THE ARMY LAWYER

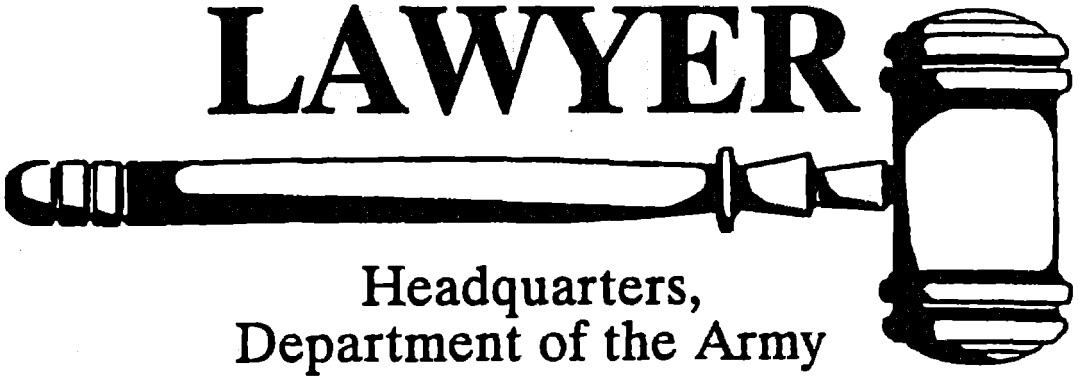

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Table of Contents

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The Third Priority: The Battlefield Dead

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Introduction

The dead and those who shortly would be dead littered the field between the battle lines. The moans of the dying and the screams of the wounded permeated the air. In just over thirty minutes, some seven thousand soldiers had been sent straight into a maelstrom of lead. Few returned unscathed. For three days, the soldiers lay in the stifling heat of early June. As the moans of the dying gave way to the stench of death, it became clear to both armies that something needed to be done to clear the field. The two armies remained in place, each behind hastily established earthworks.

The commander whose soldiers made up the vast majority of those left on the field sent a proposal to his enemy two days after the attack. Unarmed litter bearers would advance from both lines and collect the wounded and dead who were "now lying exposed and suffering between the lines."[2] The opposing commander refused the suggestion, reasoning that "such an arrangement will lead to misunderstanding and difficulty."[3] As a counter proposal, he suggested that "when either party desires to remove their dead or wounded a *flag of truce be sent, as is customary.*"[4] As the exchange of notes continued, more men would die. When, three days after the attack, the commander of the losing side agreed to send litter bearers under a flag of truce, only two survivors were found.

This incident occurred after the battle of Cold Harbor which took place on 3 June 1864 in Virginia. The two opposing generals were giants of American military history, Robert E. Lee and Ulysses S. Grant. Grant had foolishly sent thousands of soldiers directly into fixed Confederate lines.[5] Now, the remnants of that attack lay on the field. The delay in arranging the removal of the dead and wounded from the battlefield was the result of Grant's refusal to admit that he had lost the battle.[6] The normal protocol was for the losing side to ask the victor for permission to collect the dead and wounded by sending out litter bearers under a flag of truce, usually a white flag. As a Federal staff officer at Cold Harbor later explained: "An impression prevails in the popular mind, and with some reason perhaps, that a commander who sends a flag of truce asking permission to bury his dead and bring in his wounded has lost the field of battle. Hence, the resistance upon our part to ask for a flag of truce."[7] Grant refused to acknowledge defeat and his initial suggestion would have omitted the white flag.[8] Lee, having won the day, demanded that the accepted protocol be observed and that a flag of truce be sent "as is customary." While the protocol problem was being resolved, soldiers died where they had fallen.

The battle at Cold Harbor provides an excellent backdrop for an examination of the law regarding the battlefield dead. There is a relationship between the treatment of the wounded and the removal of the dead. Modern treaty based law concerning the battle-

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[2] OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Series I, vol. 36, pt. 3, 600 (1891) [hereinafter OR].

[3] *Id.*

[4] *Id.*

[5] WILLIAM S. MCFEELY, GRANT 171 (1981) ("Years later Grant stated he regretted the assault on June 3 at Cold Harbor, but this admission does not explain away his and Lee's inexcusable behavior in the hours and days following the battle."). Charles S. Venable, *The Campaign from Wilderness to Petersburg*, XIV SOUTHERN HIST. SOC. PAPERS 536 (1886) ("The victory of 3d June, at Cold Harbor, was perhaps the easiest ever granted to Confederate arms by the folly of Federal commanders.").

[6] 3 DOUGLAS SOUTHALL FREEMAN, R.E. LEE 392 (1935) ("Grant could not bring himself to make this tacit admission of defeat.").

[7] 3 SHELBY FOOTE, THE CIVIL WAR, A NARRATIVE 295 (1974).

[8] "After some disingenuous proposals, General Grant finally asked a truce to enable him to bury his dead." WALTER H. TAYLOR, FOUR YEARS WITH GENERAL LEE 135 (Indiana Univ. ed. 1962).

field dead is found in the Geneva Convention relating to the wounded and sick.[9] The general obligation to the wounded is that they be promptly treated without regard to their nationality.[10] This article examines the narrower issue of the duty a belligerent owes to those who are beyond treatment—the dead.[11] What obligations exist regarding the dead? Must they be buried? If so, under what conditions? Are the dead to be protected? If so, from what? What of the property of the dead? What criminal sanctions apply to maltreatment of the dead and their property?

The Dead and Defeat

We first consider the problem of collecting and disposing of the dead. General Lee's reference to the requirement for a flag of truce "as is customary" is instructive. Where both armies remained in place after an attack it would have been foolhardy for one force to unilaterally send out litter bearers without the consent of the other. Because the majority of the wounded and dead would probably belong to the force that had pulled back after an attack, that force would logically be considered the loser and was expected to ask for permission to clear the field. The custom to which Lee referred was found in the cumulative military experience up to that time. He was, like other professional soldiers of that age, certainly aware of the customs of the battlefield and viewed them as establishing rules of conduct.

The accepted procedure for the identification and removal of the dead from the battlefield had existed for several centuries and was even demonstrated in Shakespeare's play, *The Life of Henry V*.[12] After the disastrous French defeat at Agincourt in 1415, the French King sent a herald[13] to King Henry's English forces. Shakespeare provides the following dialogue:

> HERALD: I come to thee for charitable license
> That we may wander o'er this bloody field
> To book our dead, and then to bury them;
> To sort our nobles from our common men. . . .
>
> KING: I tell thee truly, herald
> I know not if the day be ours or no. . . .
>
> HERALD: The day is yours.[14]

Shakespeare's play closely follows the actual Battle of Agincourt. The French, having lost the battle come to the victorious English, admit their loss and ask permission to register the dead ("book our dead") and remove the bodies. Of course, merely describing the custom does not explain it. For an explanation, we also look to history.

There are three basic scenarios in which one might expect to find the dead left on the battlefield. First, one side might abandon the field to the other. In this case, any duty to care for the dead would fall on the side controlling the field. Second, the two sides might remain on the field with the dead between them as at Cold Harbor. In which case, there would have to be some arrangement between the two opposing forces. Third, soldiers of one side might die behind the lines of their enemy. In which case, the side behind which they fell would usually have to dispose of them, but the opposing forces might enter into an arrangement for their return or burial by soldiers of their own force.

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[9] *See* Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31. [hereinafter GWS].

[10] *Id.* art. 12.

[11] The treatment of the dead at sea is found in Article 18 of the second Geneva Convention. Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85. [hereinafter GWS(Sea)]. The general obligation to the dead at sea is not appreciably different from that to the dead on land. This article, however, is limited to the dead on land battlefields.

[12] WILLIAM SHAKESPEARE, THE LIFE OF HENRY THE FIFTH. *See also* Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1 (1992).

[13] "Heralds" carried messages between the opposing forces in mediaeval warfare. Yet, they were more than mere messengers. Heralds were essentially neutral observers, schooled in the Code of Chivalry with which every Knight was expected to comply. They did not participate in battle and wore distinctive garb to distinguish themselves from warriors. The French heralds at Agincourt did not belong to the French army, but to "an international corporation of experts who regulated civilized warfare." JOHN KEEGAN, THE ILLUSTRATED FACE OF BATTLE 96 (1976). They were the accepted experts in the law of arms. M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 209 (1965).

[14] HENRY V, *supra* note 12, act IV, scene 7.

