a demonstration project, and eligible businesses were required to have at least five contracts with a total value of $25 million. *See* National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 834(a), (b)(3), 103 Stat. 1509 (1989).

[206] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 811(a), 110 Stat. 186, 394 (1996).

18. Facility-Wide Commercial Practices Program. With an eye toward increasing the efficiency of the acquisition process, Congress authorized the Secretary of Defense to conduct a pilot program using commercial practices on a facility-wide basis.[207] Under this program, facility contracts may be awarded without requiring the contractor or subcontractors to provide certified cost and pricing data[208] or to comply with the *Cost Accounting Standards*.[209] Additionally, the Secretary may substitute commercial procedures for the government's access and audit rights, use commercial oversight, inspection, and acceptance procedures, eliminate the government's right to make unilateral changes to contracts, and forces arbitration to resolve disputes for facility contracts under the program.[210]

19. Meltdown of the Government Acquisition Workforce. Just when it looked like the drawdown was over, Congress has directed the Secretary to submit a plan on restructuring the defense acquisition organization.[211] The plan must provide for the reduction of the military and civilian personnel assigned or employed in the DOD acquisition organizations by twenty-five percent over a five-year period, with a Fiscal Year 1996 reduction of 15,000. Moreover, the plan must reduce management overhead by consolidating acquisition organizations, including functions of the Defense Contract Audit Agency and the Defense Contract Management Command.

20. Defense Modernization Account Established. Concerned about the "serious shortfall in funding for modernization,"[212] and desiring to encourage the DOD to achieve economies and efficiencies which would produce savings,[213] Congress authorized the Secretary of Defense and the service secretaries to transfer "excess funds" into a "Defense Modernization Account."[214] The secretaries are authorized to transfer up to $1 billion in unexpired procurement funds and funds used to support installations and facilities. For a period of three years after the end of the fiscal year in which such a transfer occurs, funds in the account may be used to increase the quantity of items under a procurement program to achieve a more efficient production or delivery rate, or for research, development, test, evaluation, and procurement necessary to modernize existing systems. Authority to transfer funds into the account expires on 30 September 2003.[215]

21. Limitation on Investing in Excess Defense Industrial Capacity. Congress has restricted the DOD's use of funds for capital investment, development, or construction of a government-owned, government-operated (GOGO) defense industrial facility. Prior to undertaking such activity, the Secretary of Defense must certify to Congress that no similar capability or minimally used capacity exists in any other GOGO defense industrial facility.[216]

22. New Restriction on Use of Contingency Funds. Congress has historically provided the Secretary of Defense and the Service Secretaries with emergency and extraordinary expense funds for contingencies which could not be anticipated or classified or for other confidential purposes.[217] Although legally available for any purpose the Secretary deems proper, the DOD and the military departments have tightly regulated their use.[218] Nevertheless, the Secretary of Defense apparently pushed the envelope too far, using $5 million in contingency funds to provide fuel oil to North Korea.[219] As a result, Congress imposed new restrictions on the DOD's use of these funds. The Secretary of Defense

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[207] *Id.* § 822, 110 Stat. 186, 396 (1996).

[208] *See* 10 U.S.C. § 2306a.

[209] *See* 41 U.S.C. § 422(f).

[210] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 822(i), 110 Stat. 186, 399 (1996).

[211] *Id.* § 906, 110 Stat. 186, 404 (1996).

[212] H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 838 (1995).

[213] *See* S. REP. No. 112, 104th Cong., 1st Sess. 279 (1995).

[214] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 912, 110 Stat. 186, 407 (1996) (adding 10 U.S.C. § 2215).

[215] *Id.*

[216] *Id.* § 1083, 110 Stat. 186, 456 (1996).

[217] *See* 10 U.S.C. § 127. These funds typically are provided as an earmark to the O&M appropriation. *See, e.g.*, Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, tit. II, 109 Stat. 636, 638 (1995) (earmarking $14,437,000 of the Army's O&M appropriation for emergencies and extraordinary expenses).

[218] *See* DEP'T OF DEFENSE, DIR. 7250.13, OFFICIAL REPRESENTATION FUNDS (Feb. 23, 1989); DEP'T OF ARMY, REG. 37-47, CONTINGENCY FUNDS OF THE SECRETARY OF THE ARMY (15 Jan. 1990); DEP'T OF AIR FORCE, INSTR. 65-603, OFFICIAL REPRESENTATION FUNDS—GUIDANCE AND PROCEDURES (1 May 1992); DEP'T OF NAVY, REG. 7042.7, GUIDELINES FOR USE OF OFFICIAL REPRESENTATION FUNDS (5 Dec. 90).

[219] *See* H.R. REP. No. 131, 104th Cong., 1st Sess. 160 (1995); S. REP. No. 124, 104th Cong., 1st Sess. 214 (1995).

must notify Congress fifteen days in advance prior to obligating or expending amounts in excess of $1 million; for obligations or expenditures between $500,000 and $1 million, the Secretary must provide five days notice.[220] Advance notice is not required, however, if national security objectives will be compromised.

23. New Funding Mechanisms for Unbudgeted Operations. Congress expressed its concern about the DOD's increasing involvement in unbudgeted peacekeeping and humanitarian assistance operations, and the impact these operations have on military readiness.[221] Noting the cancellation of training exercises, deferral of necessary maintenance, and a general degradation of readiness, Congress decried the DOD's practice of robbing Peter to pay Paul—raiding operational readiness accounts to pay for unfunded operations.[222] To remedy this situation, Congress provided the Secretary with transfer authority of $200 million to reimburse accounts for the incremental expenses of a deployment.[223] These funds may be transferred from the unobligated balance of any DOD appropriation other than operation and maintenance (O&M) appropriations from the operating forces or mobilization accounts. Additionally, Congress directed the Secretary to require the DBOF to waive the incremental costs incurred in providing services in support of a deployment, while prohibiting the Secretary from restoring DBOF balances through increases in rates or by using O&M appropriations from the operating forces or mobilization accounts. Finally, to overcome the President's objections,[224] Congress stated in a "Sense of Congress" provision that the President should seek a supplemental appropriation from Congress within ninety days after an operation commences to replenish the DBOF or other funds or accounts.[225]

24. Expanded Counter-Drug Activities for National Guard. Congress clarified its intent regarding the use of the National Guard of a state to engage in counter-drug activities. In accordance with a state plan approved by the Secretary of Defense, personnel may be ordered to perform full-time National Guard duty under 32 U.S.C. § 502(f) to engage in counter-drug and drug interdiction activities.[226] Congress included an end-strength limitation of 4000 guardsmen engaged in full-time counter-drug activities for more than 180 days; although, the Secretary of Defense may increase the end strength by twenty percent if necessary for national security.[227]

25. Cooperative Threat Reduction with the Former Soviet Union. Congress authorized $300 million for cooperative threat reduction (CTR) programs in Fiscal Year 1996,[228] a reduction of $71 million from the President's budget request.[229] Significantly, Congress allocated a specific amount for each CTR program,[230] while allowing the Secretary of Defense to exceed the specified amounts by fifteen percent if he provides Congress with fifteen days advance notice.[231] The Secretary also must report to Congress the activities and forms of assistance he plans to provide at least fifteen days before obligating any funds for a CTR program.[232] Finally, Congress prohibited use of any CTR funds for peacekeeping-related activities with Russia.[233]

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[220] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 915, 110 Stat. 186, 413 (1996) (amending 10 U.S.C. § 127).

[221] H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 842-44 (1995).

[222] *Id.*

[223] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1003, 110 Stat. 186, 415 (1996) (amending 10 U.S.C. § 127a).

[224] The President objected to the mandatory provision in the original Authorization Bill requiring him to request a supplemental appropriation from Congress within forty-five days after the start of an operation. *See* H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 243 (1995).

[225] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1003, 110 Stat. 186, 415 (1996).

[226] *Id.* § 1021, 110 Stat. 186, 426 (1996).

[227] *Id.*

[228] *Id.* § 1201, 110 Stat. 186, 469 (1996).

[229] H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 866 (1995).

[230] For example, Congress earmarked $90 million for the elimination of strategic offensive weapons in Russia, Ukraine, Belarus, and Kazakhstan; $42.5 million for weapons security in Russia; and $35 million for nuclear infrastructure elimination in Ukraine, Belarus, and Kazakhstan. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1202, 110 Stat. 186, 469 (1996). Interestingly, Congress denied authorization of any funds for the Defense Enterprise Fund, believing DOD funds should not be used to convert Russian military enterprises to civilian use. *See* H.R. REP. No. 131, 104th Cong., 1st Sess. 257 (1995).

[231] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1202(a), (b), 110 Stat. 186, 469 (1996).

[232] *Id.* § 1205, 110 Stat. 186, 470 (1996).

[233] *Id.* § 1203, 110 Stat. 186, 470 (1996).

26. New Prohibition on DOD Support for United Nations Activities. Rejecting another attempt to "divert scarce defense resources toward a nondefense purpose,"[234] Congress prohibited the DOD from using its funds to make a financial contribution to the United Nations (UN) for the costs of a UN peacekeeping activity or for any arrearage owed by the United States to the UN.[235]

27. Changes to the DOD's Humanitarian Assistance Programs. Congress specified five DOD programs for consolidation in a budget account known as "Overseas Humanitarian, Disaster, and Civic Aid."[236] The programs include humanitarian and civic assistance,[237] transportation of humanitarian relief supplies,[238] foreign disaster assistance,[239] excess nonlethal supplies for humanitarian relief,[240] and humanitarian assistance.[241] Congress also expanded the DOD's authority to conduct humanitarian and civic assistance to include landmine detection and clearance, but limited this authority to activities related to education, training, and technical assistance.[242] Finally, Congress eliminated the Secretary of State's authority over the DOD's transportation of humanitarian relief, while removing the DOD's authority to transfer funds to the Secretary of State to pay costs associated with transporting or distributing humanitarian relief supplies.[243] While these changes may facilitate the DOD's conduct of humanitarian assistance missions, Congress continued to express its belief that these operations are fundamentally the responsibility of the Department of State and the Agency for International Development (AID).[244] Toward that end, Congress directed the Comptroller General to report on the existing funding mechanisms available to the Department of State or AID to cover the costs associated with these operations.[245]

28. Authority to Conduct Minor Construction Projects Expanded. All DOD activities may use O&M funds to perform minor construction up to $300,000 per project.[246] Congress has amended this authority to allow the use of O&M funds up to $1 million for military construction projects intended solely to correct deficiencies which threaten life, health, or safety.[247] Projects using unspecified minor military construction funds, normally limited to $1.5 million per project, may have an approved cost up to $3 million if the purpose is to correct such deficiencies.[248]

In a related provision, Congress authorized the Secretary of Defense to conduct a "Laboratory Revitalization Program" using a $3 million threshold for minor military construction projects and a $1 million threshold for O&M funded construction projects.[249] These higher thresholds will apply to construction performed at any DOD laboratories, other than contractor-owned facilities, which have been designated by the Secretary for participation in the program.

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[234] H.R. REP. No. 131, 104th Cong., 1st Sess. 260 (1995).

[235] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1301, 110 Stat. 186, 473 (1996) (adding 10 U.S.C. § 405).

[236] *Id.* § 1311, 110 Stat. 186, 473 (1996). *See also* Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, tit. II, 109 Stat. 636, 642 (1995) (appropriating $50 million for Overseas Humanitarian, Disaster, and Civic Aid programs of the DOD).

[237] 10 U.S.C. § 401.

[238] *Id.* § 402.

[239] *Id.* § 404.

[240] *Id.* § 2547.

[241] *Id.* § 2551.

[242] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1313, 110 Stat. 186, 474 (1996) (amending 10 U.S.C. § 401). Congress specifically prohibited members of the armed forces from engaging in the physical detection, lifting, or destroying of landmines unless performed for the concurrent purpose of supporting a United States military operation. *Id.* § 1313(b), 110 Stat. 186, 475 (1996).

[243] *Id.* § 1312, 110 Stat. 186, 474 (1996).

[244] *See* H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 871 (1995).

[245] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1311(b), 110 Stat. 186, 473 (1996).

[246] 10 U.S.C. § 2805(c).

[247] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2811, 110 Stat. 186, 552 (1996) (amending 10 U.S.C. § 2805(c)(1)).

[248] *Id.* (amending 10 U.S.C. § 2805(a)(1)).

[249] *Id.* § 2892, 110 Stat. 186, 590 (1996).

In an interesting clarification, Congress eliminated from the definition of minor military construction project the requirement that the project be for a "single undertaking at a military installation."[250] Under the new definition, a minor military construction project is a military construction project that has an approved cost equal to or less than $1.5 million.[251] Although the purpose of this change is not entirely clear, the Senate Armed Services Committee indicated that the amendment will make the definition of minor military construction consistent with the definition of military construction found in 10 U.S.C. § 2801.[252]

29. New Authority to Convey Damaged Military Family Housing. Congress authorized the Service Secretaries to convey any family housing unit that is uneconomical to repair due to damage or deterioration.[253] This authority is limited to $5 million per fiscal year in aggregate total value, and may not be used to convey family housing units at military installations approved for closure or at installations outside the United States in which the Secretary of Defense terminates operations. Moreover, the secretary must notify Congress twenty-one days prior to entering a conveyance agreement. Proving the maxim that "there is no free lunch," Congress mandated that persons receiving the conveyance of family housing units pay the fair market value as determined by the secretary. The proceeds received from the buyer must be deposited in the Family Housing Improvement Fund,[254] which the secretary may use to construct replacement units or to repair existing units without further appropriation from Congress.

IV. Conclusion.

While the implementing regulations will tell the full story, the provisions outlined above could result in some of the biggest changes in government contracting in over a decade. The repeal of the Brooks ADP Act, with the resultant elimination of the GSBCA as a bid protest forum, will significantly impact purchases of information technology. Perhaps the most significant changes, however, will be the further relaxation of procedures for the purchase of commercial items, especially the $5 million simplified acquisition threshold applicable to these purchases. We look forward to the implementing regulations, hopeful that the spirit of streamlining will not be frustrated. We also look forward to whatever surprises Congress will have for us between now and the next Year-in-Review. Hopefully, we will not have to do next year's article in several parts!

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[250] *Id.* § 2812, 110 Stat. 186, 552 (1996) (amending 10 U.S.C. § 2805(a)(1)).

[251] Title 10 U.S.C. § 2801(a) defines the term "military construction" to include "any construction, development, conversion, or extension of any kind carried out with respect to a military installation." A "military construction project" is defined to include all military construction work "necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility."

[252] S. REP. No. 112, 104th Cong., 1st Sess. 327 (1995). *See also* H.R. Rep. No. 131, 104th Cong., 1st Sess. 281 (1995) (describing the amendment as a "technical and clarifying change").

[253] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2818, 110 Stat. 186, 553 (1996) (adding 10 U.S.C. § 2854a).

[254] *See id.* § 2801 (creating Defense Family Housing Improvement Fund, 10 U.S.C. § 2883).

Eroding the *Feres*[1] Doctrine—A Critical Analysis of Three Decisions

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Introduction

In *United States v. Johnson*,[2] the United States Supreme Court reaffirmed the principle that military members may not bring tort actions against the government for injuries arising out of, or in the course of, activities incident to service. However, Justice Scalia, joined by Justice Brennan, Justice Marshall, and Justice Stevens, wrote a scathing dissent, stating, "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."[3] Since *Johnson*, several lower courts have found creative means to avoid application of the *Feres* doctrine. This article discusses and critically analyzes several of these cases.[4]

Overview of the *Feres* Doctrine

In *Brooks v. United States*,[5] the Supreme Court first reviewed whether service members could recover damages for tort injuries under the Federal Tort Claims Act (FTCA).[6] In *Brooks*, two soldiers, who were also brothers, were on leave visiting with family. While driving in a car with their father on a public highway, a United States Army vehicle struck their car, killing one of the brothers and badly injuring the other. The Court found that the accident was not incident to service and allowed the soldiers to bring an action under the FTCA. However, the Court stated that "[w]ere the accident incident to the Brooks' service, a wholly different case would be presented."[7]

In less than one year, such a situation presented itself to the Court. In *Feres v. United States*,[8] the Court consolidated three cases involving service members seeking relief under the FTCA. The three cases involved two allegations of medical malpractice and an allegation of negligence in providing safe housing and maintaining an adequate fire watch. The Court determined that the injuries were incident to service; therefore, the service members could not bring an action under the FTCA.