By the time of the War Between the States, a recognized protocol or custom regarding the removal of the wounded and dead from the battlefield had developed. It generally required the loser of the battle,[15] if the armies remained on the field, to request permission to clear the field. Given the tactics of the mid nineteenth century in which massed infantry formations would attack enemy troops who were often behind fixed fortifications or in trenches, the dead left on the field after an unsuccessful attack would primarily be from the attacker's forces. It is in this sense that the request for permission to bury the dead represented a recognition that the attack had failed and, therefore, an admission of defeat.

The effort to police the dead and wounded from the battlefield was usually initiated by one commander communicating to the other under a flag of truce (at least before the advent of radio). Modern usage is to use a white flag as a flag of truce. The individual who conveys the desired message and arranges the truce is known as a *parlementaire*. The opposing commander is under no obligation to recognize a white flag, although the modern practice is to do so. If both sides agree to cease fighting, an armistice[16] results. Such battlefield suspensions are popularly known as "truces."[17] During the period in which a truce is in effect both parties agree to refrain from fighting or doing any act inconsistent with the truce.[18] A battlefield suspension of arms is known as a "special truce." A special truce might be the result of a verbal or written agreement, but a special truce should be specific as to its duration. A general truce or general armistice is a suspension of arms over a whole theater of operations and is more comprehensive in its coverage of the conduct of both armies during the truce period.[19] By the end of the eighteenth century the system of parlementaires and truces was the keystone of the customary law of war[20] and was the usual way in which the recovery of the dead would be coordinated.

Concern for the treatment of the dead has always been a secondary concern to the care of the wounded on the battlefield. Burying the dead after large battles "came a poor third in an army's priorities, lagging well behind the tasks of continuing the war and caring for the wounded."[21] After all, the dead are beyond immediate human help.

Yet, in every society, accounting for[22] and disposing of the dead plays a significant part. One need only look at the pyramids of Egypt or the mausoleums of Greece for confirmation of the

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[15] Grotius also discussed the methods by which the victorious army might be determined:

> The other evidences—the collecting of spoils, the giving up of the dead for burial, and challenging to battle a second time, which . . . you sometimes find mentioned as signs of victory—prove nothing in themselves, excepting in so far as, in connection with other signs, they bear witness to the flight of the enemy. Surely in case of doubt the one who has retired from the field of battle may be presumed to have fled.

H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, bk. III, ch. XX, pt. XLV(3)(Carnegie ed., F. Kelsey trans. 1925)(1646). However, he also set out two examples related to the conclusions to be drawn from a request to bury the dead left on the field:

> Plutarch, *Agesilius*, says: 'But after the enemy had sent to ask permission to bury their dead he granted it, and having in that manner obtained a testimony of victory he went away to Delphi.' Likewise in the *Nicias*: 'And yet according to established and accepted custom those who had received permission to bury their dead were thought to have given up all claim to the victory, and those who had obtained such a request did not have the right to set up a trophy.'

Id. n.1.

[16] "While Anglo-American practice in the past has been extremely flexible in referring to capitulations, truces, suspensions of arms, and other such acts as armistices, and the reverse. Continental practice, particularly since the First and Second Hague Conferences, has steadily crystallized its conceptions. It tends to consider an armistice as an agreement for the general termination of hostilities, concluded by both military and civilian representatives of a defeated Power on wider than strictly military bases, to provide not merely for the end of open warfare, but for a transitional regime of indeterminate duration." Malbone W. Graham, *Armistices-1944 Style* 39 AM. J. INT'L. L. 286-287 (1945). *See also* Armistices, II OPPENHEIM'S INTERNATIONAL LAW §§ 230-34 (H. Lauderpacht ed., 7th ed. 1952).

[17] A truce is "a cessation of fighting ordinarily on a small sector of the fighting area (traditionally but not necessarily brought about by a white flag and accompanying parley) between enemy forces for some special purpose of relatively short duration, such as evacuating casualties or discussing terms of surrender." Roger Melville Saunders, Armistice and Capitulation 5 (1956) (unpublished thesis, The Judge Advocate General's School, Charlottesville, Virginia.).

[18] The word "truce" is derived from the Old English word "treow", which meant "faith, pledge." JOHN AYTO, DICTIONARY OF WORD ORIGINS (1990). The violation of a truce is considered a war crime. After World War II, German Oberleutnant Gerhard Grumpelt was tried by a British military commission for scuttling U-Boats after the armistice was signed. He was convicted. His defense counsel argued that there was no *mens rea* because he believed the armistice to signify only a cease fire. The reporter of the case wrote, "[i]t would appear to be beyond doubt that any violation of a capitulation or armistice is prohibited and if committed constitutes a violation of the customary and conventional rules of the laws and usages of war." The Scuttled U-Boats Case, I LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 55, 68 (1947).

[19] GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 339-41 (1902).

[20] GEOFFREY BEST, HUMANITY IN WARFARE 61-62 (1980).

[21] JOHN KEEGAN AND RICHARD HOLMES, SOLDIERS 160 (1985).

[22] In modern times, one reason for accounting for and identifying the dead is related to the payment of death benefits to survivors. In the Russo-Japanese War the Japanese made no attempt to identify Chinese dead because the Chinese military took no notice of the civil status of its soldiers. "If it had been possible to identify them, one of the great reasons for identification, the right of the family of the deceased to a pension, did not exist among the Chinese." PERCY BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS 119 (1908).

prominent place the dead play in the society of the living. Hugo Grotius, considered the father of modern international law, concluded that the orderly disposal of the dead was part of the law of nature.[23] This law of nature extended even to what Grotius called "public enemies" and, he wrote, "[e]xamples are found everywhere."[24] Today, American concern for our battlefield dead is at the core of the cry "bring 'em home" regarding the missing and dead of the Vietnam War.

It is often possible to communicate with the force that actually has a particular body and ask that it be returned or that it be buried in a marked grave or that members of the deceased's family be given special permission to enter the enemy lines and remove the body or that personal property on the body be collected and returned. During the War Between the States, such requests, and compliance with them, appear to have been fairly common.[25] On occasion, a commander might ask permission to send his own men behind enemy lines to aid in the burial detail. For security reasons, such requests were probably rare and their being granting even rarer.[26]

When one side is clearly left in control of the battlefield, sanitation and hygiene will demand that all the dead be buried or removed as soon as possible. Where sanitation is a problem it is unlikely that there will be any discrimination as to the treatment of the dead. All will be buried or otherwise disposed.

Conventional Law

The codification of the customary law of war began with the 1864 Geneva Convention; however, this treaty did not address the dead. In 1874, at the urging of the Russian Czar, an international conference convened in Brussels to consider refinements in the law of war. It was proposed that some method be adopted "for the purpose of identifying killed and wounded after a combat . . . in recent wars, families had been left a whole year in a state of uncertainty as to the fate of their relatives."[27] Thus, at least one reason for identifying the dead was an accepted obligation owed to the next of kin. The proposal was not adopted and the battlefield dead remained without written protection.[28]

In 1880, the Institute of International Law published the *Oxford Manual on the Laws of War on Land* (*Manual*). The *Manual* specifically addressed the dead in two articles:

> Art. 19. It is forbidden to rob or mutilate the dead lying on the field of battle.
>
> Art. 20. The dead should never be buried until all articles on them which may serve to fix their identity, such as pocket-books, numbers, etc. shall have been collected. The articles thus collected from the dead of the enemy are transmitted to its army or government.[29]

Though an unofficial document, the *Manual* was considered largely reflective of the customary and codified law of war at the time. Yet, it was not a law creating document.

When the 1864 treaty was formally considered for revision at the turn of the century, the dead were finally recognized in an

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[23] GROTIUS, *supra* note 15, at bk. II, ch. XIX, pt. I.

[24] For example,

> So Hercules buried his enemies, Alexander, those who fell at Issus. Hannibal sought out for burial the Romans, Gaius Flaminius, Publius Aemilius, Tiberius Gracchus, and Marcellus. "You might believe," says Silius Italicus, "that a Carthaginian leader had fallen." The same duty was discharged to Hanno by the Romans, to Mithridates by Pompey, to many by Demetrius, and to King Archelaus by Antony. In the oath of the Greeks, when they were making war on the Persians, there was this: "I will bury all allies; as victor in war, even the barbarians."
>
> Quite generally in the histories you may read that an armistice was granted "for the removal of the dead." There is an instance in the *Attica of Pausanias*: "The Athenians say that the Medes were buried by them, for the reason that it is right that all dead bodies be buried."

Id. pt. III(2) (footnotes omitted).

[25] After the Battle of Olustee, Florida, in February 1864, the Union commander requested that the Confederate authorities search for the body of Colonel Charles W. Fribley and mark its place of burial so that Fribley's widow might visit it. It was also proposed that she be accompanied by the adjutant of the Union force on the visit. This request was denied. A few weeks later Fribley's body was identified and the Confederate commander, General W. M. Gardner, forwarded his personal property, including an ambrotype to her through the Union commander. General Gardner also wrote, "Traces have also been discovered of his watch, a letter from his wife to himself, and his diary, and steps have been taken to recover possession of them; if successful the two former articles will be forwarded." OR, *supra* note 2, series I, vol. 35, pt. 2, at 7.

[26] In September 1864 in Virginia, General Gregg of the Union Army asked to be allowed "to send parties to Ream's Station to bury the Federal dead." OR, *supra* note 2, series 1, vol. 42, pt. 2 at 1230. *Id.* at 1230. Confederate general Wade Hampton, the commander, said in reply, "I cannot accede to this request, but I have ordered all your dead to be buried." *Id.*, at 1231.

[27] 65 BRIT. STATE PAPERS 1038 (1873-1874).

[28] There was some concern at the Brussels conference about meddling with the 1864 Geneva Convention. The proposal concerning the dead would have been placed in a section of the proposed treaty concerning the protection of the sick and wounded. When the delegates could not agree on the substance of that section, the final document simply reiterated the duty to comply with the 1864 Geneva Convention. As a result, the dead were not specifically addressed in the 1874 Brussels document.

[29] *See* DIETRICH SCHINDLER AND JIRI TOMAN, THE LAW OF ARMED CONFLICTS 14 (1988).

official document. In 1906, the Swiss government (which had called for an international conference to consider revisions to the 1864 treaty) submitted questions to the various governments as the basis for the upcoming discussions. Among these were the following:

> The Geneva Convention [1864] lays down the principle that wounded and sick soldiers shall be received and attended to, whatever their nationality (Art. 6, sec. 1). Is it advisable to add that soldiers, when disabled, shall be protected against ill treatment and plunder?
>
> Should it be further stipulated:
>
> (a) That no burial or cremation of the dead shall take place without a previous careful examination of the bodies?
>
> (b) That every soldier shall carry on his person a mark by which he can be identified?[30]
>
> (c) That the list of the dead, sick, and wounded taken in charge by the enemy shall be delivered by the latter as soon as possible to the authorities of their country or army?[31]

Note that the Swiss in their proposal combined the battlefield obligations to the wounded with a proposed new obligation to the dead. As finally adopted, the new provisions read:

> Article 3
>
> After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded, and to protect the wounded and dead from pillage and ill treatment. He will see that a careful examination is made of the bodies prior to their interment or incineration.
>
> Article 4
>
> As early as possible each belligerent shall forward to the authorities of the country or army the marks or military papers found upon the bodies of the dead, together with a list of names of the sick and wounded taken in charge by him. Belligerents will keep each other mutually advised of internments [sic] and transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all objects of personal use, valuables, letters, etc., which are found upon the filed of battle, or have been left by the sick or wounded who have died in sanitary formations or other establishments, for transmission to persons in interest through the authorities of their own country.[32]

The American delegation, in its report to Washington, explained the new duties as follows:

> After each combat the occupant of the field is required to take necessary measures for the protection of the wounded and an examination and identification of the dead. To that end all individual medals, or tokens, together with all letters, valuables, and personal belongings found upon the field or upon the bodies of those who have fallen in battle, are to be collected and transmitted to the lines of the enemy.[33]

However, the American delegation also reported that the new clauses were "very broadly stated, and are intended to apply not only to the case where a successful belligerent occupies the battlefield, but also to a case in which both opposing armies occupy new positions at some distance from the field where the losses were incurred."[34] Interestingly, the American delegation interpreted the new provision as no longer imposing an obligation to collect and bury the dead solely upon the force which held the field. In their minds, the dead were to be honorably treated regardless of where they were found.

Yet, in spite of the American delegation's report, the actual language adopted seems to be more limited in scope. The treaty imposed obligation technically only arose after an engagement and then fell solely on the possessor of the field. The 1906 treaty simply required a field commander to take measures to search for the wounded. The dead were only inferentially addressed in the

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[30] The first army to require identity disks was the Prussian army. In the Franco-Prussian war, each German soldier was required to carry a card showing his regiment and number. The card was referred to as the soldier's "*grabstein*," in English his "tombstone." J. M. SPAIGHT, WAR RIGHTS ON LAND 433 (1911).

[31] REPORT OF THE AMERICAN DELEGATION TO THE SECOND GENEVA CONFERENCE, July 10, 1906, FOR. REL. 1906, II, 1551. [hereinafter REPORT].

[32] Geneva Convention of Jul. 6, 1906, 35 STAT. 1885 (1907).

[33] REPORT, *supra* note 31, at 1557.

[34] *Id.*

Thus, by the end of World War II there were two major aspects to the treatment of the dead. One was an obligation to, when possible, properly and honorably dispose of the dead. This obligation, present from antiquity and recognized as part of the law of nature, was codified to an extent in the 1929 Geneva Convention. The other, and more recent, requirement was that the dead be protected against other forms of maltreatment, including mutilation and larceny or pillage.

The law of war is retrospective. Its development always follows the last conflict. After World War II, there was another effort at codifying the law of war. This endeavor culminated in the four 1949 Geneva Conventions.[44] The dead are considered in Articles 15, 16, and 17 of the first 1949 Geneva Convention dealing with the wounded and sick in the field.

Article 15 is entitled "Search for Casualties, Evacuation." In pertinent part, it provides:

> At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.[45]

Article 15 expands the duty set out in the 1929 Geneva Convention. The obligation under the 1949 Geneva Convention applies "at all times" and is imposed on all parties, not just the force left in control of the battlefield. However, in spite of the tone of the opening phrase, "At all times," the obligation is somewhat muted by the addition of language emphasizing that the duty is especially strong "after an engagement" and that the duty actually is only that "all possible measures" be taken to effect the search. The official *Red Cross Commentary* to the Convention, which provides explanation and interpretation of the treaty, describes the obligation to search for and protect the *wounded and dead* as a "bounden duty, which must be fulfilled as soon as circumstances permit."[46] However, this seems to be a slight overstatement as the actual obligation to the dead is different from that to the wounded. The obligation regarding the dead is to search for them and to "prevent their being despoiled." The requirement is to *collect* the wounded and sick, but only to *search* for the dead. Again, however, the *Red Cross Commentary* expands the obligation:

> The dead must also be looked for and brought back behind the lines with as much care as the wounded. It is not always certain that death has taken place. It is, moreover, essential that the dead bodies should be identified and given a decent burial. When a man has been hit with such violence that there is nothing left of him but scattered remains, these must be carefully collected.[47]

The *Red Cross Commentary* also explains that the language "at all times, and particularly after an engagement" is "adapted to the conditions of modern war, in which hostilities are more continuous than they were in the past."[48] Regarding the prohibition on despoiling the dead, the commentary to the Conventions states, "[a]lthough this Article speaks only of measures to prevent the 'despoiling' [French, *dépouillement*] of the dead, it incontestably involves a prohibition of 'pillage' [French, *pillage*] of the dead."[49]

Nonetheless, the language of the 1949 Article focuses on the wounded to a greater extent than its 1929 predecessor. The *Red Cross Commentary* extends much more protection to the dead than the actual language of the treaty. In large measure, therefore, the *Red Cross Commentary* describes the customary, rather than the treaty based, international law regarding the dead.

Article 16 of the first 1949 Geneva Convention also addresses the dead. Article 16 is based on Article 4 of the 1929 Geneva

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[44] GWS, *supra* note 9; GWS(Sea), *supra* note 11; Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW];Geneva Convention of August 12, 1949, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]. Note that each of the four Conventions is intended to protect a particular class of people from the horrors of war.

[45] Article 15, GWS, *supra* note 9. The comparable provision of the GWS (Sea) Convention, Article 18, deletes the introductory phrase "at all times" and only requires that the search be made "[a]fter each engagement." *Supra* note 11.

[46] JEAN PICTET, COMMENTARY, GENEVA CONVENTION I, GWS, 151 (1952). [hereinafter PICTET]. Pictet wrote a Commentary to each the four Conventions.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 152 n.2.

Convention and repeats the obligation to attempt to identify the dead. Article 16 also requires the following:

> Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of the double identity disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as a complete list of the contents of the parcel.[50]

Article 15 is intended to apply at the front lines of battle. Article 16 applies behind the front lines. Article 15 establishes the obligation to search for, collect, and generally protect the wounded and dead. Article 16 establishes the bureaucratic actions to be taken after the dead are found. Recall that part of the motivation for identifying the dead is to let their next of kin know their fate. Part of that knowledge is the place and date of death. Of course, where a body is simply found on the battlefield it may be difficult determine the exact date and time of death, but every effort should be made through an examination of the body to arrive at an approximate time.