The Court's decision was based on many factors.[9] First, the Court noted the FTCA's purpose was to hold the United States liable for tort injuries in the same manner as private litigants.[10] Yet, because private individuals could not raise armies, they could not be sued for service connected injuries.[11] Therefore, the FTCA was not intended to expose the federal government to injuries incident to service when private citizens were not subject to such suits.[12]

Second, the Court commented that liability under the FTCA was determined by the location of the victim at the time of in-

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[1] Feres v. United States, 340 U.S. 135 (1950).

[2] 481 U.S. 681 (1987).

[3] *Id.* at 700-01 (quoting *In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1246 (EDNY), *appeal dism'd*, 745 F.2d 161 (2d Cir. 1984)).

[4] The author will critically analyze three decisions: Elliott by and Through Elliott v. United States, 13 F.3d 1555 (11th Cir. 1994), *vacated for reh'g en banc*, 28 F.3d 1076 (11th Cir.) (*en banc*), *aff'd by an equally divided Court*, 37 F.3d 617 (11th Cir. 1994); Romero by Romero v. United States, 954 F.2d 223 (4th Cir. 1992); M.M.H. v. United States, 966 F.2d 285 (7th Cir. 1992).

[5] 337 U.S. 49 (1949).

[6] 28 U.S.C. § 2671 (1995).

[7] *Brooks*, 337 U.S. at 920.

[8] 340 U.S. 135 (1950).

[9] Due to the scope of this article, I will not discuss all the rationale of the Supreme Court.

[10] *Feres*, 340 U.S. at 141-42.

[11] *Id.*

[12] *Id.*

jury.[13] Because armed forces assign service members to many different locations, the validity of any one service member's claim would hinge on the state law where that service member happened to be assigned at the time of injury.[14] Consequently, only some state laws would allow service members recovery. To avoid this inequitable result, the Court concluded that the FTCA must have been intended to exclude claims incident to service.[15]

Conversely, the Court noted that the relationship between the government and service members was "distinctly federal in character."[16] Consequently, that relationship should be evaluated using federal authority, not state law.[17] Additionally, the Court noted a system existed for the "simple, certain, and uniform compensation [of] injuries or death of those in the armed forces."[18]

Several years later, the Supreme Court revisited the issue of injuries incident to service in *United States v. Brown*.[19] Brown, a discharged veteran, filed suit under the FTCA for an injury to his leg caused during an operation at a Veterans Administration (VA) Hospital. The purpose of the surgery was to correct a knee injury sustained while Brown was on active duty. The Court determined Brown's case was governed by *Brooks*, not *Feres*.[20] Brown incurred the injury during surgery after discharge while he was a civilian; therefore, his injury was not incident to service.[21] Consequently, Brown could bring his tort action against the VA under the FTCA.

Two decades passed before the Supreme Court again reviewed and clarified the scope of the *Feres* doctrine. In *Stencel Aero Engineering Corp. v. United States*,[22] the Court reviewed Stencel's indemnification action against the United States in a case involving a National Guardsman who was permanently injured when the egress life-support system of his fighter jet malfunctioned. Stencel manufactured the life support system.

The Court found that *Feres* barred Stencel's indemnification action, just as it barred the pilot's claim against the United States. In doing so, the Court narrowed the factors articulated in *Feres* to three. First, is the relationship between the parties "distinctly federal in character?"[23] Second, is there access to a compensation scheme which provides a "swift, efficient remedy for injured serviceman, ... [and] provides an upper limit of liability for the Government . . . ?"[24] Third, what is the effect of the action on military discipline?[25]

After *Stencel*, the Court reviewed an action involving the death of a service member on leave who was killed by a fellow service member.[26] The Court found that *Feres* barred the suit, focusing on the third factor articulated in *Stencel*—the effect on military discipline.[27] The Court noted the first two factors, while present in the case, were "no longer controlling."[28]

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[13] *Id.* at 142-43.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 143.

[17] *Id.* at 143-44.

[18] *Id.* at 145.

[19] 348 U.S. 110 (1954).

[20] *Id.* at 112.

[21] *Id.*

[22] 431 U.S. 666 (1977).

[23] *Id.* at 672.

[24] *Id.* at 674.

[25] *Id.* at 673.

[26] United States v. Shearer, 473 U.S. 52 (1985).

[27] *Id.* at 57-59.

[28] *Id.* at 58 n.4.

Ten years later, in *United States v. Johnson*,[29] the Court retreated from its position that the third factor—military discipline—was controlling in evaluating cases under *Feres*. Instead, the Court reiterated the three factors for evaluation: (1) federal relationship, (2) statutory disability system, and (3) military discipline.[30] After reviewing these factors, the Court determined that the injuries were incident to service.[31]

However, Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, rendered a stinging dissent.[32] Justice Scalia began his dissent by noting that the Court had "not been asked by respondent here to overrule *Feres* . . . ."[33] Justice Scalia then reviewed the history of the FTCA, concluding that the language and history of the Act did not exclude service members from its coverage.[34] Next, Justice Scalia examined each of the three factors used to justify the *Feres* doctrine, finding them unpersuasive.[35] In sum, Justice Scalia stated, "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."[36]

A Critical Review of Three Cases

Federal courts always have reluctantly applied *Feres*.[37] With Justice Scalia in their corner, they have found new courage in reviewing cases involving *Feres*.[38] As a result, the *Feres* doctrine is slowly eroding. This section analyzes and critically reviews several decisions to determine if they are consistent with prior precedent.

The Case of Elliott by and Through Elliott v. United States[39]

The Facts and the Court's Decision

On 14 August 1989, David Elliott, was an active duty staff sergeant in the United States Army and was on ordinary leave from military duties. He and his wife, Barbara, a civilian, lived in government quarters on Fort Benning, Georgia. During his leave, Barbara went to sleep in their bedroom, leaving David in the living room watching television. During the night, a defective hot water heater and vent pipe leaked carbon monoxide, resulting in injuries to both David and Barbara.[40]

Barbara Elliott brought suit in federal district court on behalf of herself and her husband under the FTCA.[41] She claimed that the government negligently failed to maintain the vent pipe, proximately causing injuries to herself and her husband.[42] She argued that because David Elliott was on ordinary leave at the time of the incident, his injuries were not due to his military service.[43] In

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[29] 481 U.S. 681 (1987). In *Johnson*, a Coast Guard pilot was killed in a helicopter crash during a rescue mission. At the time of the crash, the Federal Aviation Administration (FAA) had positive radar control over the helicopter. The pilot's wife brought action against the FAA, claiming the controller's negligence had caused the crash. The United States argued that the suit was barred under *Feres* because the death was incident to the pilot's Coast Guard service.

[30] *Id.* at 684 n.2.

[31] *Id.* at 691.

[32] *Id.* at 693-703.

[33] *Id.* at 692.

[34] *Id.* at 692-93.

[35] *Id.* at 695-703.

[36] *Id.* at 700-01 (quoting *In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1246 (EDNY), *appeal dism'd*, 745 F.2d 161 (2d Cir. 1984)).

[37] Justice Scalia cites numerous cases in support of his statement that Feres has been universally criticized. *See Johnson*, 481 U.S. at 36 n.*.

[38] *See, e.g.*, Kelly v. Panama Canal Comm'n, 26 F.3d 597 (5th Cir. 1994); Elliott by and Through Elliott v. United States, 13 F.3d 1555 (11th Cir. 1994), *vacated for reh'g en banc*, 28 F.3d 1076 (11th Cir.)(en banc), *aff'd by an equally divided Court*, 37 F.3d 617 (11th Cir. 1994); Green v. Hall, 8 F.3d 695 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 58 (1994); Romero by Romero v. United States, 954 F.2d 223 (4th Cir. 1992); M.M.H. v. United States, 966 F.2d 285 (7th Cir. 1992).

[39] 13 F.3d 1555 (11th Cir. 1994), *vacated for reh'g en banc*, 28 F.3d 1076 (11th Cir.) (*en banc*), *aff'd by an equally divided Court*, 37 F.3d 617 (11th Cir.) (*en banc*).

[40] The couple was found in their apartment the next morning when Barbara failed to go to work. David remained comatose for two weeks and he suffered serious, permanent, and debilitating injuries from inhaling carbon monoxide. Barbara, while comatose when initially discovered, recovered from her injuries within three weeks. *Id.* at 1556-57.

[41] Aside from damages for injuries sustained in the incident, she and her husband claimed loss of consortium. *Id.* at 1557.

[42] *Id.*

[43] *Id.*

response, the Government asserted that David Elliott's injuries were incident to service because he was enjoying a military benefit at the time of his injuries.[44]

The United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) characterized the issue in the case as "whether the *Feres* doctrine denied military persons recovery for injuries incurred while on leave due to an armed force's negligent maintenance of on-base housing."[45] With this issue framed, the Eleventh Circuit reviewed the three factors of the *Feres* doctrine, finding the first two factors no longer controlling.[46] Focusing on the third factor, the Eleventh Circuit determined that a review of military housing policy did not bring military discipline into question.[47] Therefore, none of the *Feres* factors barred review of the case.

The Eleventh Circuit then turned to the totality of the circumstances to determine if the injuries were incident to service.[48] The court reviewed David Elliott's duty status, the situs of the injury, and the nature of his activity.[49] The court found that David Elliott's leave status tipped both the first and third factor in favor of granting suit while only the situs of the injury weighed in favor of the *Feres* bar.[50] Consequently, the Eleventh Circuit held that *Feres* did not bar the suit.

Critical Analysis

Arguably, the Eleventh Circuit erred in finding that *Feres* did not bar David Elliott's suit. The court ignored the first two factors in *Feres*, relying only on the third. Moreover, in evaluating the third factor, the court ignored the effect that these types of suits would have on military discipline. Lastly, the court improperly relied on David Elliott's leave status when evaluating the totality of the circumstances.

The Three *Feres* Factors

Although the Eleventh Circuit may agree with Justice Scalia's dissent in *Johnson*,[51] it is not free to ignore the majority. In reviewing a case under *Feres*, courts must evaluate all three factors—the federal relationship, the statutory disability system, and the impact on military discipline.[52] In *Elliott*, the Eleventh Circuit impermissibly failed to consider all three *Feres* factors by focusing solely on the third factor.

In finding the first two factors irrelevant, the Eleventh Circuit cited *Shearer*,[53] Justice Scalia's dissent in *Johnson*,[54] and a 1980 opinion of the United States Court of Appeals for the District of Columbia, *Hunt v. United States*.[55] None of these cases, however, overrides the recent affirmation of the majority of the Supreme Court that cases should be evaluated using *all three factors*.[56]

If the Eleventh Circuit had properly reviewed the first two factors reaffirmed in *Johnson*, it would have determined that they counselled against permitting suit. First, the relationship between David Elliott, an active duty service member, and the military authorities running the housing units is distinctly federal in na-

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[44] *Id.*

[45] *Id.* Additionally, the Eleventh Circuit addressed whether the *Feres* doctrine barred Barbara Elliott's claim for loss of consortium as a derivative claim. On finding David Elliott's injuries not incident to service, the Eleventh Circuit ruled that *Feres* did not bar the claim for loss of consortium. *Id.* at 1563.

[46] *Id.* at 1558-59.

[47] *Id.* at 1559-60.

[48] The Eleventh Circuit reviewed the duty status of the service member, the situs of the injury, and the nature of the activity involved when reviewing the totality of the circumstances. *See* Pierce v. United States, 813 F.2d 349 (11th Cir. 1987). Several other circuits use the same or similar criteria in evaluating claims; others rely solely on the factors articulated in *Feres*. *See, e.g.*, Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (three-part test); Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983) (four-part test); Sanchez v. United States, 839 F.2d 40 (2d Cir. 1988) (reviews only the three *Feres* factors).

[49] *Elliott*, 13 F.3d at 1561-63.

[50] *Id.*

[51] *Johnson*, 481 U.S. 681, 693-703 (1987).

[52] *Id.* at 684 n.2.

[53] Shearer v. United States, 473 U.S. 52 (1985). The Eleventh Circuit cites the footnote in *Shearer* where the Court states that the first two factors are no longer controlling. *Elliott*, 13 F.3d at 1559.

[54] *Johnson*, 481 U.S. at 693-703.

[55] 636 F.2d 580 (D.C. Cir. 1980).

[56] *Johnson*, 481 U.S. 681 (1987). Ironically, as with *Elliott*, *Johnson* is an Eleventh Circuit case where the court improperly focused on the third *Feres* factor, ignoring the first two. While the Supreme Court never retreats from its position that the third factor may be most important, in *Johnson*, the Supreme Court reaffirmed that courts must examine all three factors.

ture.[57] Second, statutory disability benefits are available to David Elliott for his injuries.[58] Therefore, these two factors indicate that Elliott's suit should be barred. Consequently, the Eleventh Circuit's failure to evaluate these factors contributed to its incorrect decision.

The Effect on Military Discipline

When evaluating the third *Feres* factor, the Eleventh Circuit failed to consider the relevant facts and case law, resulting in an incorrect conclusion. First, the Eleventh Circuit simply accepted the lower court's findings by noting that it had reviewed the issue regarding housing and had found no apparent effect on military discipline.[59] While it is unclear how the court was able to make this observation, it is irrelevant to the issue that was before the Eleventh Circuit.

The issue before the Eleventh Circuit should have been whether the case was the "*type* of claim that, if generally permitted, would involve the judiciary in military affairs at the expense of military discipline and effectiveness."[60] Surely, service members' challenges to the fitness of their assigned quarters would bring into question the military decision-making process and impacting on discipline.[61]

For example, a military commander with a limited budget may determine that upgrading housing is a low priority compared with other projects on the installation. As such, he may choose not to update the heating system in a housing unit but instead update an aircraft hanger.[62] The judiciary's review of that decision goes directly to military readiness and decision making.[63] Consequently, the Eleventh Circuit incorrectly concluded that challenges to decisions regarding military housing would not effect military discipline.

The Totality of Circumstances

Duty Status. The Eleventh Circuit's analysis of the totality of circumstances begins and ends with David Elliott's duty status—authorized leave. However, what the court fails to recognize is that duty status is not determinative but only one factor to consider. This is clear from Supreme Court precedent. In *Shearer*,[64] a service member *on leave* was killed by another service member. Yet, despite that the victim was on leave, the Court found that *Feres* barred his cause of action. Duty status is merely one consideration in determining whether *Feres* bars an action.[65]

Aside from ignoring *Shearer*, the Eleventh Circuit incorrectly relied on *Brooks* as establishing a "leave" exception. While the Brooks brothers were on leave at the time of their accident, the Supreme Court did not solely base its decision on that fact. Instead, the Supreme Court evaluated all of the circumstances to determine whether the brothers' injuries were incident to service.[66] Therefore, contrary to the intimation of the Eleventh Circuit in *Elliott*, there is no *per se* "leave" exception to the *Feres* doctrine.

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[57] *Feres* involved a suit brought on behalf of a service member killed in a fire in military quarters. The Supreme Court stated, "[w]ithout exception, the relationship of military personnel to the Government had been governed exclusively by federal law." Feres v. United States, 340 U.S. 135, 146 (1950).

[58] In *Elliott*, the Eleventh Circuit comments that the military disability system is "woefully inadequate to care for [Elliott's] debilitating injuries." Elliott by and Through Elliott v. United States, 13 F.3d 1555, at 1559 n.5 (11th Cir. 1994), *vacated for reh'g en banc*, 28 F.3d 1076 (11th Cir.) (*en banc*), *aff'd by an equally divided Court*, 37 F.3d 617 (11th Cir. 1994). Again, the Eleventh Circuit ignored the language in *Johnson*. The Supreme Court pointed out that the disability system is "swift and efficient, . . . [and] normally require[s] no litigation." *Johnson*, 481 U.S. at 690 (quoting Stencel Aero Engineering Corp. v. United States, 431 U.S. at 673; *Feres*, 340 U.S. at 145). Therefore, while the amount of money received may not equal that of a tort judgment, it is a sum certain, received quickly, with minimum effort on the part of the recipient.

[59] *Elliott*, 13 F.3d at 1560.

[60] Shearer v. United States, 473 U.S. 52, at 59 (1985).

[61] The Defense Department reports that about 60% of family housing units are inadequate. Defense Secretary William Perry cited old housing on military posts as directly impacting on the readiness of troops. Bradley Graham, *The New Military Readiness Worry: Old Housing*, WASH. POST, Mar. 7, 1995, at A1, A6.