Article 17 of the first 1949 Geneva Convention deals exclusively with the dead. The *Red Cross Commentary* clarifies that this article is "essentially concerned with the dead picked up by the enemy on the battlefield, that is to say, with the mortal remains of combatants.[51] Article 17, in pertinent part, provides the following:

> Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made.[52]

The purpose of the examination of the body is to confirm the fact of death and identify, if possible, the decedent. The phrase "parties to the conflict shall ensure" is intended to clarify that this obligation is mandatory and not optional.[53] The drafters considered individual graves, rather than mass graves, to be more consistent with the general obligation to respect the dead and individual graves would make subsequent exhumation easier. Nonetheless, this requirement is not absolute. When required, because of the climate, hygiene, or sanitation, a commander may still order burial of bodies in common graves.[54]

Death must be confirmed before burial or cremation. Additionally, an effort must be made to establish identity. An identity disk, a requirement for which is suggested in Article 16, must remain with the body. The second paragraph of Article 17 addresses cremation of the body:

> Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail on the death certificate or on the authenticated list of the dead.[55]

When the 1949 Geneva Convention was written, the Nazi crematoria were fresh in the minds of the drafters. Cremation was used by the Nazis not only to dispose of the bodies but to hide the evidence of the cause of death.[56] However, like mass graves, there may be occasions when cremation is the most appropriate way to dispose of the body. The law now mandates that the reasons for such action be recorded. The next requirement imposed by the 1949 Geneva Convention is:

> They [Parties to the conflict] shall ensure that the dead are honorably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and

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[50] GWS, *supra* note 9, art. 16.

[51] PICTET I, GWS, *supra* note 46, at 176.

[52] GWS, *supra* note 9, art 17.

[53] PICTET I, GWS, *supra* note 46, at 176-77.

[54] *Id.*

[55] GWS, *supra* note 9, art. 17.

[56] PICTET I, GWS, *supra* note 46, at 178-79.

> marked so that they may always be found. For this purpose, they shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country. These provisions shall likewise apply to ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.[57]

This paragraph records the core of the duty to the dead: They are to be honorably treated and their graves respected. The requirement that graves be "grouped" by nationality was intended to avoid the past problems caused by "hasty roadside burials" in individual, and often undocumented, graves, rather than in cemeteries.[58] Finally, the grave must be marked in such a way that it can later be found and its occupant exhumed. To ensure integrity of the system, the parties to the conflict agree to establish a graves registration service. Today, in the United States Army, this responsibility is placed on the Adjutant General of the Army.[59] Army *Field Manual 10-63* provides guidance on the search for[60] and treatment of the dead. The manual provides the following: "Enemy dead are also to be honorably buried. If possible, they are provided the rites of their religion."[61] A V-shaped marker is used to mark the grave of unidentified and enemy dead[62] and "[w]hen burying enemy dead every effort must be made to establish separate cemeteries so that transfer of custody of the deceased will be easier."[63]

Driven largely by the post-World War II conflicts, a diplomatic conference revised the law of war in 1977. This conference produced the 1977 Protocols to the Geneva Conventions.[64] Article 34 of Protocol I is entitled "Remains of Deceased." However, Article 34 excludes from its coverage those who would receive "more favorable consideration under the [1949 Geneva] Conventions." Thus, combatants who die on the battlefield and who are covered by Articles 15-17 of the 1949 Geneva Convention Relative to the Sick and Wounded are not protected by Article 34 of Protocol I. Nonetheless, because it does reinforce the general obligation to maintain respect for the dead it merits brief mention.

Article 34 was largely a United States initiative and was driven by a desire to retrieve the remains of United States military personnel killed in Southeast Asia.[65] The thrust of Article 34 is that those who die either in occupied territory or in prisoner of war camps must be accounted for and their bodies properly treated. But, paragraph 4b could be interpreted as applying to the battlefield dead. That paragraph deals with the exhumation of remains and reads as follows:

> A High Contracting Party in whose territory the gravesites referred to in this Article are situated shall be permitted to exhume the remains only:
>
> (b) where exhumation is a matter of overriding public necessity, including cases of medical or investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinterment.

Because the 1949 Geneva Conventions do not provide guidance on when an exhumation should take place, it could be argued that there is no more favorable treatment in the 1949 Geneva Conventions for the dead soldier whose body is about to be ex-

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[57] GWS, *supra* note 9, art. 17.

[58] PICTET I, GWS, *supra* note 46, at 180.

[59] DEP'T OF ARMY, REG. 638-30, GRAVES REGISTRATION ORGANIZATION AND FUNCTIONS IN SUPPORT OF MAJOR MILITARY OPERATIONS (14 Oct. 1985).

[60] "All commanders must make certain that . . . units under their command promptly search for, recover, identify, and evacuate remains. . . . Commanders must take every precaution to protect search and recovery teams from mines, unexploded ammunition, booby traps, and antipersonnel mines which the enemy may have put near, under, or on remains." DEP'T OF ARMY, FIELD MANUAL 10-63, HANDLING OF DECEASED PERSONNEL IN THEATERS OF OPERATION, at 2-1 (28 Feb. 1986).

[61] *Id.* at 5-5.

[62] *Id.*

[63] *Id.* at 4-5.

[64] Protocol I Additional to the Geneva Conventions of August 12, 1949 and Relating to the Victims of International Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391. The United States has not ratified the Protocol.

[65] Article 32 of the Protocol makes clear that the implementation of Section III of the Protocol which concerns "Missing and Dead Persons" is "prompted mainly by the right of families to know the fate of their relatives." *Id.*

humed and, as a result, this provision of Article 34 of Protocol I does not apply. In any event, it does seem that Article 34 of Protocol I, by placing restrictions on exhumations and reburials, reinforces the idea that an honorable burial and respectful treatment are demanded by customary international law.

Criminal Cases—In General

The dead are entitled to be protected. There are two aspects to this protection. First, the body must not be mutilated. Second, the personal property on the body must be secured. Those who mistreat the dead or the property of the dead have found themselves before the bar of justice. Although the position of the dead as a poor third in battlefield priority has limited the circumstances under which a clear duty to actually bury the dead can be established and enforced, the duty to refrain from deliberate mutilation of the dead has been a legal constant. The duty to protect the dead from pillage has been a constant too.

There appear to be few United States criminal cases involving the actual mutilation of a corpse on the battlefield. This may be because mutilation of the dead is so abhorrent that even combat does not create an environment in which a rational person would engage in the practice. As an evidentiary matter, it would seem that a soldier who has the time to mutilate or steal from the dead also has the time to either bury the dead or make arrangements for their proper disposal or, at least, refrain from mistreating the body.

Nonetheless, there are documented instances of mutilation of enemy corpses during World War II by United States service members, particularly in the Pacific theater of operations.[66] Ears, gold teeth, bones, scalps and skulls were collected from the battlefields as souvenirs.[67] Some such items were sent back to the United States. One service member sent President Franklin D. Roosevelt a letter opener made from the bone of a dead Japanese soldier. Roosevelt refused the gift.[68]

Criminal Cases—Mutilation

As indicated, the 1929 Geneva Convention, which applied to World War II, made the care of the dead more than an addendum to the treatment of the wounded. Combatants owed a special duty to the dead and a violation of that duty was a war crime. After World War II, several trials of both German and Japanese soldiers based on a breach of the duty to the dead reinforced the principle of lawful and humane treatment of fallen combatants.

The 1929 Geneva Convention required that the dead be "honorably interred" and the grave marked. The trial of Max Schmid, a German medical officer in France, grew out of his failure to comply with these requirements concerning the dead. Just before the D-Day landings, the body of an American aviator was brought to Schmid's dispensary by a German burial detail. Schmid "severed the head from the body, boiled it and removed the skin and flesh and bleached the skull which he kept on his desk for several months"[69] before sending it to Germany. At his trial, the prosecution claimed he sent it to his wife as a souvenir. He claimed he used it only for instructional purposes and sent it home so that it might be buried in a cemetery. He argued that he acted without malice and had no intention of mutilating the body. An American military commission convicted him and sentenced him to ten years in prison. Schmid had violated Articles 3 and 4 of the 1929 Geneva Convention by subjecting the body to maltreatment and failing to *honorably* inter it. Interestingly, even with the clear rule set out in the 1929 Geneva Convention, a reporter covering the case referred to Lauterpacht's treatise on international law that described the rule as one of customary international law:

> According to a customary rule of the law of nations belligerents have a right to demand from one another that dead soldiers shall not be disgracefully treated and in particular that they shall not be mutilated but shall be, as far as possible, collected and buried or cremated on the battlefield by the victor . . . The belligerents are bound to make provisions for the honorable interment and for respectful treatment and proper marking of graves so that they can always be found.[70]

Several cases involving the mistreatment of the bodies of dead allied soldiers were brought against Japanese soldiers. One Japanese soldier was tried by a United States military commission and sentenced to twenty-five years in prison for "bayoneting and mutilating the dead body of a United States prisoner of war."[71] If the victim had been a prisoner of war, then the body was not found on the battlefield; nonetheless, the case does represent an incident of the ill treatment of a dead body. In another United States case, several Japanese defendants were charged with "preventing

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[66] *See generally* GEORGE FEIFER, TENNOZAN 483-99 (1992).