[62] Even during the defense build up in the 1980's, family housing was not upgraded. Instead, the monies went to weapon systems. *Id.* at A6.

[63] In the Army, regulations govern the management of housing and those regulations give the commander ample discretion in making decisions. Moreover, the military regulates service members and family members' conduct in military housing. Failing to follow regulations could result in eviction. *See* DEP'T OF ARMY, REG. 210-50, INSTALLATIONS: HOUSING MANAGEMENT (24 May 1990).

[64] *See generally* Shearer v. United States, 473 U.S. 52 (1985).

[65] *See also* Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) (action barred when based on allegation of medical malpractice while on excess leave); Walls v. United States, 832 F.2d 93 (7th Cir. 1987) (action barred when based on injury while on leave and engaging in recreational activity with military club); Madsen v. United States *Ex Rel.* United States Army, Corps of Engineers, 841 F.2d 1011 (10th Cir. 1987) (action barred when based on allegation of medical malpractice while on terminal leave); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980) (action barred when based on injury while on leave and engaging in recreational activity with nonappropriated fund instrumentality club); Herreman v. United States, 476 F.2d 234 (7th Cir. 1973) (action barred where National Guardsman injured during Space A travel while on leave).

[66] As the Court subsequently summarized in *Feres*, "The injury to Brooks did not arise out of, or in the course of, military duty. Brooks was on furlough, driving along a highway, under compulsion of no orders or duty and on no military mission. Feres v. United States, 340 U.S. 135, 146 (1950).

Situs of the Injury. The Eleventh Circuit correctly determined that the situs of the injury, a military post, suggested that the case was *Feres* barred. However, the court immediately discounted this factor by stating "no bright-line rule exists which compels an outcome."[67] The court then quickly turned to the nature of the activity.

Nature of the Activity. Lastly, the Eleventh Circuit incorrectly evaluated the nature of Elliott's activity at the time of injury. Instead of viewing Elliott's activities in the broad sense, the court took a very narrow view. In other words, the broad approach views Elliott as enjoying the military benefit of quarters at the time of injury; the narrow approach views Elliott as enjoying his television, ignoring that he is in military quarters while watching television. As a result, *Elliott* ignores the relationship between the activity and the federal government.

However, the courts generally take a broad view when evaluating the nature of service members' activities under *Feres*.[68] This approach is consistent with the *Feres* doctrine; it evaluates the general relationship between the activity at the time of the injury and a service member's military service. If the activity is related to the service member's military service, the nature of the activity will counsel against permitting suit.

Moreover, by viewing the activity narrowly, the Eleventh Circuit reached several incorrect conclusions. First, the court concluded that Elliott was not subject to military control while watching his television.[69] Military quarters, however, always are subject to military control and regulations.[70]

Second, the Eleventh Circuit found irrelevant that Elliott was entitled to his quarters only by virtue of his military status.[71] However, other federal courts have found that the provision of military benefits makes an activity incident to service.[72] That finding is based on the existence of the distinctly federal relationship between the government and the beneficiary under the circumstances. Only by virtue of that federal relationship is the individual able to engage in the activity resulting in the injury.[73] Therefore, the Eleventh Circuit erred in finding Elliott's entitlement to quarters irrelevant.

Conclusion

A review of the *Feres* factors and totality of the circumstances indicates Staff Sergeant Elliott's suit should have been barred. Even though Elliott was on leave at the time of his injury, his injury occurred on post while he was enjoying a military benefit only available to him by virtue of a federal relationship.

The Case of M.M.H. v. United States[74]

Facts and the Court's Decision

On 15 November 1985, M.M.H., an active duty soldier, tested positive for the HIV virus which results in AIDS.[75] After being

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[67] Elliott by and Through Elliott v. United States, 13 F.3d 1555, 1561 (11th Cir. 1994), *vacated for reh'g en banc*, 28 F.3d 1076 (11th Cir.) (*en banc*), *aff'd by an equally divided Court*, 37 F.3d 617 (11th Cir. 1994). This statement is ironic when the Eleventh Circuit distinguished contrary precedent based solely on Elliott's leave status at the time of his injuries. *Id.* at 1562-63 nn.7-8. The Eleventh Circuit established a bright line test, focusing on "duty status."

[68] *See* Lauer v. United States, 968 F.2d 1428 (1st Cir.), *cert. denied*, 113 S. Ct. 812 (1992) (viewed activity broadly as enjoying military recreation—not walking along road); Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (viewed activity broadly as enjoying military automotive service station—not getting car brakes repaired); Walls v. United States, 832 F.2d 93 (7th Cir. 1987) (viewed activity broadly as enjoying military flight club—not flying airplane); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (viewed activity broadly as enjoying military recreational facility—not boating); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980) (viewed activity broadly as enjoying military flight club—not flying airplane).

[69] *Elliott*, 13 F.3d at 1562.

[70] *See supra* note 62. *See also* Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (military automotive service station under control of Marine Corps); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (military recreational facility under control of commanding general); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980) (military flight club under control of Air Force).

[71] The Eleventh Circuit declined to expand its previous holdings where it had held that the provision of military medical benefits to military personnel, due to their status as military members, made their activities incident to service. *Elliott*, 13 F.3d at 1562-63.

[72] *See* Lauer v. United States, 968 F.2d 1428 (1st Cir. 1992) (recreational activity only available to military members and family); Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (military automotive service station only open to military members, family and select civilians); Walls v. United States, 832 F.2d 93 (7th Cir. 1987) (military flight club only open to military members); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (military recreational facility only open to military members, family and select civilians); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980) (military flight club only open to military members, family and select civilians).

[73] This is highlighted by the Eleventh Circuit's failure to address the similarity between the *Elliott* and *Feres* case. While the first factor, duty status, differs between the two, the nature of the activity is identical. In *Feres* and *Elliott*, both service members were involved in private activities in military quarters when injuries resulted from government negligence. In *Feres*, the Supreme Court held that the federal relationship between parties barred action.

[74] 966 F.2d 285 (7th Cir. 1992).

[75] *Id.* at 286.

informed of this test result, M.M.H. began to suffer from a variety of ailments, resulting in her honorable discharge on 27 November 1985.[76] After discharge, M.M.H became severely depressed and even attempted to commit suicide by drinking an excessive amount of alcohol and then cutting her wrists and arm with a ripped aluminum can.

On 3 December 1985, the Army learned that the initial blood test was incorrect.[77] However, the Army failed to inform M.M.H. of this negative test result.[78] Subsequently, on her own, M.M.H. learned that she was HIV negative.[79]

When M.M.H. brought suit, she alleged that the Army negligently inflicted severe emotional distress when it failed to inform her of the second blood test.[80] She claimed that the failure to notify her of the second result was an independent tort.[81] The Government asserted that the failure to correct the misdiagnosis constituted a continuation of the original tort, so the case was *Feres* barred.[82]

The United States Court of Appeals for the Seventh Circuit (Seventh Circuit) defined the issue as whether the government committed an independent tort after discharge.[83] The court found that because the second test result was received after discharge, the government's failure to notify was a separate, independent, post-discharge, negligent act.[84] The Seventh Circuit based its conclusion on the fact that the second test result was distinct from the initial faulty diagnosis.[85]

Critical Analysis

A review of the applicable case law and the *Feres* factors reveal that the Seventh Circuit reached the correct conclusion. The court correctly determined that a separate, independent, post-discharge, negligent act occurred in the case. Because the she was a civilian at the time of that act, her claim was not barred by *Feres*.

Brief Review of Case Law

The Supreme Court reviewed the issue of post-discharge injuries in *United States v. Brown*.[86] In *Brown*, a service member incurred a knee injury while on active duty.[87] After he was discharged from the service, the VA performed several operations on his knee.[88] During one of the surgeries, a defective tourniquet was used, resulting in permanent and serious injuries.[89] The Court stated:

> The injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status. The damages resulted from a defective tourniquet applied in a veterans' hospital. Respondent was there, of course, because he had received an injury in the service. And the causal relation of the injury to the service was sufficient to bring the claim under

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[76] *Id.*

[77] *Id.* at 287.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 288.

[82] *Id.*

[83] *Id.* at 289. Additionally, the Seventh Circuit reviewed whether the act prolonged or aggravated a pre-existing injury so as to cause independent damages. *Id.* However, the Seventh Circuit remanded this issue to the lower court for factual findings. *Id.*

[84] *Id.* at 289.

[85] *Id.*

[86] 348 U.S. 110 (1954).

[87] *Id.* at 142.

[88] *Id.*

[89] *Id.*

> the Veterans Act. But, unlike the claims in the Feres case, this one is not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act.[90]

Based on the *Brown* case, when an independent act occurs after discharge, the courts have found that *Feres* does not bar a claim.[91] Conversely, if the injury is a post-discharge continuation of an in-service tort, the claim is *Feres* barred.[92] This independent act theory includes the failure to warn or monitor the service member after discharge.[93]

Application of the Case Law

In M.M.H.'s case, an initial blood test revealed that she was HIV positive. Because of this false test, she was misdiagnosed and incorrectly informed of her medical condition. After her discharge, a second blood test (performed by an independent civilian agency) indicated that she was HIV negative. On receipt of the second blood test, the government had an independent duty to inform M.M.H. of her true medical condition. The government's failure to inform M.M.H. that she was HIV negative was a separate tort from the original misdiagnosis.

As in *Brown*, the second tort had a causal connection to the first.[94] In *M.M.H.*, the second blood test was only necessary to confirm an in-service diagnosis. But for the in-service HIV positive diagnosis, M.M.H. would not have had a second test. However, on receipt of the second test result, the government had an independent duty to notify M.M.H. While there is certainly a causal connection between the two events, they are not one continuous tort.

Even in a case where a continuous tort exists, the court should look to see when the duty to warn arises.[95] If the duty arises while the person is in the service, then the failure to fulfill that duty is continuous from the moment the duty arises. Therefore, no new cause of action arises. However, if the duty to warn arises after discharge, a new cause of action does exists.[96]

The government asserted that the case involved one continuous tort—a misdiagnosis.[97] At first glance, support for that assertion can be found in several cases.[98] However, as the Seventh Circuit in *M.M.H.* correctly noted

> If the government simply failed to rectify a prior mistake, this failure might be a one con-

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[90] *Id.* at 112.

[91] *See, e.g.*, McGowan v. Scoggins, 890 F.2d 128 (9th Cir. 1989) (retiree's claim for injury while on base for personal errand not *Feres* barred); Cortez v. United States, 854 F.2d 723 (5th Cir. 1988) (claim of behalf of soldier on temporary disability retired list who committed suicide while in military medical facility not *Feres* barred); Cole v. United States, 755 F.2d 873 (11th Cir. 1985) (allegations that government knowledge concerning hazard of radiation increased significantly after discharge not *Feres* barred); Broudy v. United States, 722 F.2d 566 (9th Cir. 1983) (same); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (recognized post-discharge torts not *Feres* barred, but unclear if soldier discharged at time misdiagnosis of injury is discovered); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (failure to warn of effects of nuclear weapons testing separate tort); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (independent tort where government deliberately refused to give information about drug testing after discharge).

[92] *See, e.g.*, Maddick v. United States, 978 F.2d 614 (10th Cir. 1992) (claim for injuries resulting from failure to warn of damages from military diving found to be continuous tort and *Feres* barred); Kendrick v. United States, 877 F.2d 1201 (4th Cir. 1989) (claim for injuries resulting from medication administered due to in-service injuries while on temporary disability retire list found to be barred as continuing treatment); Heilman v. United States, 731 F.2d 1104 (3d Cir. 1984) (government's failure to warn of dangers of in-service radiation exposure barred as continuous tort); Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984) (same); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983) (government's failure to inform and warn of exposure to LSD while on active duty barred as continuous tort); Stanley v. Central Intelligence Agency, 639 F.2d 1146 (5th Cir. 1981) (same).

[93] *See generally* cases cited *supra* note 92.

[94] In *Brown*, the veteran had surgery to correct a knee injury caused by his active duty service. But for the in-service knee injury, Brown would not have required the VA operation. However, even with this causal connection, the Court found the tort a separate act. United States v. Brown, 384 U.S. 110 (1954).

[95] *See* Heilman v. United States, 731 F.2d 1104 (3d Cir. 1984) (duty to warn arises at the time defendant knew or should have known of the hazards of in-service radiation exposure); Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984) (same); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982) *cert. denied*, 462 U.S. 118 (1983) (duty to inform and warn of exposure to LSD arose on active duty because of dangers known at time); Stanley v. Central Intelligence Agency, 639 F.2d 1146 (5th Cir. 1981) (same).

[96] *See* Cole v. United States, 755 F.2d 873 (11th Cir. 1985) (allegations that government knowledge concerning hazard of radiation increased significantly after discharge not *Feres* barred); Broudy v. United States, 722 F.2d 566 (9th Cir. 1983) (same); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (recognized post-discharge torts not *Feres* barred, but unclear if soldier discharged at time misdiagnosis of injury is discovered).

[97] M.M.H. v. United States, 966 F.2d 285, at 289 (7th Cir. 1992).

[98] *See* Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (failure to diagnosis tuberculosis found to be continuous tort); Wisneiwski v. United States, 416 F. Supp. 599 (E.D. Wis. 1976) (failure to inform of blood test found to be continuous tort).

tinuous tort. In the present case, however, the plaintiff presented evidence that the government learned of the mistake *after* the plaintiff's discharge. As a result, the government's duty to warn may have arisen after discharge, so that the government's failure to notify was a separate and independent post-discharge negligent act, distinct from its faulty diagnosis.[99]

Application of the *Feres* Factors

The three *Feres* factors support the conclusion that M.M.H.'s claim was not barred. First, the Supreme Court in *Brown* noted that the federal relationship between the parties did not preclude suit because "[c]ertainly [a medical malpractice] claim is one which might be cognizable under local law, if the defendant were a private party."[100] Moreover, at the time of the second tort, M.M.H. was a civilian. Therefore, her relationship with the government was no different from that of any private citizen. Consequently, the first factor does not caution against permitting suit.

Additionally, the military disability compensation system did not cover M.M.H. because she was discharged from the service at the time of her injury.[101] Because M.M.H. would not benefit from the "simple, certain, and uniform compensation"[102] scheme, this factor does not result in barring the suit.

Lastly, M.M.H.'s suit would have little effect on military discipline or decision making. At the time that the military doctor received the second HIV test result, M.M.H. was no longer subject to military control. She had been honorably discharged from the service. Therefore, military discipline was not an issue. Moreover, her challenge to the doctor's decision would not impact on military decision making regarding service members. Because she was a civilian at the time the duty to notify arose, her status was more akin to a family member than to an active duty service member. Therefore, just as a family member can question military doctors without implicating *Feres*,[103] so too can M.M.H. in her civilian status.

The Case of Romero by Romero v. United States[104]

Facts and the Court's Decision

The Romeros were active duty service members stationed at Camp Pendleton, California, when Roxanna Romero became pregnant.[105] Due to an incompetent cervix, Roxanna Romero went into premature labor.[106] She gave birth to a boy, Joshua, who was diagnosed as suffering from cerebral palsy.[107]

The Romeros alleged that the doctors failed to implement a proper prenatal treatment plan, resulting in the premature birth and injuries to Joshua.[108] The Romeros claimed that the doctors should have sutured Roxanna's cervix until she went into labor.[109] Once in labor, the sutures could have been removed without harming the child or mother.[110] The Romeros alleged that if this medical treatment had been provided, Joshua would not have suffered any injuries.[111]

The United States Court of Appeals for the Fourth Circuit (Fourth Circuit) framed the issue as whether "Joshua's FTCA suit for alleged negligent prenatal care provided to his mother [was] barred under *Feres*."[112] The Fourth Circuit separated its analysis

[99] *M.M.H.*, 966 F.2d at 289.

[100] Brown v. United States, 348 U.S. 110, 113 (1954).

[101] *See* DEP'T OF ARMY, REG. 635-40, PERSONNEL SEPARATIONS: PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION (1 Sept. 1990) (IO1, 15 June 1992) (IO2, 15 June 1994).

[102] Feres v. United States, 340 U.S. 135, 145 (1950).

[103] *See, e.g.*, Burgess v. United States, 744 F.2d 771 (11th Cir. 1984); Portis v. United States, 483 F.2d 670 (4th Cir. 1973).

[104] 954 F.2d 223 (4th Cir. 1992).

[105] *Id.* at 224.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 225.

[110] *Id.*

[111] *Id.* at 224-25.

[112] *Id.* at 224.

into two parts: (1) application of the *Feres* doctrine, and (2) application of the genesis test.[113]

The Government argued that *Feres* barred the case because the prenatal care was directed to Roxanna, an active duty service member. The Fourth Circuit rejected that argument, finding "the purpose of the treatment was to insure the health of a civilian, the unborn child, not a service member."[114]

Turning to the genesis test, the Fourth Circuit concluded that the test's intention was to bar "civilian injury that derive[d] from a service-related injury to a service member."[115] As such, the Fourth Circuit concluded that the analysis was whether a service member was injured, not whether the negligent act occurred in-service.[116] Consequently, because Roxanna was not injured, the Fourth Circuit found that Joshua's claim was not barred.[117]

A Brief Review of Case Law

Most genesis cases involve claims by family members for injuries resulting from their service member spouse or parent's exposure to adverse conditions while on active duty.[118] In these cases, courts have found the action barred because the litigation would involve inquiry into the treatment of the service member while on active duty.[119] Courts have found a *Feres* bar even if the family member would have an independent cause of action under state law.[120] This conclusion is consistent with *Stencel* because the Supreme Court intended to prohibit a "back door" approach to litigation.[121]

Consistent with the reasoning in *Stencel*, most courts approach less traditional genesis cases from the same angle. If the family member's injury has its genesis in an act directed toward the service member, the case is barred.[122] However, several courts have rejected the traditional analysis.[123]

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[113] *Id.* at 225-27. The Fourth Circuit describes the genesis test as a determination if dependent's injury had its "genesis" in a service-related injury to a service member. *Id.* at 225-26. The genesis test is derived from *Stencel*, which barred derivative claims. *Id.*

[114] *Id.* at 225. The Fourth Circuit stated:

> Presumably [Roxanna's] state of health would have been the same whether the physician placed the sutures or not. If the treatment had been administered, its sole purpose would have been directed at preventing injury to Joshua. The failure to place the sutures during the prenatal period and to cut them immediately preceding birth was the direct cause of injuries to Joshua, a civilian. Because the purpose of the treatment was to insure the health of a civilian, not a service member, *Feres* does not apply.

Id.

[115] *Id.* at 226.

[116] *Id.*

[117] *Id.* The Fourth Circuit reviewed the *Feres* factors, finding none of them in favor of barring suit. *Id.* at 226-27.

[118] *See, e.g., In re* "Agent Orange" Litigation, 818 F.2d 201 (2d Cir. 1987) (claims by children resulting from father's exposure to defoliant); Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984) (child's action for injuries sustained due to father's exposure to radiation); Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984) (service member wife's action for congenital birth defects, miscarriages, and trauma caused by husband's exposure to radiation); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982) (child's action for congenital birth defects caused by service member father's exposure to radiation)); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 118 (1983) (same).

[119] *Romero*, 954 F.2d at 225.

[120] *See, e.g.*, In re *"Agent Orange" Litigation*, 818 F.2d at 201 (claims by children resulting from father's exposure to defoliant); *Gaspard*, 713 F.2d at 1097 (service member wife's action for congenital birth defects, miscarriages, and trauma caused by husbands's exposure to radiation); *Monaco*, 661 F.2d at 129 (child's action for congenital birth defects caused by service member father's exposure to radiation)); *Lombard*, 690 F.2d at 215 (same).

[121] In *Stencel*, the Supreme Court stated:

> [I]t seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety.

Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673 (1977).

[122] *See* Irwin v. United States, 845 F.2d 126 (6th Cir. 1988), *cert. denied*, 488 U.S. 975 (1989) (child's cause of action arises from negligent prenatal medical care provided to service member mother); Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988) (same); West v. United States, 744 F.2d 1317 (7th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1053 (1985) (children's cause of action arising from negligent mistyping of service member father's blood); Scales v. United States, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1062 (1983) (child's cause of action arises from negligent medical care in providing rubella vaccine to service member mother while pregnant).

[123] *See* Mossow by Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) (child's claim sustained for legal malpractice); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (permits child's suit for negligent prenatal care, rejecting the traditional analysis); Graham v. United States, 753 F. Supp. 994 (D. Maine 1990) (same). In *Mossow*, a military attorney improperly informed active duty parents that their child's medical malpractice claim was *Feres* barred. The Eight Circuit found the legal advice regarding the child's cause of action was an independent direct injury. *Mossow*, 987 F.2d 1370 n.8 (citing Air Force regulation). Because the child was alive at the time of the legal advice and entitled to legal assistance, this case is more akin to established precedent than *Romero*. *See infra* text accompanying note 123.

Critical Analysis

Arguably, the Fourth Circuit erred in finding Joshua Romero's claim not barred by *Feres*. The child's claim is barred under both the *Feres* doctrine and the genesis test.

Application of *Feres*

The Fourth Circuit's conclusion that Feres did not bar the suit because the prenatal treatment was directed toward Joshua is without support.[124] While this would be true if the medical care was rendered directly to the child,[125] in this case, the medical care was provided to the mother. The procedure that the Romeros desired to be performed would have been performed on the mother. While the child would benefit from the sutures, the surgery would only involve the mother's body, not the child's.

Moreover, taking this argument to its logical conclusion, potential claims could result because most prenatal care is directed toward the health of the fetus. For example, good nutrition of the mother is encouraged to improve the health of the unborn child.[126] According to the Fourth Circuit's reasoning, a child could bring suit for low birth weight based on the doctor's failure to properly educate his mother about prenatal nutrition.

The prenatal medical care was a benefit being provided to Joshua's service member mother for her pregnancy, and, therefore, was incident to service.[127] Until Joshua's birth, *all* medical care was directed to Roxanna Romero as an expectant service member mother.[128] Any failure to provide proper medical care was a breach of care owed to Roxanna, the health care recipient, not Joshua. Therefore, the Fourth Circuit's attempt to create a legal fiction that the child was the health care recipient must fail.

The Genesis Test

The Fourth Circuit found that the genesis test did not apply because the mother suffered no "physical injury."[129] While a review of the case law reveals a requirement for a negligent or intentional act, no requirement for a "physical injury" exists.[130] From a common sense approach, this holding is subject to abuse. In *Romero*, Roxanna alleged that she received inadequate medical care because she would not have gone into premature labor had the doctors sutured *her* cervix. It is equally apparent that Roxanna suffered trauma from this experience, probably in the form of mental anguish, pain, and suffering. Consequently, while not alleged in the case, Roxanna certainly appears to have suffered an emotional injury from negligent medical care.[131]

However, through careful pleading, Roxanna did not allege a personal tort or injuries.[132] By focusing on the lack of physical injury, the Fourth Circuit lost sight of the facts of the case. Regardless of the plaintiff's allegation, the court should have focused on the negligent act resulting in the alleged tort, not the plaintiff's alleged injuries.[133]

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[124] The Fourth Circuit purports to follow the reasoning in Burgess v. United States, 744 F.2d 771 (11th Cir. 1984) and Portis v. United States, 483 F.2d 670 (4th Cir. 1973). However, those cases are inapposite because the injuries were inflicted directly on the children after their birth. Perhaps this is why the Fourth Circuit cites no precedent in support of its final conclusion. *See Romero*, 954 F.2d at 225.

[125] *See, e.g.*, Burgess v. United States, 744 F.2d 771 (11th Cir. 1984) (child's suit for post-delivery injuries not barred by *Feres*).

[126] *See generally* EISENBERG, MURKOFF, AND HATHWAY, WHAT TO EXPECT WHEN YOU'RE EXPECTING (Workmans Pub., Inc. 1984).

[127] *See supra* text accompanying notes 69, 70, 71.

[128] In *Lowe*, the Ninth Circuit clearly stated:

> [The sailor] was there treated by Naval medical personnel solely because of [his military] status. It inescapably follows that whatever happened to him in that hospital and during that course of treatment had to be "in the course of activity incident to service." (quoting *Schultz v. United States*, 421 F.2d 170 (5th Cir. 1969)).

Lowe v. United States, 440 F.2d 454, 452-53 (9th Cir.), *cert. denied*, 404 U.S. 833 (1971).

[129] Romero by Romero v. United States, 954 F.2d 223, 226-227 (4th Cir. 1992).

[130] Scales v. United States, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1062 (1983) (child's cause of action arises from negligent medical care in providing rubella vaccine to service member mother while pregnant); West v. United States, 744 F.2d 1317 (7th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1053 (1985) (children's cause of action arising from negligent mistyping of service member father's blood).

[131] Roxanna's case would be *Feres* barred.

[132] Roxanna does claim consequential damages resulting from Joshua's injuries, such as the loss of filial love and mental anguish. *Romero*, 954 F.2d at 224.

[133] Unfortunately, this is aggravated by the Fourth Circuit's view of the negligent act, the failure to suture the cervix, as an act directed toward the child. This only further confuses the situation.

The best illustration of the correct focus for analysis is *Scales v United States*.[134] In *Scales*, an active duty service member received a rubella vaccination during her pregnancy. While the child may have suffered physical injuries from the vaccination, the mother did not.[135] However, in *Scales*, the United States Court of Appeals for the Fifth Circuit did not focus on the lack of physical injury to the mother and instead correctly examined the negligent act, which was administered to the mother.[136] As in *Scales*, if the *Romero* court properly focused on the negligent act, it would have found the effect on military discipline the same as if the suit was brought by the parent or child.

As the Supreme Court stated in denying recovery in *Stencel*, "[t]he litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Forces to testify in court as to each other's decisions and actions."[137]

In this case, military doctors would be second-guessed regarding their evaluation and treatment of Roxanna during her pregnancy. Because Roxanna claimed that the doctors had misdiagnosed the condition of *her* cervix, all testimony and evidence should have related to the medical treatment of the service member. Consequently, the litigation would involve the treatment of the service member whether brought by the mother or the child.[138]

By failing to recognize this fact, the Fourth Circuit incorrectly evaluated the *Feres* factors. While arguably the first two factors may not caution against recovery,[139] the third factor strongly supports barring suit. Since *Feres*, a medical malpractice case, federal courts have routinely found that medical malpractice cases affect military discipline and decision making to a degree that requires barring suit.[140] This conclusion includes claims for prenatal medical care.[141]

Consequence

Precedent does not support the determination that the service member must suffer a physical injury. In cases where a physical injury has not been alleged, courts have examined the negligent act when applying the *Feres* rationale.[142] Moreover, the Fourth Circuit's holding is subject to abuse. In *Romero*, the plaintiffs declined to allege a personal injury to permit recovery for the child. This "backdoor approach" to litigation should be discouraged.

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[134] *See generally Scales*, 685 F.2d at 970. *See also* Irwin v. United States, 845 F.2d 126 (6th Cir. 1988), *cert. denied*, 488 U.S. 975 (1989) (child's cause of action arises from negligent prenatal medical care provided to service member mother); *West*, 744 F.2d at 1317.

[135] The mother alleges, in a separate cause of action, that had she known of the dangers of rubella, she would have aborted the fetus. *Scales*, 685 F.2d at 972. However, for purposes of this article, I only examine the child's claim for damages resulting from the mother's vaccination.

[136] In *Romero*, the Fourth Circuit discounted the *Scales* analysis because it was decided before the Supreme Court decision in *Johnson*. Because of the timing of decision, *Scales* focused on the third *Feres* factor. *Scales*, 973 F.2d at 970. However, while the *Johnson* decision reaffirms the importance reviewing all the factors, it does not suggest that all three must be present. Moreover, it never repudiates its prior statement that the third factor, if present, should be given particular attention in evaluating a case under *Feres*. *See* United States v. Shearer, 473 U.S. 52 (1985).

[137] Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673 (1977).

[138] This theory is commonly called the "inherently inseparable" analysis. In *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987), the Eleventh Circuit rejected this theory, permitting a child to recover for medical malpractice committed on the mother. This case has not gained acceptance by other courts. *See, e.g.*, Irwin v. United States, 845 F.2d 126, 131 (6th Cir. 1988). In *Romero*, the Fourth Circuit did not rely on *Del Rio* but instead focused on the lack of physical injury. In doing so, the Fourth Circuit did not have to reject the "inherently inseparable" theory which would certainly be viewed with disfavor. Instead, the Fourth Circuit separated the child from the mother, and following that reasoning—the child, the health care recipient, was injured; the mother, a passive participant, was not.

[139] I believe the first factor cautions against review. Because the mother and child are inseparable in this action, there is a "distinctly federal" relationship between the parties.

[140] *See, e.g.*, Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988) (obstetrics case where court applied *Feres* with reluctance); Vallance v. United States, 574 F.2d 1282 (5th Cir.), *cert. denied*, 439 U.S. 965 (1978) (barred medical malpractice claim for failing to diagnosis tumor); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (barred medical malpractice claim for misreading X-ray).

[141] *See Irwin*, 845 F.2d at 126 (child's cause of action arises from negligent prenatal medical care provided to service member mother); *Atkinson*, 825 F.2d at 202 (same); Scales v. United States, 685 F.2d 970 (5th Cir. 1982) (child's cause of action arises from negligent medical care in providing rubella vaccine while pregnant). *But see Del Rio*, 833 F.2d at 282; Graham v. United States, 753 F. Supp. 994 (D. Maine 1990).

[142] *See Scales*, 685 F.2d at 970; West v. United States, 744 F.2d 1317 (7th Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1053 (1985).

Conclusion

In both *Elliott*[143] and *Romero*,[144] the courts of appeal erred in attempting to avoid application of the *Feres* doctrine. By avoiding *Feres*, inequity resulted. For example, in *Elliott*,[145] because of Eleventh Circuit's impermissible creation of a "leave exception," Elliott was allowed to bring suit while Feres was barred, even though both cases involved negligent maintenance of military housing.[146]

Similarly, in *Romero*,[147] the Fourth Circuit erred in its attempt to create the legal fiction that the child is the prenatal health care recipient—not the mother.[148] As a result, Romero was allowed to bring suit, but *Griggs*, a similar medical malpractice case and one of the cases consolidated with *Feres*, was not. Yet both cases involved medical malpractice on service members. By failing to follow precedent, the *Elliott*[149] and *Romero*[150] courts have begun to erode the *Feres* doctrine.

However, in *Atkinson v. United States*,[151] the United States Court of Appeals for the Ninth Circuit also openly expressed its dissatisfaction with *Feres*. Yet, after confessing its desire to find for plaintiff, the court stated: "We are nonetheless reluctant to carve out an exception to the *Feres* doctrine after five members of the Court appear to have emphatically endorsed *Feres* and all three of its rationale. That task, if it is to be undertaken at all, is properly left to the Supreme Court or to Congress."[152] Other courts would be wise to follow the same course.

As *Adkinson* notes, the Supreme Court recently reaffirmed the importance of evaluating all three *Feres* factors—the federal relationship, the statutory liability system, and the effect on military discipline.[153] Therefore, while it maybe tempting to do so, result-oriented courts are not free to pick and choose which *Feres* factor best supports the desired holding. Courts must review *all three factors*, even those that do not support the result the court desires.

Once a court evaluates the *Feres* factors, it must review the totality of the circumstances in light of all these factors. In making such a review, the courts must rule consistent with Supreme Court precedent, instead of creating legal fictions or reaching result-oriented decisions. While courts may disfavor *Feres*, it is still the law of the land until Congress or the Supreme Court acts to change it.

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[143] Elliott by and Through Elliott v. United States, 13 F.3d 1555 (11th Cir. 1994).

[144] Romero by Romero v. United States, 954 F.2d 223 (4th Cir. 1992).

[145] *Elliott*, 13 F.3d at 1555.

[146] *See supra* text accompanying notes 40-73.

[147] *Romero*, 954 F.2d at 223.

[148] *See supra* text accompanying notes 124-128.

[149] *Elliott*, 13 F.3d at 1555.

[150] *Romero*, 954 F.2d at 285.

[151] 825 F.2d 202 (9th Cir. 1987).

[152] *Id.* at 206.

[153] United States v. Johnson, 481 U.S. 681 (1987).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

International and Operational Law Notes

International and Operational Law Note

Civilian Protection Law

Until recently, students of the law of armed conflict divided their discipline into neat categories that closely tracked the Hague and Geneva Conventions and several other law of war treaties. Commentators, military and civilian, spoke in terms of these traditional rules and focused their research, publication, and instruction efforts on this well-defined area of the law.