[67] *Id.* at 493.

[68] DOWER, *supra* note 43, at 65.

[69] Trial of Max Schmid, XIII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 151 (1949).

[70] OPPENHEIM, *supra* note 16, § 124.

[71] Note that the dead soldier had been a prisoner of war. His body was not found on the battlefield. Case of Lieutenant Jutaro Kikuchi, *reported in* Schmid, *supra* note 69, at 152.

an honorable burial due to the consumption of parts of the bodies of prisoners of war by the accused during a special meal in the officer's mess." They were found guilty and the sentences ranged from imprisonment to death.[72]

The war in Vietnam led to many allegations of maltreatment and mutilation of enemy dead by American soldiers. One oft repeated, and widely reported, story was that American interrogators pushed prisoners of war out of helicopters to get other prisoners to talk. An investigation by the army could not substantiate such "war stories" and it is doubtful that such instances actually occurred. However, the Army did discover that on one occasion the corpse of an enemy soldier was thrown out of a helicopter to intimidate prisoners of war. Disciplinary action was taken against the pilot of the helicopter.[73]

Reports of the mutilation of bodies, particularly cutting the ears off dead enemy soldiers, also circulated. One such incident was filmed and shown on the *CBS Evening News* in 1967.[74] In another incident which occurred in 1967, an Army sergeant was court-martialed for "conduct to the prejudice of good order and discipline," a violation of Article 134 of the Uniform Code of Military Justice (UCMJ). The sergeant was convicted of decapitating two enemy corpses and posing for a photograph with the heads.[75] The disciplinary or judicial action taken in these incidents is proof that such conduct was not sanctioned by the command in Vietnam. In October 1967, General Westmoreland, United States Commander in Vietnam, described the practice of cutting ears and fingers off the dead as "subhuman" and "contrary to all policy and below the minimum standards of human decency."[76] In the primary army manual on the law of war during the Vietnam War, which still applies today, the "maltreatment of dead bodies" is described as an act "representative of violations of the law of war (war crimes)."[77]

Plunder, Pillage, and Looting—In General

If from time immemorial, the proper disposal of the dead has been mandated by the laws of nature, the control of any property found on the dead has not been so well defined. In ancient times such property constituted the spoils of battle. The right of the warrior to scour the battlefield for personal enrichment was a useful recruiting tool. However, as groups of men became less of a temporary force raised for a particular conflict and became more akin to the standing professional armies of today, there was less reason to entice enlistments with promises of battlefield largess. Also, maintaining armies was expensive and if there were to be spoils of war they should go to the king and his commanders and not to the common soldier.[78]

Maintaining discipline on the battlefield is the legitimate concern of modern armies and was no less so in the armies of antiquity. Permitting soldiers to take property from the dead, even the enemy dead, could lead to the collapse of the unit integrity demanded by the tactics of the day. In wars in which the main tactic was an attack by a massed formation of troops against similarly disposed enemy troops, any distraction breaking the formation could lead to defeat. For this reason, commanders were quick to issue orders prohibiting individual pillage until the battle was clearly decided. Representative of this principle is King James II's Article XXIV of his Articles of War of 1688:

> When it shall please God that His Majesty's Forces shall beat the Rebels, or Enemy, every man shall follow his Officer in the Chase; but whoever shall presume to pillage or plunder till the Rebels, or Enemy be entirely beaten, he shall suffer Death, or such other Punishment as shall be pronounced against him by the General Court-Martial; and the Pillage so gotten shall be forfeited to the use of sick and maimed soldiers.[79]

In the warfare of the Middle Ages, the usual outcome of a battle was that one side broke its formation, ran, and abandoned the field to the other, leaving its dead on the field. The victorious force might either pursue the enemy or remain on the field. If it remained on the field, then permission to "spoyle" the dead might be granted by the commander. After the spoil was taken, the dead would be buried where they fell.

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[72] Case of Lieutenant General Tachibana Yochio and Thirteen Others. *Id.*

[73] There were actually two offenses here. One was the mistreatment of the body. The other a violation of the prohibition on using coercion to extract information from prisoners of war. GPW, *supra* note 44, art. 17. The helicopter incident is discussed in GUENTHER LEWY, AMERICA IN VIETNAM 322 (1978).

[74] There was some involvement, if not encouragement, from the CBS cameraman at the scene. The cameraman provided the knife used to perform the act. *Id.*

[75] *Id.* at 329. The case was *United States v. Hodges*, CM 420341. The case is not found in the published appellate reports.

[76] *Id.*

[77] DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 504c (July 1956) [hereinafter FM 27-10].

[78] The rule today is that private property simply found on the battlefield is presumed to be enemy public property and, therefore, belongs to the government, not the individual soldier who finds it. *Id.* paras. 394c, 395. Any private property taken from the enemy, living or dead, is held only for safekeeping and cannot be confiscated. *Id.* para. 406a.

[79] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 925 (1920).

Even as armies became more professional there were sometimes problems with ransacking the dead. After the January 1863 Battle of Murfreesboro in Tennessee (sometimes called Stone's River), a Confederate general, A. P. Stewart, commented on the burial of the dead in his after action report:

> Many of the enemy's dead, and some of our own, were left on the field unburied. We procured a few spades on Saturday evening, and buried as many bodies as was possible under the circumstances. I would respectfully submit that at least all of our own dead might have been buried during the three days we held the field. Attention is also respectfully called to the plundering and stripping of the dead, even our own, and to the propriety of a general order prohibiting it.[80]

There was an understandable tendency to take items of military equipment and uniforms from those no longer in need of them. Nonetheless, the taking of personal property from the dead was a serious matter that could subject the Civil War soldier to court-martial.[81]

The Swiss suggestions sent out before the 1906 Geneva Convention conference only asked whether the new treaty should protect the disabled from plunder and ill treatment. It is unlikely that the dead would have been categorized as "disabled." At the time, "plunder," as a noun, referred to the personal property taken from an enemy. As a verb, it referred to the act of taking the personal property.[82] Plunder and pillage have now become interchangeable in common parlance.

The 1906 treaty obligated the force in possession of the field, and therefore in most cases the corpse, to protect those left on the field from "pillage and ill treatment." Pillage was considered a form of robbery. An element of robbery, however, is that the taking be against the will of the victim,[83] an impossibility when the victim is dead.

The drafters of the 1906 Geneva Convention recognized that any army or government that adopted the new rules should be sophisticated enough to have strict proscriptions against individual soldiers taking private property from the dead. By the time of the conference, pillage was recognized as a criminal act[84] contrary to discipline on the battlefield. It was considered to be the type of offense that would "convert legitimate warfare into marauding, and a disciplined military force into a band of stragglers and freebooters,"[85] and because it was regarded "as the most immediately fatal [offense] to the discipline and morale of soldiers, as calling in all cases for severe punishment."[86] They reasoned that an offense so universally condemned and so inconsistent with discipline would surely be punished by each belligerent as a violation of its own military codes.

Today, pillage, in common understanding, has actually come to refer to wide-spread looting and stealing from the enemy population. Article 33 of the 1949 Geneva Convention relative to civilians simply states: "Pillage is prohibited."[87] The commentary to this convention provides that the "prohibition is general in scope."[88] Unfortunately, "pillage" is not defined in the 1949 Geneva Convention and the placement of the provision in an article dealing with the imposition of collective penalties on the civilian population is an indication that what is addressed and prohibited is the taking of property as part of a general or collective punishment of the civilian inhabitants of a particular area. Nonetheless, the obligation is described in the commentary as:

> The High Contracting Parties prohibit the ordering as well as the authorization of pillage. They pledge themselves furthermore to prevent or, if it has commenced, to stop individual

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[80] OR, *supra* note 2, series I, vol. 20, pt. 1, at 726.

[81] "[P]ilfering that ranked lowest in Rebel esteem was that of plundering dead comrades. . . . Ransacking of deceased Federals was regarded with less disapproval and was therefore more common. . . ." BELL I. WILEY, THE LIFE OF JOHNNY REB 46 (1943).