In the last decade, however, the most frequent application of United States power occurred in diverse operations that repeatedly defied the application of the traditional law of armed conflict. In response to the endless stream of legal issues raised by these new age operations, termed "operations other than war" (OOTW), The Judge Advocate General's School began the development of a new series of courses. These courses direct attention to the myriad of problems that judge advocates face in applying domestic, international, and host nation legal regimes within the OOTW context.

An example of this new breed of law school instruction is Civilian Protection Law (CPL). The Judge Advocate General's School developed CPL in recognition that military forces will confront civilians in nearly every type of potential military operation. Civilians no longer represent a single aspect of contemporary missions. Instead, they have become the very object of such missions. The protection of civilians and the preservation of their basic human rights has been one of the primary justifications forwarded for international intervention in nearly every recent operation.

The lessons learned by the United States, its coalition partners, and international organizations during recent operations such as Operation UPHOLD DEMOCRACY in Haiti, serve as a valuable resource in the development of the CPL complex. The legitimacy of these important multinational operations and the national prestige of the United States has become increasingly dependent on the ability of the military legal community to recognize sophisticated legal issues, provide advice, and frequently serve as actors in this emerging area of the law.

Recognizing the important nexus between the protection of civilians and operational success, The Judge Advocate General's School began the burdensome task of assembling CPL, a task never before contemplated by other academic or governmental institutions. The professors assigned to this task designed a structure of study that surveys, analyzes, and solves the sophisticated problems associated with the application of an entire range of protective measures and laws.

Those involved in the ongoing development of CPL are mindful of the increasing involvement of the United States in OOTW. This involvement has, in turn, highlighted our nation's commitment to the protection of the victims of war and the enforcement of worldwide humanitarian law. Accordingly, The Judge Advocate General's School has pursued CPL development, scholarship, and application within the context of the diverse multitude of potential OOTW. Students and practitioners are continually reminded that the operations of tomorrow may bear little resemblance to past and present operations. The challenge and prime directive of CPL is the recognition of this nearly infinite field of application.

Because of the realities discussed above, CPL does not, and could not, represent any single domestic, international, or host nation code. Instead, it offers an approach to the application of a wide array of existing legal regimes that provide protections for civilians in every conceivable set of circumstances.

The CPL comprises a wide array of both customary and conventional legal regimes (treaties or portions of treaties) and domestic law and policy. Additionally, the rules of international humanitarian law provide the cornerstone of CPL, serving as the starting point for almost any CPL discussion. Finally, host nation law also serves as an important CPL component. The extent of host nation law application is based on canons of public international law and the national policy of the United States, our coalition partners, and the international organizations under whose mandates we act.

Many of these regimes are designed to protect a particular class of civilians in a particular set of circumstances. Some very important portions of CPL apply only during times of armed conflict. For example, Article 3, common to the four Geneva Conventions of 1949, and Protocol II Additional to the Geneva Conventions (1977) are both designed to provide protection only during internal or noninternational armed conflict. Other portions of the Geneva Conventions provide protections for civilians during the course of international armed conflicts.

Conversely, other bodies of law operate without regard to the state or type of hostilities. The 1951 Refugee Convention serves as an example of this type of law (providing specific protections for civilians that fear persecution from their own government).

Several important regimes, however, establish rules that provide protection for all civilians in any area that might be affected by military operations. These bodies of law apply without regard to the nature of the conflict (internal versus international) or the specific class of affected civilian. These systems apply without regard to any type of legal prerequisite. Any number of human rights treaties or declarations serve as examples of this type of baseline law.

To make the analysis process more efficient, the architects of CPL integrated its primary components into a four-tiered system. This methodology provides a simple road map for the student to access the complex body of law that provides protection for civilians during the course of contemporary military operations. The four tiers consist of (1) international human rights legislation, (2) host nation law, (3) international customary and conventional law, and (4) the domestic law and policy of the United States (which frequently requires the application of law from another tier by analogy). The nature and purpose of the operation, the nations involved, the status of the affected civilians, and the policy decisions of our leadership controls the application of those components.

A student of CPL can address and answer any question involving the application of the underlying legal regimes by using the systematic method of analysis offered by the four-tier system. For example, the first tier of protection is made up of those rights and protections to which all persons, civilian or not, are entitled. Within this tier, humanitarian law, human rights legislation, and the expanded view of Article 3, common to the four Geneva Conventions of 1949, provide minimum baseline protections that serve as a starting point for CPL application and analysis.

The Judge Advocate General's School is directly linked to the practitioners in the field, and is uniquely poised to take immediate advantage of their experiences. Consequently, participants in the planning and execution of such operations from all four military services, the Coast Guard, and many federal agencies have contributed to the evolution of CPL and other similar courses.

Like other courses in the International and Operational Law arena, The Judge Advocate General's School constructed CPL to perform beyond the academic environment. The CPL's greatest utility will be borne in the nuances and diversities of OOTW of the next century. Students and practitioners from all military services and the various federal agencies and departments will apply its lessons. Major Whitaker.

International Law Note

International Criminal Tribunal for Rwanda 1995 in Review

Background

On 8 November 1994, United Nations Security Council (UNSC) Resolution 955 adopted the Statute of the International Tribunal for Rwanda. The purpose of the Rwandan International Tribunal (IT) is to prosecute Rwandan suspects responsible for genocide and other serious violations of international humanitarian law committed in Rwanda or in neighboring states during 1994.[1] Despite a Rwandan government request for intervention, the UNSC established the Rwandan IT under Chapter 7 of the United Nations Charter to ensure Rwandan cooperation throughout the life of the Tribunal as well as to ensure cooperation of neighboring states in which alleged humanitarian law violators reside. This was also a more expeditious process.[2]

General Provisions

The first plenary session of the Rwandan IT was held in The Hague on 26 to 30 June 1995. The judges adopted the rules of evidence and procedure and elected Laity Kama as president and Yakov A. Ostrovsky as vice president.[3] The two trial chambers of the Rwandan IT are composed of the following judges:[4]

Trial Chamber 1

Judge Laity Kama, P.J. (Senegal)

Judge Navanethem Pillay (South Africa)

Judge Lennart Aspegren (Sweden)

Trial Chamber 2

Judge William Sekule, P.J. (Tanzania)

Judge Tafazzal H. Khan (Bangladesh)

Judge Yakov A. Ostrovsky (Russia)

[1] S.C. Res. 955, U.N. SCOR, 22d Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994); *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter Rwandan Statute].

[2] Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), U.N. SCOR, U.N. Doc. S/1995/134 (13 Feb. 1995).

[3] Further Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), U.N. Doc. S/1995/533 (30 June 1995).

[4] International Criminal Tribunal for Rwanda Press and Information Office, *Conclusion of the First Extraordinary Session of the International Criminal Tribunal for Rwanda*, June 30, 1995.

The Rwandan IT has similar statutory provisions as the International Criminal Tribunal for the Former Yugoslavia (ICT-Y). These tribunals share a chief prosecutor and appeals chamber.[5] The charter for the Rwandan IT forbids trials in absentia, requires proof beyond a reasonable doubt to convict, and limits the maximum penalty to life imprisonment.[6]

Judges of the Rwandan IT were directed by Article 14 of the Rwandan Statute to adopt rules of procedure and evidence modeled after those of the ICT-Y.[7] Imprisonment can occur in Rwanda or any other state indicating a willingness to accept the convicts, which is unlike the ICT-Y because the Former Yugoslavia was excluded as a location for incarcerating convicts of that tribunal.[8] Investigations will be conducted both inside and outside Rwanda. Over 400 suspects have been identified, most of whom now live outside of Rwanda.[9] All states are under an obligation to cooperate with the Rwandan IT and comply with its requests for assistance.[10]

The rules of procedure and evidence of the ITC-Y and the Rwandan IT differ only in the types of crimes that each tribunal can charge. The Rwandan IT has the authority to prosecute crimes against humanity, genocide, violations of Common Article 3 of the 1949 Geneva Conventions, and Article 4 of Additional Protocol II.[11] These crimes result from armed conflict, whether international or internal in nature.

Approximately 500,000 Tutsi civilians reportedly died in the civil war between the Hutu-led government and the Tutsi-dominated rebel army.[12] In September 1995, the Red Cross reported that 54,599 men and women were being held in Rwandan jails in connection with the 1994 genocide committed by the country's Hutu ethnic majority. The extreme lack of prison space contributed to the deaths of thousands of detainees.[13] The current Tutsi-led government of Rwanda has officially stated that it will put these "murderers" on trial only after the Rwandan IT has begun its work.[14]

Kenya, which has an antagonistic relationship with the present Tutsi-led government in Kigali, is providing safe-refuge for approximately 10,000 Rwandan refugees. In refusing to release Rwandan suspects to the Rwandan IT, President Danile Arap Moi said, "I shall not allow anyone of them to enter Kenya to serve summonses [sic] and look for people here, no way."[15] This is an obvious breach of Kenya's obligations as a member state of the United Nations, but the Rwandan IT prosecutor's only recourse is to formally request specific persons to be released and to report any refusals to the UNSC.[16]

The Rwandan IT's staff in Kigali, where the prosecutor's office is located, was expected to consist of fifty staff members by January 1996.[17] Recent United Nations budget problems and the failure of neighboring states to cooperate are just two of the reasons for the Rwandan IT's slow start. The investigation team is led by a former Canadian Mounted Policeman Alphonse Breau.[18] Thirty Scottish attorneys are assisting the prosecutor's office in conducting interviews and preparing legal documents.[19]

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[5] *Id.* ¶¶ 16, 17.

[6] *Id.* ¶ 18.

[7] *Id.*

[8] *Id.* ¶ 19.

[9] Report of the Secretary General of the United Nations Assistance Mission for Rwanda, ¶ 30, U.N. Doc. S/1995/457 (June 4, 1995).

[10] Rwandan Statute, *supra* note 1, art. 28.

[11] *Id.* arts. 2-4. The definitions of crimes against humanity and genocide are exactly the same as for the ICT-Y. The definition of violations of Common Article 3 includes as follows: "(a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) pillage; (g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (h) threats to commit any of the foregoing acts." *Id.*

[12] Donatella Lorch, *Kenya Refuses to Hand Over Suspects in Rwanda Slayings*, N.Y. TIMES, Oct. 6, 1995.

[13] Reuter, *Hundreds Die in Rwanda's Jails*, WASH. POST, Sept. 27, 1995.

[14] Sudarsan Raghavan, *War Crimes Trial Mired in Delays*, S.F. CHRON., Oct. 30, 1995, at A8.

[15] Reuter, *supra* note 3.

[16] Rwandan Statute, *supra* note 1, art. 28.

[17] Reuter, *supra* note 3.

[18] Associated Press, *Tribunal to Indict First Rwandan War Crimes Suspect Before End of Year*, AP WORLDSTREAM, Oct. 19, 1995.

[19] *War Crimes*, SUN TIMES, June 11, 1995.

Arusha, Tanzania, has been selected as the session site for the Rwandan IT. However, no United Nations personnel are currently in Arusha. Renovations to Arusha's conference hall, which is to be used for a courtroom, has not yet begun.[20]

Indictments

As Justice Goldstone promised, the first Rwandan IT indictments were issued before the end of 1995. The first indictments were announced 12 December 1995 and charged eight unidentified persons with crimes against humanity, genocide, and violations of Common Article 3 to the 1949 Geneva Conventions for acts committed at four different locations. Thousands of men, women, and children were allegedly massacred at each site in April 1994.[21] Pursuant to Rwandan IT Rule of Procedure 53(b),[22] the indictment will not be released to the public. At the announcement of the indictment, Justice Goldstone told reporters that the Rwandan IT would "do nothing to make it easier for the people who have been indicted to evade arrest."[23]

Conclusion

The first mass grave exhumations were expected to occur in January 1996. These actions are in furtherance of the Rwandan IT Prosecutor's Office efforts to bring justice to those most responsible—both at the national and local level—for the mass killings that took place in Rwanda in 1994. Substantial resources and the continued support and cooperation of the international community will be necessary. Major Mills.

Intelligence Law Note

Fiscal Year 1996 Intelligence Authorization Act

The President signed the Intelligence Authorization Act for Fiscal Year 1996 (Act) into law on 6 January 1996. Some highlights include:

* Authorization for the President to delay the imposition of a particular sanction based on the proliferation of weapons of mass destruction when he determines that the imposition of such a sanction would "risk or compromise a sensitive intelligence source." If the President exercises this authority, he must report his decision to the intelligence committees.

* Allows for funds to assist a foreign country in a counter terrorism issue related to the protection of life or property of the United States. The congressional committees will have to be informed fifteen days in advance.

* Places restrictions on the funding of the National Reconnaissance Office (NRO) and directs an investigation into the NRO's financial management practices by the inspector generals of the Department of Defense and the Central Intelligence Agency. These provisions require the President to forward a report to the intelligence committees.

* Extends the authority of the Secretary of Defense to conduct commercial activities as "security for intelligence collection activities abroad."

* Amends the Fair Credit Reporting Act, requiring a consumer reporting agency to give to the Federal Bureau of Investigation (FBI), for counterintelligence purposes, information on a consumer. The request must be certified by the FBI Director or a designee. The amendment authorizes a court to issue an order ex parte. Such certifications must be reported to Congress semiannually. The Act places information dissemination requirements on the FBI when using this investigative tool.

The Act reflects a continuing concern by Congress over the personnel and fiscal management policies of the intelligence community. In the Senate Conference Report of 21 December 1995, the Senate Select Committee on Intelligence alluded to future legislation being considered for next year to "ensure the intelligence community is organized to effectively address the Nation's critical intelligence needs today and in to the future."[24] Regarding the intelligence community budget (which remains classified), Senator Specter stated that for the past six years the budget has been reduced each year for a cumulative reduction of 17%.[25] In the classified annex to the report on the Act, which accompanies the unclassified version, the conferees took several initiatives to enhance the intelligence community's capabilities in proliferation, terrorism, and counter narcotics.[26] Lieutenant Colonel Crane.

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[20] Reuter, *supra* note 3.

[21] International Criminal Tribunal for Rwanda Press and Information Office, *December 12 Press Statement by the Prosecutor for the International Criminal Tribunal for Rwanda, Justice Richard Goldstone*, Dec. 12, 1995.

[22] Rules of Procedure and Evidence, Rwandan IT, ITR/3/Rev.1, Rule 53, at 49 (June 29, 1995) ("(A) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.").

[23] *Rwanda Tribunal Indicts Eight for Genocide*, N.Y. TIMES, Dec. 12, 1995, at 26.

[24] Opening comments by Senator Specter in the Intelligence Authorization Act for Fiscal Year 1996-Conference Report. 141 CONG. REC. 19135 (Dec. 21, 1995).

[25] *Id.*

[26] *Id.*

Notes from the Field

*Of Ostriches and Other Ratites—A Claims Saga**

Introduction

Claims judge advocates should not have their heads in the sand about overflight claims for damage to ostriches.[1] Ostriches, emus, and rheas (known collectively as ratites) are a growing industry in the United States. Ostrich leather boots are selling at western clothing stores for $300 to $500. Ratite meat is now served at finer restaurants and is considered a delicacy. Ostrich feathers adorn hats and other garments. Many aloe lotions are now made with emu oil, which increases the effectiveness of the aloe—one lotion is called Emu Vera.

With the growth of the ratite industry, problems of military aircraft flying over ratite farms also have increased. These claims fall under the Military Claims Act, 10 U.S.C. § 2733 (1988) and *Army Regulation 27-20*, chapter 3. Chapter 3, paragraph 3-2(b) allows for payment of damages caused by the "noncombat activities" of the Army. *Department of the Army Pamphlet 27-162*, paragraph 5-55 specifically lists overflight damage as a noncombat activity.[2]

Chapter 3 allows payment of claims for damages caused by noncombat activities despite the absence of negligent or wrongful acts.[3] Under chapter 3, a claimant would only need to show that an overflight *caused* the damages to their birds. Any award may be reduced, however, on the grounds of contributory or comparative negligence.[4] If the claim is denied, a claimant's only course of action is to submit an administrative appeal under chapter 3. A claimant who attempts to sue under the Federal Tort Claims Act after a denial of a claim must meet the higher burden of showing both causation *and* negligence.