[82] BLACK'S LAW DICTIONARY 907 (2d ed. 1910).

[83] *Id.* at 1043.

[84] A year after the 1906 Geneva Conference, the 1899 Hague Regulations governing land warfare were revised. Article 28 addressed pillage: "The pillage of a town or place, even when taken by assault, is prohibited." However, this provision concerns only places and is found in Section II, Chapter I of the Convention which deals with the "Means of Injuring the Enemy, Sieges, and Bombardments." As such, it would not seem to outlaw the pillage of the battlefield dead. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 STAT. 2277, T.S. No. 539.

[85] WINTHROP, *supra* note 79, at 626.

[86] *Id.*

[87] GC, *supra* note 44, art. 33.

[88] PICTET IV, GC, *supra* note 46, at 226.

> pillage . . . . The prohibition of pillage is applicable to the territory of a Party to the conflict as well as to occupied territories.[89]

This prohibition on pillage, although found in the convention protecting civilians, is more evidence that stealing property from the enemy, dead or alive, soldier or civilian, is illegal.

Criminal Cases—Property of the Dead

Crimes committed against the dead or their property are punishable under United States military law. Stealing the property of the dead is no different than stealing any other property and might be punished as larceny. However, because the relevant international agreements refer not to larceny, but to pillage, it is useful to look at the way in which pillage was addressed in the old Articles of War compared to how it is addressed in the modern UCMJ.

The 1940 Army field manual on the law of war addressed the obligation to the dead as follows:

> Robbery or maltreatment of the wounded or dead on a battlefield are outrageous offenses against the laws of war. It is the duty of the commanders to see that such offenders, whether members of the armed forces or civilians, are promptly apprehended and brought to trial before competent military tribunals. Like other serious offenders against the laws of war they may be sentenced to death or such punishment as the trial tribunal may be legally authorized to impose.[90]

In World War II, the War Department also issued a general circular addressing the collection of "war trophies." It provided that "[T]he taking of decorations, insignia of rank, or objects of value either from prisoners of war or from the wounded or dead (otherwise than for examination and safekeeping) is a violation of international law . . . . Under no circumstances may war trophies include any item which in itself is evidence of disrespectful treatment of enemy dead."[91]

This author has been unable to find a reported criminal case involving an American soldier in World War II charged with stealing from the dead. American soldiers sometimes searched the bodies of the dead for "souvenirs." The practice was frowned on but "occasionally the macabre searches turned up useful intelligence information."[92] However, there were prosecutions relating to the general offense of "pillage." Article 75 of the Articles of War (applicable to American soldiers during the war) prohibited misconduct before the enemy, and provided in pertinent part: "Any . . . soldier, who before the enemy, . . . quits his post . . . to plunder or pillage, . . . shall suffer death or such other punishment as a court-martial may direct."[93]

There were several criminal cases concerning Article 75 larceny offenses. Although none dealt directly with the maltreatment of the dead, they are instructive as examples of how such a case might be prosecuted today and the problems associated with proving offenses involving mistreatment of the dead and their property. In *United States v. Murphy*, the conviction of three American soldiers for quitting their place of duty for the purpose of pillaging and plundering was upheld.[94] In June 1944, the three soldiers left their place of duty near les Foulons, France, and ransacked one house, stole money from the owner of another, and fired several shots inside the second home. All three were sentenced to extensive prison terms by a general court-martial. On appeal the issue of the defendants' intent was addressed. The court cited former Acting The Judge Advocate General of the Army William Winthrop's treatise on military law "that it [private property] is taken . . . will of course be the strongest evidence that the offender left his station for the purpose of taking it."[95] The conviction was upheld. Note that these soldiers were charged with and convicted not of engaging in plunder but of quitting their post with the intention of doing so.

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[89] *Id.*

[90] 3 CHARLES HENRY HYDE, INTERNATIONAL LAW § 682 (1945).

[91] DEP'T OF WAR, CIRCULAR 353 (Aug. 31, 1944); William Gerald Downey, *Captured Enemy Property: Booty of War and Seized Enemy Property*, 44 AM. J. INT'L L. 488 (1950).

[92] ALLEN, *supra* note 41, at 154.

[93] Articles of War, art. 75.

[94] United States v. Murphy, 8 B.R. 327 (ETO CM 3091) (1944).

[95] *Id.* at 333 (citing Winthrop, *supra* note 79, at 627).

In another case, Private Edward Dann was charged with having quit his post "for the purpose of plundering and pillaging" as well as with larceny.[96] Dann left his post near Heteren, Holland, in October 1944 and went to the local village in search of food. While there, he went into a bombed out bar and forced open a safe. He stole the contents and was later tried and convicted by a general court-martial (the case was referred as a capital case). Dann's platoon leader testified that it was "common practice for men to go to houses to obtain food,"[97] but no member of the platoon was "ordered to go out to pillage or plunder."[98] Another lieutenant from Dann's battalion testified that he had seen Dann in the village and had asked him what he was doing there. Dann replied that he was getting food. The lieutenant then told Dann that, "Getting food was permissible, but he was overstepping the bounds by taking personal property."[99] Dann testified in his own defense, and when asked on cross-examination if he had been given permission to pillage and plunder replied, "I don't know whether you call it plunder or not, but I was given permission to get fruit and beer."[100] Dann was convicted and sentenced to a dishonorable discharge and three and a half years confinement.

On appeal, that portion of his conviction relating to quitting his post for the *purpose* of plundering and pillaging was disapproved. The court considered that the "only question for determination is whether there is in the record competent and substantial evidence that accused 'quit his post' and if so whether he did so at the time with the specific intent entertained at the time of quitting, to plunder and pillage, *i.e.*, to seize and appropriate without authority public or private property."[101] The appellate court found that the requisite intent had not been proven. Importantly, the court emphasized that: "It is obvious that the record may not be held legally sufficient to support findings of guilty of plundering and pillaging under the laws of war. . . . The specification did not allege plundering or pillaging *but quitting his post for that purpose*, an entirely separate and distinct offense."[102] Dann's conviction for larceny was upheld.

In a third case, Private William Whitfield was charged with quitting his place of duty for the "purpose of plundering and pillaging."[103] Additionally, he was charged with rape and other related offenses. Whitfield left his post at Elters, Germany, in April 1945 and went into the nearby town in search of cognac. In the process, he stole a pistol from the attic of a house. At his trial by general court-martial he was convicted of, among the other crimes, quitting his post for the purpose of plundering and pillaging. Whitfield was sentenced to life imprisonment.

At the trial, the prosecution introduced the pistol as evidence of plunder and pillage. On appeal, that portion of the conviction concerning the pistol was set aside. The appellate court first determined that the offense of "pillage" involves a taking against the will of the victim or a taking by force and violence. Neither was present in Whitfield's case. The court referred to the *Corpus Juris* definition of plunder as "A word having no especial legal signification. As a noun it means booty; pillage; rapine; spoil; that which may be taken from the enemy by force. As a verb, in its common meaning, it means to take property from persons or places by open force."[104] The appellate court concluded that "the record fails to show that [Whitfield] at any time took property from anyone by force and violence. His taking the pistol implied only that he may have committed a different offense, with which he was not charged, of simple larceny."[105] His conviction of the other offenses was upheld.

The court in *Murphy* considered that the taking of property could be enough evidence for the fact finder to determine the presence of the requisite intent. In *Dann* and *Whitfield*, the court took a more conservative approach. The true distinction may lie in the actions of the accused. Murphy and his co-accused did much more damage than just take property. Perhaps the inference to be drawn is that the likelihood of proving the requisite intent increases as the amount of damage increases. In any event, it is important to note that none of the cases involved taking property from the

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[96] United States v. Dann, 15 B.R. 17 (CM ETO 5445) (1945). The case was referred capital, an indication of how seriously the command considered the offense.

[97] *Id.* at 19.

[98] *Id.*

[99] *Id.* at 20.

[100] *Id.*

[101] *Id.* at 24 (citations omitted).

[102] *Id.* at 25 (emphasis in original, citations omitted).

[103] United States v. Whitfield, 24 B.R. 267 (CM ETO 11725) (1945).

[104] *Id.* at 273 (quoting 49 C.J.S. 1036).

[105] *Id.*

sentence.[121] However, a charge of violating Article 99 by quitting one's post for the purpose of engaging in looting and pillaging can be punished by death.[122] Winthrop's admonition as to the effect on unit discipline of wholesale pillage[123] supports the imposition of the death penalty as a deterrent to similar conduct by others. A violation of Article 99 can only occur in the presence of the enemy, but it does seem incongruous that actually performing the act (looting and pillaging) is, for punishment purposes, considered to be less of a discipline problem than merely quitting one's post for that purpose. This disparity should be corrected. To appear to punish the international offense (pillage) less seriously than the purely domestic military offense (quitting one's post for the purpose of pillage) tarnishes the image of the United States Armed Forces as one which takes its obligations under international law seriously.