Background

The ratite industry has been growing since 1990. Prices peaked in early 1994 and have since stabilized. As of April 1995, 975 breeder/brokers were members of the American Ostrich Association (AOA). Although these members are located nationwide, they are concentrated in the Southwest where the hot, dry weather mimics that of native ratite climates. Because not all ostrich breeders are members of the AOA, and other farmers deal in emus and rheas, estimating the exact size of the ratite industry in America is difficult.

Of the three ratites, ostriches are the largest. Weighing as much as 250 to 400 pounds, they tend to be rather skittish and difficult to work with, especially during mating season (which runs from November to April). Emus are smaller and uglier, weighing up to 140 pounds. They have a milder disposition, are hardier, and easier to raise. Because of this, emus are becoming the leader in the ratite business. Rheas are the smallest of the three, weighing forty to sixty pounds when grown. They have the nastiest disposition and are much more difficult to raise profitably. Accordingly, fewer people raise rheas, and the market for them has fallen.

Causation

Ratites are extremely sensitive to strange noises. The noise from overflying helicopters and jets can scare them, causing the birds to panic and injure or kill themselves by running into barns or fences. The noise can come from a helicopter far away. For example, the noise from a CH-47 two-rotor helicopter can carry up to two miles, depending on weather conditions.

These birds also can be startled or killed by a number of other things. Wild animals or dogs can get into their pens. Motorcycles or other machinery can make noises that scare the birds and cause them to injure themselves. Just seeing a shadow of a plane flying at 10,000 feet overhead may scare the birds. However, once the birds become accustomed to a sound, they do just fine. For example, an emu farmer located just four miles south of Fort Sill, Oklahoma, has his farm next to his gravel business and directly in the path of both the Lawton Municipal Airport and the post airstrip. The birds do not pay attention to the machinery, jets, helicopters, or even the transport jets that fly overhead. However, the sounds of an unfamiliar machine have caused the birds to panic.

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* The author thanks Captain Scott Elwood Reid for his help in researching and editing this article.

[1] Actually, there is no evidence that ostriches bury their heads in the sand. The origins of this myth are unclear. *See* BRIAN C.R. BERTRAM, THE OSTRICH COMMUNAL NESTING SYSTEM, 8 (1992).

[2] Overflight damage claims generally are not payable under the Federal Tort Claims Act (FTCA) because claimants must show negligence or wrongful acts under state law. 28 U.S.C. § 1672. *See generally* Laird v. Nelms, 406 U.S. 797 (1972) (holding that the FTCA does not waive sovereign immunity for strict liability, even if state law would allow recovery). *See also* DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, paras. 4-7m, 4-7x (1 Aug. 1995) [hereinafter AR 27-20].

[3] AR 27-20, *supra* note 2, para. 3-8(a)(2).

[4] *Id.*

To prove causation from a military overflight, a claims attorney must determine when the flight occurred and when the birds were hurt. Sometimes a gap of several hours, or even days, exists between the time of the flight and the alleged injury. In that situation, it becomes more likely that the damages were caused by something other than the overflight.

Investigation

The first step in an overflight investigation is to obtain flight records. The Air traffic control (ATC) can keep several useful records, depending on local procedure. At Fort Sill, the ATC keeps for thirty days the taped recordings of radio communications between aircraft and the ATC. They also keep for thirty days "flight strips," which are Federal Aviation Agency forms that record an aircraft's call sign, flight number, type (instrument flying rules (IFR) or visual flying rules (VFR)), route, and altitude. The IFR flights occur when an aviator flies using instruments rather than vision. These types of flights are increasingly common, and the flight strip on an IFR flight should provide reliable information on the path of an aircraft.

The Fort Sill ATC has computers which constantly track the exact altitude and position of all aircraft in the area and are capable of recording this data. However, this record is not preserved because it is bulky and rarely used. A more useful record is DA Form 2408-12, Army Aviator's Flight Record. It is usually kept at the unit and lists the crew, date, time, and sometimes the flight path. It provides a good starting point for interviewing the pilot and crew. Check to see if your installation or local airport maintains these records.

When conducting an investigation, the claims attorney should look at the same flight map that the aviator used. Called "VFR sectionals," these maps usually show no-fly areas. At Fort Sill, every known ratite farm is plotted on the VFR sectionals and identified as no-fly zones. Examine the unit standard operating procedures governing flight missions and check the local flight regulations for specific prohibitions against flying over ratite farms. Be aware that National Guard and Reserve units sometimes fly unusual patterns. Also, joint drug interdiction missions with the Drug Enforcement Agency may have involved flights and they may have different records or standard operating procedures.

When interviewing witnesses, the claims attorney should ask specific questions about the route, the altitude, deviations from the flight path, and the "no-fly" zones. Ask if the unit was aware of the locations of ostrich farms and whether such considerations are a part of flight planning.

Military flights generally maintain certain altitudes, such as 1000 feet AGL (above ground level, as opposed to MSL, above mean sea level). They rarely go below that altitude, and if they go below 500 feet AGL they will be warned by a tracking computer called Minimum Safe Altitude Warning (MSAW). Stories of helicopters buzzing around at 200 feet generally lack credibility because of prohibitions in unit flight standard operating procedures. Similarly, some flights take place only in certain flight areas. Pilots are responsible for knowing the boundaries of these areas and staying within them.

The main issue in a ratite overflight claim often boils down to credibility. Does the claims attorney believe the claimant or is this a situation where the claimant may be looking to bail out of a failed ostrich farm? Likewise, the claims attorney must assess the credibility and professionalism of the pilot involved. For example, could the pilot have made a mistake and flown outside his limits? Answering these questions is crucial when making the causation finding.

Damages

The law on property damage is to pay for the lost value of the property at the time and place of the loss. If property is damaged, pay the difference in value caused by the damages. If destroyed, pay the full value of the property minus salvage.[5]

In ratite cases, dead birds usually have some value. Their meat can be salvaged for about five dollars per pound, and their feathers or leather might have some worth. The main value in a bird, however, is its reproductive ability. A female ostrich with a proven capability of producing 50 to 100 eggs a year is worth more than several unproven birds.

One unique aspect of the ratite industry is the wild price swings that have occurred over the past few years. The industry was at its hottest from 1993 to early 1994. During that time, a proven breeder pair of ostriches could sell for anywhere from $25,000 to $50,000, or more. A nine month-old emu would sell for $3000 to $4000. And even though prices have bottomed out since then, a proven breeder pair of ostriches is still valuable, fetching $10,000 to $20,000. That same nine month emu is now worth $500.

A starting point for pricing birds is the classified ads section of a ratite magazine (yes, such publications *do* exists). *American Ostrich*, the monthly publication of the American Ostrich Association, is perhaps the most reputable. Two others are *The Ostrich News*, (405) 429-3765, and *The Ratite Marketplace*, (800) 972-7730. *The Ratite Marketplace* has three related publications which specialize in ostriches, emus, and rheas. As with any classified ad, these quotes found in these magazines typically often are just the first position in a bargaining process, and should not be taken as a fair price for a bird.

Claims attorneys will likely get a more accurate assessment of ratite value by professional appraisal. Local ratite farmers and breeders will be able to provide a fair estimate. If there are no local subject-matter experts, try to find other breeders of the birds in question. One good source is the AOA at (817) 232-1200;

[5] *See id.* para. 3-8d (discussing damages under the MCA).

FAX (817) 232-1390. It provides a free information packet including a nationwide breeder list and a copy of *American Ostrich*. Other reliable sources are the American Emu Association, (214) 559-2321, and the North American Rhea Association, (512) 371-7432. These organizations list farmers and breeders by region. Claims attorneys can then ask an expert for the value of the bird in the applicable market at the time of loss.

Be sure to talk to someone who deals in the same type of bird as the claimant. For example, ask an emu farmer for emu prices and an ostrich farmer for ostrich prices. Solicit several appraisals. After doing this, the claims attorney should see a fairly clear range of prices and be able to determine which bids are reasonable. You will then be ready to make a fair offer.

A recurring issue is a claim requesting the value of all potential offspring of a bird. While it is proper to claim for the difference between a healthy productive bird and an injured or lame bird, damages are not payable for the value of every egg that this bird would have laid. A federal district court decided this very issue in a civilian overflight suit.[6]

Another recurring issue is the contributory negligence of the claimant. Recall that contributory negligence can bar or mitigate a claim.[7] If a claimant locates a ratite farm next to a military reservation where soldiers are training with artillery and aircraft in the area, he is at least partially at fault for resulting damages.[8]

Conclusion

Given the delicate and skittish nature of ratites, determining causation is often difficult. An understanding of flight plans and standard operating procedures are essential to a proper investigation. The flight crew should be personally interviewed. Furthermore, the ratite market has a number of peculiarities that make valuation equally difficult. When paying ratite overflight claims, claims attorneys must obtain accurate information about the type of bird, its reproductive capacity, and the condition of the market at the time and place of loss. Then ask an expert for an appraisal and let the claims process, well, er, fly! Captain Brian H. Nomi, Claims Judge Advocate, Office of the Staff Judge Advocate, Headquarters, United States Army Field Artillery Center & Fort Sill, Fort Sill, Oklahoma.

[6] *See* Winningham v. Anheuser-Busch, Inc., 859 F. Supp. 1019 (N.D. Tex. 1994).

[7] AR 27-20, *supra* note 2, para. 3-8(a)(2).

[8] Claims attorneys apply the common law principle of coming to a nuisance as modified by state contributory/comparative negligence. *Id.* para. 3-8a(1)(a).

Ratite Price Matrix

Ostrich*

Fertile Egg	9 months	18 months	30 months	Breeders
$200	M: $500 F: $1500	M: $1000 F: $3000	M: $1000-$2500 F: $7500	M: $1000-$2500 F: $7500
$100-$150	M: $400-$600 F: $800	M: $500-$1000 F: $1000-$1500	$3500 a pair	$5000 a pair
$100-$200	M: $500 F: $800	$1000-$1500	$2000-$3000	$4000-$10,000 a pair

Emu*†

Fertile Egg	9 months	18 months	30 months	Breeders
$150-$200	$500-$700 a pair	$3000 a pair	$4000-$8000 a pair	$25,000 a pair
$50	$150-$200	$250	$1000	$1000
$50-$100	$400-$500	$500-$600	$1500-$1800	$3000-$5000

Rhea*

Fertile Egg	9 months	18 months	30 months	Breeders
	$25	$200-$300	$300-$400	
$50-$100	$250	$500	M: $850 F: $1100	$2500 a pair
$50	$100	$200-$250	$250-$500	$1000 a pair
$10-$30	$100	$200-$250	$1500-$2500 a pair	$1500-$2500 a pair

* These prices reflect the fair market value in southwestern Oklahoma and are the results of a survey of three farmers of ostriches and emus and four farmers of rheas.

† No figures relative to gender are available.

Prices vary at different times in different parts of the country. These are all the price quotes from my study, and they show the wide ranges from which one must find the reasonable price. "M" and "F" indicates male and female, respectively. All birds are priced individually unless noted as being for a pair. Birds usually start laying by their third Autumn.

A problem with pricing ratites is that most people would not part with a proven, productive pair for any price because they make money. On the other hand, people think that a bird that is for sale must have something wrong with it or else it would not be for sale. The above prices reflect appraisals where I asked for the fair value of a given bird.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

The tables below reflect the average pretrial and posttrial processing times of general, special, and summary courts-martial for the fiscal years (FY) 1992 through 1995.

General Courts-Martial

	FY 1992	FY 1993	FY 1994	FY 1995
Records received by Clerk of Court	1156	1035	789	827
Days from charging or restraint to sentence	53	54	53	58
Days from sentence to action	72	66	70	78
Days from action to dispatch	9	7	8	7
Days en route to Clerk of Court	11	8	9	8

BCD Special Courts-Martial

	FY 1992	FY 1993	FY 1994	FY 1995
Records received by Clerk of Court	316	174	150	161
Days from charging or restraint to sentence	42	38	37	35
Days from sentence to action	61	59	58	63
Days from action to dispatch	6	7	7	6
Days en route to Clerk of Court	8	7	9	8

NonBCD Special Courts-Martial

	FY 1992	FY 1993	FY 1994	FY 1995
Records reviewed by SJA	104	65	53	46
Days from charging or restraint to sentence	42	35	33	44
Days from sentence to action	40	25	28	32

	FY 1992	FY 1993	FY 1994	FY 1995
Records reviewed by SJA	739	353	335	297
Days from charging or restraint to sentence	15	14	14	16
Days from sentence to action	8	8	8	8

Litigation Division Notes

The Case of *Dickson v. Secretary of Defense*

Introduction

On 31 October 1995, a three-judge panel of the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) decided a case that appears to diminish the power of the Army Board for Correction of Military Records (ABCMR) to dismiss untimely petitions. In *Dickson v. Secretary of Defense*,[1] the D.C. Circuit held that the ABCMR statute of limitation waiver determinations are subject to judicial review. According to *Dickson*, the ABCMR must now provide a reasoned explanation for its decision, explaining how the facts merit the conclusion that it would not be in the interest of justice to waive the three-year statute of limitations.

Background

Dickson resolved three separate D.C. district court cases that had been consolidated: *Dickson*, *Hodges*, and *Haire*.[2] In each case, an individual applied to the ABCMR for a discharge classification upgrade several years after the three-year statute of limitations period had expired.[3]

In each case, the petitioner failed to state why the ABCMR should waive the statute of limitations. The ABCMR denied all three applications by stating that the applicants had failed to establish that it would be in the interest of justice to excuse their failure to file within the limitations period.[4] The ABCMR did not address the merits of the petitions.

Lower Court Decisions

The district court granted the government's motions to dismiss each plaintiffs' complaint.[5] The district court based its decisions on its interpretation of the language of 10 U.S.C. § 1552(b) which states:

> No correction may be made under subsection (a)(1) unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board established under subsection (a)(1) *may* excuse a failure to file within three years after discovery if it finds it to be in the interest of justice (emphasis added).

The district court interpreted the word "may" in this paragraph as granting exclusive discretion to the ABCMR to make statute of limitations waiver determinations. The district court held that such discretionary determinations were not judicially reviewable.[6]

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[1] 68 F.3d 1396 (D.C. Cir. 1995).

[2] *See* Dickson v. Secretary of Defense, No. 93-952, Mem. Op. (D.D.C. May 6, 1994) (Richey, J.) (*Dickson* and *Haire*); Hodges v. Secretary of Defense, No. 92-2326, Mem. Op. (D.D.C. June 24, 1994) (Harris, J.).

[3] Dickson applied to the ABCMR for a discharge upgrade in 1984, nineteen years after his discharge. Haire applied to the ABCMR for a discharge upgrade in 1986, thirty one years after his discharge. Hodges applied to the ABCMR for a discharge upgrade in 1985, twenty-eight years after his discharge.

[4] *Dickson*, 68 F.3d at 1399.

[5] *Id.* at 1400.

[6] *Id.*

Circuit Court Decision

The D.C. Circuit reversed the holding of the district court, ruling that the lower court had erred as a matter of law. The D.C. Circuit began its analysis by examining the Administrative Procedure Act (APA), which provides that final agency actions are subject to judicial review unless (1) a statute precludes judicial review or (2) the agency action is committed to agency discretion by law.[7] Because no statute precluded judicial review, the issue in this case was whether 10 U.S.C. § 1552(b) committed the waiver decision solely to ABCMR discretion. The D.C. Circuit held that 10 U.S.C. § 1552(b) did not have this effect.

The D.C. Circuit applied a different interpretation to the word "may" in § 1552(b), which states in pertinent part that a board *may* excuse a failure to file within three years. The D.C. Circuit interpreted this language to mean that Congress had intended to confer *some* discretion on the ABCMR, but did not intend to leave the matter *solely* to ABCMR discretion. The D.C. Circuit stated that a strong presumption exists that Congress intends judicial review of administrative actions.

In addition to its reviewability holding, the D.C. Circuit held that the decisions in these particular cases were arbitrary and capricious because the ABCMR had failed to provide a reasoned explanation for its waiver determinations. The D.C. Circuit held that the ABCMR must provide a rational explanation between the facts of the case and the decision made. However, the D.C. Circuit conceded that it would uphold a decision of "less than ideal clarity if the agency's path may reasonably be discerned."

The D.C. Circuit indicated that in situations where national security is at stake the ABCMR would not have to disclose the reasons for its decisions. This, however, is a very narrow exception.