There is another possible problem regarding the disparity in punishment. An enemy prisoner of war charged by United States military authorities with a precapture act of looting and pillaging in violation of international law is entitled to a trial according to the same standards as a member of the forces of the detaining power.[124] One might argue, therefore, that because an American soldier, charged under UCMJ Article 103, could not be given the death penalty for actually looting and pillaging, neither could an enemy soldier who is tried in a United States military forum for the same offense.

Where the corpse is actually mutilated, the accused, if charged under the UCMJ, might be charged only with "conduct prejudicial to good order and discipline" (Article 134, UCMJ) or with a violation of any standing orders against such conduct (Article 92, UCMJ). Either of these two charges seems less than appropriate given the severity, and depravity, of the offense. Therefore, in the opinion of this author, one who mutilates a corpse should be charged, and again would be more appropriately charged, with a direct violation of the law of war. The United States policy of charging United States soldiers with violating the UCMJ rather than the law of war simply stands in the way of appropriate punishment where mutilation of a corpse is alleged.

War leads to death and destruction. Those who give their lives in warfare deserve respect, even from their adversaries on the battlefield. The law and human decency permit no less. The inscription on the Tomb of the Unknown Soldier at Arlington Cemetery provides the *raison d'etre* for protecting and honorably treating the dead: "Here Rests in Honored Glory an American Soldier, Known But to God."

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[121] "[S]hall be punished as a court-martial may direct." MCM, *supra* note 118, pt. IV, ¶ 103(b).

[122] "[S]hall be punished by death or such other punishment as a court-martial may direct." *Id.* pt. IV, ¶ 23a.

[123] WINTHROP, *supra* note 79, at 626.

[124] GPW, *supra* note 43, art. 87. *See also* HOWARD S. LEVIE, PRISONERS OF WAR 336-40 (1979).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

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

Family Law Notes

Former Spouses' Protection Act Update

Almost all judge advocates, no matter where they work, will at some point be asked about the Uniformed Services Former Spouses' Protection Act (USFSPA).[1] Enacted in 1983, the USFSPA continues to be a source of discussion, litigation, and even legislative amendment. Why such heightened interest? And why, given the USFSPA's age, is not the area more settled?

Part of the heightened interest in the USFSPA is undoubtedly attributable to the emotional attachment that military members have for military retired pay. Many link retired pay to difficult duty experiences, sometimes served in combat zones. Despite their emotional attachment, most military members understand that the USFSPA authorized states to divide military retired pay as property,[2] and that in most of the United States, military retired pay has been divided as marital or community property.[3] Consequently, the critical point today is that military retired pay *is* a valuable asset.

Military retired pay is frequently the most significant asset acquired during a military member's marriage. This should not be a surprise. Military pensions often have much greater value than nonmilitary pensions. This stems from the point in life at which payments begin; for those leaving active duty, retired pay begins immediately. It is not unusual for service members to retire from the military at age forty or earlier. Compare this with nonmilitary pension interests that may not begin paying until age fifty-five or sixty.[4]

How much, and when, retired pay will be paid are questions of federal law. Subject to some limitations, the question of how much retired pay is marital property and how it will be divided at divorce are questions of state law. As a result, legal assistance attorneys (LAAs) must not only fully understand the federal law but must be capable of addressing the differing nuances in the law of our states and territories. Failing to appreciate these differences in state law can affect property interests that could be worth hundreds of thousands of dollars. Fortunately, in addition to direct research in the cases and statutes of each of these forums, a number of resources are available to LAAs to make their job easier.

One resource that LAAs should keep close by is the TJAGSA Practice Notes section of *The Army Lawyer*. Although the notes cover a wide range of legal assistance topics, the USFSPA has been the specific focus of notes on a regular basis. The most significant recent note on the USFSPA, which covered division formulas, appeared in the June 1995 issue.[5] Other recent notes have discussed the status of retired pay as property,[6] the impact of Veterans Administration disability pay on retired pay,[7] the Survivor Benefit Plan (SBP),[8] and the impact of the Dual Compensa-

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[1] Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451 (1994)).

[2] *Id.* § 1408(c).

[3] The primary exception is now Puerto Rico. See the State-by-State Guide that follows.

[4] Active component military retirement pay can have a present value of tens of thousands of dollars, several hundred thousand dollars, or up to a million dollars. Present value determinations depend on rank, years of service at time of retirement, life expectancy, and discount rate used. Estimates of present value can be obtained using the LAAWS Separation Agreements program pension value calculator. Counsel with clients who desire an accurate valuation for purposes of trading part or all of their pension should consider using the services of a pension valuation expert. Firms specializing in this work regularly advertise in bar journals.

[5] *See* TJAGSA Practice Notes, Legal Assistance Items, *USFSPA Update—Using Formula Clauses to Define the Former Spouse's Share of Disposable Retired Pay*, ARMY LAW., June 1995, at 53.

[6] *See* TJAGSA Practice Notes, Legal Assistance Items, *When Is Property Not Really Property?*, ARMY LAW., Sept. 1995, at 28.

[7] *See* TJAGSA Practice Notes, Legal Assistance Items, *Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce?*, ARMY LAW., Oct. 1995, at 28.

[8] *See* TJAGSA Practice Notes, Legal Assistance Items, *Drafting a Separation Agreement? Don't Forget the Survivor Benefit Plan!*, ARMY LAW., Dec. 1995, at 71.

tion Act on retired pay.[9] In addition to information published in *The Army Lawyer*, the USFSPA is the subject of training at TJAGSA's biannual legal assistance courses. For those unable to attend this training, or for a refresher, a videotape of the instruction can be obtained from TJAGSA's Video Information Library.[10] The outline and handouts for this instruction, and additional reference materials of interest, are available in TJAGSA's Legal Assistance Branch publication, *JA 274, A Guide to the Uniformed Services Former Spouses' Protection Act*.[11] Finally, given the significance of state law in division of military retired pay, LAAs will find the updated state-by-state analysis of the divisibility of military retired pay that follows an invaluable reference.[12] Lieutenant Colonel Block.

State-by-State Analysis of the Divisibility of Military Retired Pay[13]

On 30 May 1989, in *Mansell v. Mansell*,[14] the United States Supreme Court ruled that states cannot divide the value of Department of Veterans Affairs (VA) disability benefits received in lieu of military retired pay.[15] The Court's decision clarified that states are limited to dividing "disposable retired pay" as defined in 10 U.S.C. § 1408(a)(4).[16] When using the following material, remember that *Mansell* effectively overrules some of the listed cases predating the decision, at least to the extent a case suggests that state courts have the authority to divide more than disposable retired pay. Since *Mansell*, state courts generally have recognized the limitations of the disposable retired pay definition found in Title 10. For example, in *Torwich v. Torwich*, a New Jersey appellate court wrestled with the impact that the waiver of military retired pay associated with receipt of VA benefits has on disposable retired pay.[17] In *Knoop v. Knoop*,[18] the North Dakota Supreme Court addressed a situation involving the impact of the Dual Compensation Act[19] on disposable retired pay.[20] The following is a state-by-state guide to the current positions on divisiblity of military retired pay on divorce.

Alabama

Divisible as of August 1993 when the Alabama Supreme Court held that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property. Vaughn v. Vaughn, 634 So.2d 533 (Ala. 1993). Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979) and cases relying on it that are inconsistent with *Vaughn* are expressly overruled. Note that Alabama has previously awarded alimony from military retired pay. *See* Underwood v. Underwood, 491 So.2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); Phillips v. Phillips, 489 So.2d 592 (Ala. Civ. App. 1986) (wife awarded 50% of husband's gross military pay as alimony).

Alaska

Divisible. Chase v. Chase, 662 P.2d 944 (Alaska 1983), overruling Cose v. Cose, 592 P.2d 1230 (Alaska 1979), *cert. denied*,

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[9] *See* TJAGSA Practice Notes, Legal Assistance Items, *Reductions in Disposable Retired Pay Triggered by the Dual Compensation Act*, ARMY LAW., Mar. 1996, at 133.

[10] Interested personnel should consult TJAGSA's current *Videotape Bulletin* for information on how to get tape copies, or contact TJAGSA's Visual Information Branch at (804) 972-6317. The Videotape Bulletin order number is #96-0033A, Uniformed Services Former Spouses' Protection Act, Parts I, II (Block, Feb. 96).