Impact

Although *Dickson* appears to impose a significant burden on the ABCMR, its effect is not so great. At times in its history, the ABCMR has strictly enforced the statute of limitations. Currently, however, the ABCMR looks at the merits of every case that is presented.[8] The ABCMR does not summarily dismiss a case solely because it is untimely. Rather, it examines the facts of untimely cases to determine whether there is justification for granting the requested relief.[9] If inadequate justification exists, then the ABCMR may dismiss the case, citing the statute of limitations as its basis.[10]

Perhaps the greatest effect that *Dickson* will have is on the way the ABCMR prepares its opinions. *Dickson* requires a more detailed opinion than is currently prepared when petitions are denied because they are untimely. The ABCMR is now required to include an analysis of the merits of each case. The ABCMR is currently researching whether a change to its opinion format is in order. A decision will be made in the coming months.[11] Major Lerch.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin* (*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 Systems Bulletin Board Service, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue is reproduced below.

Buffalo Hunt Enjoined

On 26 January 1996, the United States District Court for the District of New Mexico enjoined a buffalo hunt that was to commence the following weekend at Fort Wingate, New Mexico.[12] Animal rights activists and local Indian tribes challenged the Army's concurrence in a hunt sponsored by the New Mexico Game and Fish Department (NMGFD) of state-owned buffalo. The buffalo had been introduced to Fort Wingate in 1965. Plaintiffs argued, and the district court agreed, that the Army did not perform adequate National Environmental Policy Act (NEPA) analysis prior to approving access to the installation for the hunt.

Facts

The NMGFD sought to sponsor the hunt as a means of controlling buffalo over population and to mitigate destruction of the buffalo range. The NMGFD promulgated the hunt as a state regulation.[13] The NMGFD decided that the hunt was necessary based

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[7] Administrative Procedure Act, 5 U.S.C. § 701(a)(1)(2) (West 1995).

[8] Telephone Interview with David R. Kineer, Executive Secretary, Army Board for Correction of Military Records (Jan. 31, 1996).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Funds for Animals, et al., v. United States, No. 6:96-CV-40 MV/DJS (D.N.M. 1996).

[13] By statute, the Army must comply with state hunting, fishing, and trapping regulations. 10 U.S.C. § 2671 (1995). The statute further requires the Army to provide state officials full access to its installation to carry out these regulations, conditioned only by safety and military security measures.

on its analysis of the buffalo population and then limited the number of buffalo to be killed, the age of bulls to be shot, determined how the hunters were to be chosen, selected the hunters, established the time table for the hunts, and agreed to supply NMGFD employees to escort the hunters.

New Mexico notified the local Army commander of the hunt and requested access. The commander granted access subject to four conditions: (1) the hunters were to be accompanied by a NMGFD employee, (2) hunters would hold the United States harmless for any harm suffered by any hunter during the hunt, (3) hunters would observe Army-specified off limits areas designated to protect federal interests, and (4) hunters were prohibited from bringing flame-producing devices or alcohol onto Fort Wingate. Additionally, no federal funds were to be used to perform the hunt; federal funds could be expended solely to provide access to Fort Wingate.

Issue

No NEPA analysis was performed on the grant of access for the hunt or for the pre-NEPA agreement between the Army and New Mexico in 1965 that introduced the buffalo to Fort Wingate.[14] Plaintiffs argued that this failure to perform a NEPA analysis was illegal because the Army's decision to grant access was a "major federal action" due to its impact on the plaintiffs' interests in the buffalo and ancient Indian ruins located on Fort Wingate. The Army countered that the proposed hunt was not a "federal action" because the Army had no discretion to control the hunt in any environmentally meaningful way.

The Court's Conclusion

The district court held for the plaintiffs, finding that the Army's ability to place conditions on the hunt constituted enough control to trigger the NEPA. The district court ordered the Army to take no action in furtherance of the hunt until the necessary NEPA analysis has been performed. The Army has asked the district court to reconsider its decision, as such hunts were contemplated in the 1965 agreement predating the NEPA and such pre-NEPA activities do not require NEPA analysis. If the court does not overrule its earlier decision, the Army is considering an appeal.

Rule Applies Army Wide

The Army contends that no NEPA analysis is necessary where the Army lacks discretion to act. This is true particularly where a state promulgates a hunting or fishing regulation that the federal government is required by law to follow. As a practical measure, however, Army installations should include the guidelines for hunting and fishing programs in their installation's Integrated Natural Resources Management Plan (INRMP). All installation INRMPs must undergo NEPA analysis in accordance with *Army Regulation 200-2, Environmental Effects of Army Actions*, dated 23 December 1988. Until the case above can be resolved, proposed modifications to the hunting or fishing programs can be analyzed to satisfy NEPA requirements by "tiering off" the basic INRMP NEPA document. Analyzing the effects of modifications to the hunting and fishing programs in this manner would protect the installation from challenge by animal rights groups or other interested parties. Mr. Kohns and Major Ayres.

Army Decision Making and the National Environmental Policy Act

Recently, some environmental offices appear to be uncertain about the application of the National Environmental Policy Act (NEPA) to Army decision making, and about the proper use of "Categorical Exclusions." All environmental law specialists must take an active role in ensuring that the requirements of NEPA are not overlooked or injudiciously dismissed.

As a general rule, all Army actions that have the potential to impact the human environment are subject to NEPA. Decisions involving routine actions often require little or no formal review, while decisions on new actions can trigger substantial review procedures. In rare cases, the Army's involvement in an action is so minor that it does not constitute a "federal action" and the NEPA should not apply.[15]

Army regulations provide a good framework for implementing the NEPA's requirements in Army decision making, such as *Army Regulation 200-2, Environmental Effects of Army Actions* (*AR 200-2*).[16] Environmental offices should follow *AR 200-2*'s figure 2-1 NEPA flow chart. This chart does not contain a "NO-RE-VIEW" option and should encourage environmental offices to engage in a meaningful NEPA review of proposed Army actions.

The NEPA review for Army decisions frequently is satisfied by a Categorical Exclusion (CX). Appendix A of *AR 200-2* lists twenty-nine CXs that cover routine Army activities that the Army has determined do not create significant environmental impacts. If a proposed action is encompassed by an existing CX, and no

[14] The NEPA requires an evaluation of the environmental impacts of "major federal actions." The first step in deciding whether to perform such an analysis requires determining whether the proposed action is "federal." Mere federal involvement is not enough. This determination hinges on the amount of control and responsibility the federal government has over the action itself. An often-quoted passage from William Rodgers's treatise on environmental law articulates the nature of the "action" necessary to trigger NEPA analysis: [T]he distinguishing feature of "federal" involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decisionmaker [sic]. This presupposes he had judgment to exercise. Cases finding "federal" action emphasize authority to exercise discretion over the outcome. *Id.*

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

[16] DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988).

extraordinary circumstances exist to indicate that the proposed action may have significant environmental impacts, then no further NEPA analysis is required. To determine if extraordinary circumstances exist, environmental offices must review the proposed action in light of the screening criteria listed at Appendix A. Unfortunately, environmental offices often view a proposed action covered by a CX as an action that requires no NEPA analysis or they fail to properly document, when required, the rationale for the application of the CX.

Many CXs require production of a record of environmental consideration (REC) to explain the reason that no further NEPA analysis and documentation are required. The RECs must thoroughly address each element of the screening criteria to confirm that no extraordinary circumstances exist. This is especially true with proposed actions that are likely to cause public controversy. If the Army's decision is later judicially reviewed, then the REC will be the administrative record that must justify the application of the CX.[17]

Environmental law specialists must be actively involved in the planning process for Army actions to ensure that the NEPA review is conducted and that the necessary documentation is prepared before a decision is made. A determination that the NEPA does not apply to a proposed action should be coordinated with the major Army command environmental law specialist, as should use of CXs relating to controversial projects. Major Mayfield.

Asbestos Management Program

Unions are aggressively seeking environmental differential pay (EDP) because of worker exposure to asbestos. In recent years, the Army has paid several multimillion dollar EDP awards to employees for asbestos exposure. Army failure to comply with the requirements of the asbestos management program, as specified in *Army Regulation 200-1, Environmental Protection and Enhancement*, paragraphs 10-1 to 10-5 (23 Apr. 1990), can be a major factor in arbitrator decisions to award EDP, even when asbestos exposure is undocumented or below OSHA standards.

Environmental assessments of Army installations during the last several years indicate that some installations did not complete asbestos surveys, or did not have complete asbestos management programs in place to deal with asbestos problems revealed by asbestos surveys.

Where asbestos surveys were not done, unions have sometimes been successful in convincing labor arbitrators that installations have the burden of proof to show that employees were not exposed. Because surveys were not done, the government has been unable to meet its burden of proof. In other instances, unions have been able to show that the government did not take steps to correct problems uncovered by the surveys.

Installation environmental law specialists should take an active role to ensure that their installation has an effective asbestos management program. Asbestos exposure is an excellent example of an environmental problem that has a direct labor consequence. The Army intends to publish, in the near future, an installation manual that gives technical guidance regarding the management of asbestos on Army installations. Environmental law specialists should become familiar with this document once it becomes available. Lieutenant Colonel Olmscheid.

National Defense Authorization Act of 1996 Passed

The President signed into law the 1996 National Defense Authorization Act on 10 February 1996.[18] The Act contains several amendments that affect the Installation Restoration Program. Among the new provisions, CERCLA section 120(h)(3) [42 U.S.C. § 9620(h)(3)] has been amended to allow the United States to lease BRAC property without requiring that all remedial action necessary has been taken *before* the date of transfer. The amendment allows the United States to lease the property even when the lessee has agreed to purchase the property or when the lease is in excess of fifty-five years. The United States is required to "determine," in consultation with the USEPA, that there are "adequate assurances" that the United States will take all remedial action necessary that has not been taken on the date of the lease.

The Act also amends several provisions relating to the Defense Environmental Restoration Account (DERA). Section 323 of the DERA instructs the Secretary of Defense to set a goal in place by Fiscal Year 1997 to limit spending for administration, support, studies, and investigations associated with DERA to twenty percent of the total funding for the account. Additionally, this section provides that the Secretary of Defense shall prescribe regulations regarding the establishment, characteristics, composition, and funding of Restoration Advisory Boards. Ms. Fedel.

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[17] *See* Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986); Greenpeace U.S.A. v. Evans, 688 F. Supp. 579 (W.D. Wash. 1987). All records of environmental considerations must be completed *prior* to a making a decision.

[18] National Defense Authorization Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996).

Tort Claims Note

Claims Investigation and Processing Responsibility

This note clarifies the claims responsibility of the United States Army Claims Service and field offices for the investigation and processing of tort claims arising from activities of the Department of Defense (DOD). In particular, claims associated with the DOD Domestic Dependent Elementary and Secondary Schools (DDESS), Defense Reutilization and Marketing Office (DRMO), and the Defense Commissary Agency (DeCA).

The Army is generally responsible for the investigation and processing of claims against nonaffiliated DOD agencies, such as those of DOD employees acting within the scope of employment—for example, DRMO employees or Army & Air Forces Exchange Service (AAFES) activities (nonappropriated fund activities). Claims arising wholly from actions arising from Navy and Air Force service personnel assigned to the DOD are investigated and processed by their respective services. The DOD Directive 5515.9, dated 12 September 1990, provides that claims arising from the acts or omissions of civilian personnel of DOD military departments shall be investigated and processed by the Army claims system.

DRMO Claims. The DRMOs are located on installations of all three services. Regardless of the location of a DRMO site, the Army will retain claims investigation and processing responsibility under DOD Directive 5515.9.

DDESS Claims. A Memorandum of Understanding (MOU), dated November 1994, between the General Counsels of the DOD and the Navy, the Chief of Naval Education and Training, and the Director of DOD DDESS, provides that the General Counsel of the Navy will provide legal services in support of DOD DDESS within CONUS. Coordination with the office of The Navy Judge Advocate General determined that this MOU does not include the investigation and processing of tort and personnel claims. Such claims are the responsibility of each area claims office or claims processing center, regardless of whether the claim arose on an Army, Navy, or Air Force installation.

DeCA Claims. Under a 1 June 1992 MOU between the DeCA, the Army, the Air Force, the Navy, and the Secretary of Defense Office of General Counsel, each military service agreed to investigate and process tort claims arising from the operation of DeCA commissaries under claims processing policies established by the service controlling the location of the site where the commissary is located. This includes litigation support for claims involving commissary personnel assigned to the installation.[1] This method is similar to procedures under which the services investigate and process AAFES claims arising on their installations. Mr. Rouse.

Personnel Claims Note

Discharging Article 139 Awards in Bankruptcy Proceedings

At the annual claims course in November 1995, an attendee asked a question about discharging awards made under Article 139 of the Uniform Code of Military Justice[2] in bankruptcy proceedings. This note answers that question.

Although no cases directly address this issue, these debts may be presumptively nondischargeable by the bankruptcy court. Under the provisions of the Bankruptcy Act, certain kinds of debts are nondischargeable—the court does not have the authority to relieve the debtor of the obligation to pay the debt. Under a specific provision of the Bankruptcy Act,[3] the liability of a person seeking bankruptcy protection is nondischargeable if such liability is based on the willful and malicious injury by the debtor to the person or property of another. This provision of the Bankruptcy Act only applies to acts that may be characterized as intentional torts. The congressional history clearly indicates that awards for the "reckless disregard" of the safety or property rights of another *are not* covered and remain dischargeable under the Bankruptcy Act.[4]

Federal courts have determined that an act is willful if the debtor intentionally performed the act, regardless of whether or not the debtor intended to harm the creditor.[5] Numerous federal cases give slightly varying descriptions of malice, but there is

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[1] *See* Claims Report, *Tort Claims Notes, Defense Commissary Agency Claims*, ARMY LAW., Jan. 1993, at 52, for a more detailed explanation.

[2] 10 U.S.C.A. § 939 (1995).

[3] 11 U.S.C.A. § 523(a)(6) (1995).

[4] *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 363 (1977). *Accord* S. Rep. No. 989, 95th Cong., 2d Sess. 77-79 (1978); 124 CONG. REC. 11,095-96 (Sept. 28, 1978); S. Doc. No. 17, 412-13 (Oct. 6, 1978). *See also In re* Ikner, 883 F.2d 986, 990 (11th Cir. 1989).

[5] *In re* Britton, 950 F.2d 602, 605 (9th Cir. 1991).

apparently no requirement that the debtor intend to injure the creditor.[6] Leading cases indicate that malice exists where the debtor either knew or could reasonably foresee that the debtor's conduct would injure the creditor.[7] Article 139 awards are based on either a wrongful taking of property or willful damage to property, and awards founded on a soldier's willful damage to property may be based on the soldier's recklessness. Based on the intent derived from congressional history, Article 139 awards arising out of recklessness are dischargeable in bankruptcy. However, in all other cases, the underlying action for an Article 139 award is properly viewed as an intentional tort, which will almost always meet the requirements of being both willful and malicious and nondischargeable.

Should the issue arise, the approval authority's determination of a soldier's liability under Article 139 should be treated as a similar finding in a state court. A successful Article 139 claimant could petition the bankruptcy court as an interested party, seeking the nondischargeability of the award. The approval authority's finding should establish a prima facie determination that the debt is nondischargeable in bankruptcy, provided the final action was not based on a finding of recklessness and the investigating officer's report clearly sets forth the basis of the approval authority's decision. The debtor would then have the burden to rebut that presumption.[8] Captain Koonin.

Theft of Property Attached to a Vehicle

Department of Army Pamphlet 27-162, paragraph 2-24d(9), states that "[a] claimant is expected to bolt to the vehicle items that are not factory installed, such as tape decks, radios, speakers, CB radios, and similar accessories. Such items are not secured merely by mounting them on a slide." If this guidance is not met then the claim is usually denied for these items.

Manufacturers continue to develop privately owned vehicle audio products that are "theft proof." One of these products is a radio, either permanently installed or mounted on a slide, that can be disabled, and thus not attractive to thieves, by removing the faceplate of the radio. Without the faceplate the radio is inoperable.

This feature should deter radio theft. Removing the faceplate is extremely easy and the owner of the car should remove the faceplate when exiting the vehicle. Failure to do so, barring unusual circumstances, would prohibit payment if the radio is stolen, even if the radio is bolted to the vehicle at the factory or by the vehicle owner. Major Polk.

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[6] *See, e.g.*, *In re* Littleton, 942 F.2d. 551, 555 (9th Cir. 1991); *In re Ikner*, 883 F.2d at 991.

[7] *See In re Britton*, 950 F.2d at 605 (quoting *In re* Posta, 866 F.2d 364, 367 (10th Cir. 1989)).

[8] Grogan v. Garner, 498 U.S. 279 (1991). In this case, the United States Supreme Court held that a preponderance of the evidence standard, like that used in Article 139 proceedings, applies to actions concerning the dischargeability of debts under 11 U.S.C.A. § 523(a). In footnote 9 of the *Garner* decision, the Court also held that the underlying basis of nondischargeability flows from nonbankruptcy law, to include substantive federal law.

1995 Table of Adjusted Dollar Value

This table updates the 1994 Table of Adjusted Dollar Value (ADV) previously printed in *The Army Lawyer*, April 1994, page 50. In accordance with *Army Regulation 27-20*, paragraph 11-14c, *Department of the Army Pamphlet 27-162*, paragraph 2-39e, claims personnel should use this table *ONLY* when no better means of valuing property exists.

Year Purchased	Multiplier 1995 Losses	Multiplier 1994 Losses	Multiplier 1993 Losses	Multiplier 1992 Losses	Multiplier 1991 Losses
1995					
1994	1.03				
1993	1.05	1.03			
1992	1.09	1.06	1.03		
1991	1.12	1.09	1.06	1.03	
1990	1.17	1.13	1.11	1.07	1.04
1989	1.23	1.20	1.17	1.13	1.10
1988	1.29	1.25	1.22	1.19	1.15
1987	1.34	1.30	1.27	1.24	1.20
1986	1.39	1.35	1.32	1.28	1.24
1985	1.42	1.38	1.34	1.30	1.27
1984	1.47	1.43	1.39	1.35	1.31
1983	1.53	1.49	1.45	1.41	1.37
1982	1.58	1.54	1.50	1.45	1.41
1981	1.68	1.63	1.59	1.54	1.50
1980	1.85	1.80	1.75	1.70	1.65
1979	2.10	2.04	1.99	1.93	1.88
1978	2.34	2.27	2.22	2.15	2.09
1977	2.51	2.45	2.38	2.32	2.25
1976	2.68	2.60	2.54	2.47	2.39
1975	2.83	2.75	2.69	2.61	2.53
1974	2.09	3.01	2.93	2.85	2.76
1973	2.43	3.34	3.26	3.16	3.07
1972	3.65	3.55	3.46	3.36	3.26
1971	3.76	3.66	3.57	3.46	3.36
1970	3.93	3.82	3.72	3.62	3.51
1969	4.15	4.04	3.94	3.82	3.71
1968	4.38	4.26	4.15	4.03	3.91
1967	4.56	4.44	4.33	4.20	4.08
1966	4.70	4.57	4.46	4.33	4.2

NOTES:

1. Do not use this table when a claimant cannot substantiate a purchase price. Additionally, do not use it to value ordinary household items when the value can be determined by using average catalog prices.

2. To determine an item's value using the ADV table, find the column for the calendar year the loss occurred. Then multiply the purchase price of the item by the "multiplier" in that column for the year the item was purchased. Depreciate the resulting "adjusted cost" using the Allowance List-Depreciation Guide (ALDG). For example, the adjudicated value for a comforter purchased in 1986 for $250, and destroyed in 1992, is $224. To determine this figure, multiply $250 times the 1986 "year purchased" multiplier of 1.28 in the "1992 losses" column for an "adjusted cost" of $320. Then depreciate the comforter as expensive linen (Item No. 88, ALDG) for six years at a five-percent (5%) yearly rate to arrive at the item's value of $224. (i.e., $250 x 1.28 ADV = $320 @ 30% dep = $224).

3. The Labor Department calculates cost of living at the end of a year. For losses occurring in 1996, make no adjustment. Mr. Lickliter.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule

The following is a current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires that all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units must attend the On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend the On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Eric Storey, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978 ext. 380.* Major Storey.

THE JUDGE ADVOCATE GENERAL'S RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING, ACADEMIC YEAR 1995-1996

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
27-28 Apr	Columbus, OH 9th LSO Clarion Hotel 7007 N. High St. Columbus, OH 43085 (614) 436-0700	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434
4-5 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Eugene E. Stoker Counsel, MS JW-10 Boeing Defense Space Group Missiles Space Division P.O. Box 240002 Huntsville, AL 35806 (205) 461-3629 FAX: 3209
18-19 May	Tampa, FL 174th LSO/65th ARCOM Sheraton Grand Hotel 4860 W. Kennedy Blvd. Tampa, FL 33609 (813)286-4400	LTC John J. Copelan, Jr. Broward County Attorney 115 S Andrews Ave, Ste 423 Fort Lauderdale, FL 33301 (305) 357-7600

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have a confirmed reservation. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys 5F-F10**

Class Number—**133d** Contract Attorneys' Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1996

May 1996

13-17 May:	45th Fiscal Law Course (5F-F12).
13-31 May:	39th Military Judge Course (5F-F33).
20-24 May:	49th Federal Labor Relations Course (5F-F22).

June 1996

3-7 June:	2d Intelligence Law Workshop (5F-F41).
3-7 June:	136th Senior Officers' Legal Orientation Course (5F-F1).
3 June - 12 July:	3d JA Warrant Officer Basic Course (7A-550A0).
10-14 June:	26th Staff Judge Advocate Course (5F-F52).
17-28 June:	JATT Team Training (5F-F57).
17-28 June:	JAOAC (Phase II) (5F-F55).

July 1996

1-3 July:	Professional Recruiting Training Seminar
1-3 July:	27th Methods of Instruction Course (5F-F70).
8-12 July:	7th Legal Administrators' Course (7A-550A1).
8 July - 13 September:	140th Basic Course (5-27-C20).
22-26 July:	Fiscal Law Off-Site (Maxwell AFB) (5F-12A).
24-26 July:	Career Services Directors Conference.
29 July - 9 August:	137th Contract Attorneys' Course (5F-F10).
29 July - 8 May 1997:	45th Graduate Course (5-27-C22)
30 July - 2 August:	2d Military Justice Managers' Course (5F-F31).

August 1996

12-16 August:	14th Federal Litigation Course (5F-F29).
12-16 August:	7th Senior Legal NCO Management Course (512-71D/40/50).
19-23 August:	137th Senior Officers' Legal Orientation Course (5F-F1).
19-23 August:	63d Law of War Workshop (5F-F42).
26-30 August:	25th Operational Law Seminar (5F-F47).

September 1996

4-6 September: USAREUR Legal Assistance CLE(5F-F23E).

9-11 September:	2d Procurement Fraud Course (5F-F101).
9-13 September:	USAREUR Administrative Law CLE (5F-F24E).
16-27 September:	6th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1996

May 1996

2 & 3, UT:	Evidence and Discovery Symposium Austin, TX
9 & 10, UT:	3d Annual Conference on Labor and Employment Law, Dallas, TX
16 & 17, UT:	2d Annual Computer Law Conference: Communicating and Conducting Business On-Line Austin, TX

June 1996

6 & 7, UT:	6th Annual Conference on State and Federal Appeals, Austin, TX

July 1996

21-26, ABA:	31st Annual Seminar/Workshop New Orleans, LA

For further information on civilian courses, please contact the institution offering the course. Addresses of sources of CLE courses are as follows:

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662.
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3203 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW., Suite 408 Washington, D.C. 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (904) 222-5286
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, N.W., Room 2107 Washington, D.C. 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510 (800) 727-1227.

LSU: Louisiana State University
Center of Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533 (800) 922-6516.

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(800) 225-6482
(612) 644-0323 in (MN and AK).

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(800) 932-4637 (717) 233-5774

PLI: Practising Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas
School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September 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	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually

Jurisdiction	Reporting Month
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
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**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption

For addresses and detailed information, see the February 1996 issue of *The Army Lawyer*.

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 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, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, VA 22060-6218, telephone: commercial (703) 767-9087, DSN 427-9087.

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. These publications are for government use only.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 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	Uniformed Services Worldwide Legal Assistance Directory, JA-267(94) (80 pgs).
AD B164534	Notarial Guide, JA-268(92) (136 pgs).
AD A282033	Preventive Law, JA-276(94) (221 pgs).
*AD A303938	Soldiers' and Sailors' Civil Relief Act Guide, JA-260(96) (172 pgs).
AD A297426	Wills Guide, JA-262(95) (517 pgs).
AD A268007	Family Law Guide, JA 263(93) (589 pgs).
AD A280725	Office Administration Guide, JA 271(94) (248 pgs).
AD A283734	Consumer Law Guide, JA 265(94) (613 pgs).
AD A289411	Tax Information Series, JA 269(95) (134 pgs).
AD A276984	Deployment Guide, JA-272(94) (452 pgs).
AD A275507	Air Force All States Income Tax Guide, April 1995.

Administrative and Civil Law

AD A285724	Federal Tort Claims Act, JA 241(94) (156 pgs).
AD A301061	Environmental Law Deskbook, JA-234(95) (268 pgs).
AD A298443	Defensive Federal Litigation, JA-200(95) (846 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA 231-92 (89 pgs).
AD A298059	Government Information Practices JA-235(95) (326 pgs).
AD A259047	AR 15-6 Investigations, JA-281(92) (45 pgs).

Labor Law

*AD A303539	The Law of Federal Employment, JA-210(96) (312 pgs).

*AD A291106 The Law of Federal Labor-Management Relations, JA-211(94) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

*AD A302674 Crimes and Defenses Deskbook, JA 337(94) (297 pgs).

*AD A302672 Unauthorized Absences Programmed Text, JA 301(95) (80 pgs).

*AD A302445 Nonjudicial Punishment, JA-330(93) (40 pgs).

*AD 302312 Senior Officers Legal Orientation, JA 320(95) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA 310(95) (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338(93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA 422(95) (458 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *The following provides information on how to obtain* Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The United States Army Publications Distribution Center (USAPDC) at Baltimore, Maryland, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

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.

b. 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 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.

c. 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.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) 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.

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684.

(4) Air Force, Navy, 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, Maryland 21220-2896. You may reach this office by telephone at (410) 671-4335.

3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (BBS) primarily dedicated to serving the Army legal community by providing the Army and other Department of Defense (DOD) agencies access to the LAAWS BBS. Whether you have Army access or DOD-wide access, all users may download The Judge Advocate General's School, United States Army (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 RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D);

(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. Request 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 all DOD personnel dealing with military legal issued (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791.

c. The telecommunications configuration is 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT 100/102 or ANSI terminal emulation.

d. 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.

e. *The Army Lawyer* will publish information on new publications and materials available through the LAAWS BBS.

4. Instructions for Downloading Files from the LAAWS BBS

Instructions for downloading files from the LAAWS BBS are currently being revised. If you have a question or a problem with the LAAWS BBS, leave a message on the BBS. Personnel needing uploading assistance may contact SSG Aaron P. Rasmussen at (703) 806-5764.

5. 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	April 1995	1995 AF All States Income Tax Guide for use with 1994 state income tax returns, January 1995.
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.
BULLETIN.ZIP	April 1995	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.
CHILDSPT.ASC	February 1996	A Guide to Child Support Enforcement Against Military Personnel, October 1995.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, October 1995.
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	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	December 1995	Federal Tort Claims Act, August 1994.
FOIAPT1.ZIP	November 1995	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	November 1995	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.
JA200.ZIP	November 1995	Defensive Federal Litigation, August 1995.

FILE NAME	UPLOADED	DESCRIPTION
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	April 1995	Law of Federal Labor-Management Relations, December 1994.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	November 1995	Environmental Law Deskbook, Volumes I and II, September 1995.
JA235.ZIP	August 1995	Government Information Practices Federal Tort Claims Act, August 1995.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, April 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	July 1995	Legal Assistance Wills Guide, June 1995.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.ZIP	December 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	January 1996	15-6 Investigations, August 1992 in ASCII text.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA301.ZIP	December 1995	Unauthorized Absences Programmed Text, August 1995.
JA310.ZIP	December 1995	Trial Counsel and Defense Counsel Handbook, May 1995.
JA320.ZIP	December 1995	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	December 1995	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	December 1995	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1995	OpLaw Handbook, June 1995.
JA501-1.ZIP	August 1995	TJAGSA Contract Law Deskbook Volume 1, May 1993.
JA501-2.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA501-3.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 3, May 1993.
JA501-4.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 4, May 1993.
JA501-5.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 5, May 1993.
JA501-6.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 6, May 1993.

FILE NAME	UPLOADED	DESCRIPTION
JA501-7.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 7, May 1993.
JA501-8.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 8, May 1993.
JA501-9.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 9, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	August 1995	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506.ZIP	November 1995	Fiscal Law Course Deskbook,October 1995.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA5082.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2,1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	March 1995	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	March 1995	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	March 1995	Procurement Fraud Course, March 1995.
41JA5061.ZIP	June 1995	Forty-first Fiscal Law Course, May 1995.
41JA5062.ZIP	June 1995	Forty-first Fiscal Law Course, May 1995.
41JA5063.ZIP	June 1995	Forty-first Fiscal Law Course, May 1995.
41JA5064.ZIP	June 1995	Forty-first Fiscal Law Course, May 1995.
JA509-1.ZIP	March 1994	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	June 1995	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	June 1995	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	June 1995	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.

FILE NAME	UPLOADED	DESCRIPTION
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
OPLAW95	December 1995	Operational Law Deskbook 1995.
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.
YIR94-1.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 1, 1995. Symposium.
YIR94-2.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1995	Contract Law Division 1994 Year in Review Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review.

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 and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 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.

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, SSG Aaron P. Rasmussen, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. Articles

The following information may be useful to judge advocates:

Patrick J. Beirne, *The Supreme Court Places the Endangered Species Act in "Harm's Way*, 23 N. KY. REV. 81 (1995).

Antoine Bouvier, *"Convention on the Safety of United Nations and Associated Personnel": Presentation and analysis*, 309 INT'L REV. OF THE RED CROSS 638 (1995).

Ambrose O. Ekpu, *Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria*, 24 DENV. J. INT'L L. & POLICY 55 (1995).

Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POLICY 109 (1995).

Julia A. Glazer, *The Clean Water Act Enforcement Provision: What Constitutes Diligent Enforcement under Comparable State Law*, 23 *N. KY. L. Rev.* 129 (1995).

Jo Lynne Merrill, *Multiple Obligees and the Child Support Guidenlines, A Mathematical Puzzle Partly Solved*, TEX. B.J. 124 (1996).

Dan a Naranjo, *Alternative Dispute Resolution of International Private Commercial Disputes under the NAFTA*, 59 TEX. B.J. 116 (1996).

7. TJAGSA Information Management Items

a. The TJAGSA Local Area Network (LAN) is now part of the OTJAG Wide Area Network (WAN). The faculty and staff are now accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail through the TJAGSA IMO office at godwinde@otjag.army.mil.

b. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978. Lieutenant Colonel Godwin (ext. 435).

8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nel Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

c. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Staff Judge Advocate
HQ, I Corps and Fort Lewis
ATTN: AFZH-JA (CW3 Gardner)
Fort Lewis, Washington 98433-5000
COM (206) 967-0701

* Corpus Juris Secundum, 173 Vols. (no updates since 1992)

Staff Judge Advocate
USAEC & Fort Leonard Wood
Building 1705, Attn: ATZT-JA
Fort Leonard Wood, Missouri 65473-5000
POC WO1 Holbrook
COM (314) 596-0625
DSN 581-0625

* American Jurisprudence 2d, last update 1987
* American Jurisprudence Proof of Facts, last update 1986
* United States Statutes at Large, last update 1993
* Vernon's Annotated Missouri Statutes, complete set of 66 books, last full update 1992

Division Law Library
USACOE, Missouri River Division
P.O. Box 103, Downtown Station
Omaha, Nebraska 68101
POC Christine T. Carmichael
COM (402) 221-3229

* Federal Reporter 1st Series, Vols. 1-300
* American Law Reports Annotated, Series 1, Vols. 1-175
* Northeastern Reporter, Vols. 1-200
* Northeastern Reporter Digest, 68 Vols., 1933-1969
* Pacific Digest, Vols. 1-40
* Pacific Reporter 1st Series, Vols. 1-300
* Court of Claims Reports, Vols. 104-159
* Modern Federal Practice Digest, 81 Vols., 1960-1967
* West's Federal Practice Digest 2d Series, 105 Vols., 1976-1982
* Digest of Opinions, 19 Vols., 1958-1959

Staff Judge Advocate
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