[11] This publication is new in June 1996 and is available in electronic format through the Legal Automation Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). See the Current Materials section in this issue for information on downloading files from the LAAWS BBS.

[12] Future updates to this state-by-state analysis will be published electronically to TJAGSA's *JA 274*. *See supra*. Note 11.

[13] This note updates TJAGSA Practice Notes, Legal Assistance Items, "State-by-State Analysis of the Divisibility of Military Retired Pay." ARMY LAW., July 1994, at 41. The state-by-state guide was developed with the assistance of active and reserve military attorneys and civilian practitioners throughout the country. In a continuing effort to foster accuracy and timeliness, updates and suggested revisions from all jurisdictions are solicited. Please send your submissions to the Administrative and Civil Law Department, The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

[14] 490 U.S. 581 (1989).

[15] *Id.* at 594.

[16] *Id.* at 589.

[17] 660 A.2d 1214 (N.J. Super. 1995). *See also* TJAGSA Practice Notes, Legal Assistance Items, *Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce*, ARMY LAW., Oct. 1995, at 28.

[18] 542 N.W.2d 114 (N.D. 1996).

[19] 5 U.S.C.A. §§ 5431-5504 (1995).

[20] *See also* TJAGSA Practice Notes, Legal Assistance Items, *Reductions in Disposable Retired Pay Triggered by the Dual Compensation Act*, ARMY LAW., Mar. 1996, at 133.

453 U.S. 922 (1982). Nonvested retirement benefits are divisible. Lang v. Lang, 741 P.2d 649 (Alaska 1987). Note: *See also* Morlan v. Morlan, 720 P.2d 497 (Alaska 1986) (The trial court ordered a civilian employee to retire in order to ensure the spouse received her share of a pension—the pension would be suspended if the employee continued working. On appeal, the court held that the employee should have been given the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay. In reaching this result, the court cited the California *Gillmore* decision). *See also* Clausen v. Clausen, 831 P.2d 1257 (Alaska 1992) (holding that *Mansell* precludes division of disability benefits received in lieu of retirement pay, but it does not preclude *consideration* of these payments when making an equitable division of marital assets).

Arizona

Divisible. DeGryse v. DeGryse, 661 P.2d 185 (Ariz. 1983); Edsall v. Superior Court of Arizona, 693 P.2d 895 (Ariz. 1984); Van Loan v. Van Loan, 569 P.2d 214 (Ariz. 1977) (a nonvested military pension is community property). A civilian retirement plan case, *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986), held that if the employee is not eligible to retire at the time of the dissolution, the court *must* order that the spouse begin receiving the awarded share of retired pay when the employee becomes *eligible* to retire, whether or not he or she does retire at that point.

Arkansas

Divisible, but watch for vesting requirements. Young v. Young, 701 S.W.2d 369 (Ark. 1986); *but see* Durham v. Durham, 708 S.W.2d 618 (Ark. 1986) (military retired pay not divisible where the member had not served 20 years at the time of the divorce and military pension had not "vested"). *See also* Burns v. Burns, 847 S.W.2d 23 (Ark. 1993) (in accord with *Durham*, but strong dissent favors rejecting 20 years of service as a prerequisite to "vesting" of a military pension).

California

Divisible. *In re* Fithian, 517 P.2d 449, (Cal. 1974); *In re* Hopkins, 191 Cal. Rptr. 70 (Ct. App. 1983). A nonresident service member did not waive his right under the USFSPA to object to California's jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues. Tucker v. Tucker, 226 Cal. App. 3d 1249 (1991); Hattis v. Hattis, 242 Cal. Rptr. 410 (Ct. App. 1987). Nonvested pensions are divisible. *In re* Brown, 544 P.2d 561, (Cal. 1976); *In re* Mansell, 265 Cal. Rptr. 227 (Ct. App. 1989) (on remand from *Mansell v. Mansell*, 490 U.S. 581 (1989), the court held that gross retired pay was divisible because it was based on a stipulated property settlement to which res judicata had attached). State law has held that military disability retired pay is divisible to the extent it replaces what the retiree would have received as longevity retired pay. *See In re* Mastropaolo, 166 Cal. App. 3d 953, (Cal. 1985); *In re* Mueller, 70 Cal. App. 3d 66, (Cal. 1977). The *Mansell* case raises doubt about the continued validity of this proposition. If the member is not retired at the time of the dissolution, the spouse can elect to begin receiving the award share of "retired pay" when the member becomes *eligible* to retire, or anytime thereafter, even if the member remains on active duty. *See In re* Luciano, 104 Cal. App. 3d 956, (Cal. 1980); *see also In re* Gillmore, 629 P.2d 1, (Cal. 1981) (same principle applied to a civilian pension plan)).

Colorado

Divisible. *In re* Marriage Of Beckman and Holm, 800 P.2d 1376 (Colo. 1990) (nonvested military retirement benefits constitute marital property subject to division pursuant to § 14-10-113, C.R.S. (1987 Repl.Vol. 6B)). *See also In re* Hunt, 909 P.2d 525, (Colo. 1996), reversing one of its own decisions, the Colorado Supreme Court held that postdivorce increases in pay resulting from promotions are marital property subject to division and approves use of a formula to define the marital share. In the formula discussed, final pay of the member at retirement is multiplied a percentage defined by 50% of a fraction wherein the numerator equals the number of years of overlap between marriage and service, and the denominator equals the number of years of total service of the member.

Connecticut

Probably divisible. CONN. GEN. STAT. 46b-81 (1986) gives courts broad power to divide property. *See* Thompson v. Thompson, 438 A.2d 839 Conn. (1981) (nonvested civilian pension is divisible).

Delaware

Divisible. Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible; Donald R.R. v. Barbara S.R., 454 A.2d 1295 (Del. Sup. Ct. 1982).

District of Columbia

Divisible. *See* Barbour v. Barbour, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Divisible. As of 1 October 1988, all vested and nonvested pension plans are treated as marital property to the extent that they are accrued during the marriage. FLA. STAT. § 61.075(3)(a)4 (1988); see also § 3(1) of 1988 Fla. Sess. Law Serv. 342. These legislative changes appear to overrule the prior limitation in *Pastore v. Pastore*. 497 So.2d 635 (Fla. 1986) (only vested military retired pay can be divided). This interpretation was recently adopted by the court in *Deloach v. Deloach*. 590 So.2d 956 (Fla. Dist Ct. App. 1991).

Georgia

Probably divisible. *Cf.* Courtney v. Courtney, 344 S.E.2d 421 (Ga. 1986) (nonvested civilian pensions are divisible); Stumpf v. Stumpf, 294 S.E.2d 488 (Ga. 1982) (military retired pay may be considered in establishing alimony obligations); *see also* Hall v. Hall, 51 B.R. 1002 (1985) (Georgia divorce judgment awarding

debtor's wife 38% of debtor's military retirement payable directly from the United States to the wife, which granted the wife a nondischargeable property interest in 38% of the husband's military retirement); Holler v. Holler, 354 S.E.2d 140 (Ga. 1987) (the court "[a]ssum[ed] that vested and nonvested military retirement benefits acquired during the marriage are now marital property subject to equitable division"). *Holler* cited *Stumpf* and *Courtney*, but the court decided that military retired pay could not be divided retroactively if it was not subject to division at the time of the divorce. *Id.*

Hawaii

Divisible. Linson v. Linson, 618 P.2d 748 (Haw. Ct. App. 1981); Cassiday v. Cassiday, 716 P.2d 1133 (Haw. 1986). In Wallace v. Wallace, 677 P.2d 966 (Haw. Ct. App. 1984), the court ordered a Public Health Service employee (who was covered by the USFSPA) to pay a share of retired pay on reaching retirement age whether or not he retires at that point. He argued that this amounted to an order to retire, violating 10 U.S.C. § 1408(c)(3), but the court affirmed the ruling. In *Jones v. Jones*, 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that *Mansell's* limitation on dividing VA benefits cannot be circumvented by awarding an offsetting interest in other property. It also held that *Mansell* applies to military disability retired pay as well as VA benefits.

Idaho

Divisible. Ramsey v. Ramsey, 535 P.2d 53 (Idaho 1975) (reinstated by Griggs v. Griggs, 686 P.2d 68 (Idaho 1984)). Courts cannot circumvent *Mansell's* limitation on dividing VA benefits by using an offset against other property. Bewley v. Bewley, 780 P.2d 596 (Idaho Ct. App. 1989). *See* Leatherman v. Leatherman, 833 P.2d 105 (Idaho 1992) (A portion of husband's civil service annuity attributable to years of military service during marriage was a divisible military service benefit and was subject to statute relating to modification of divorce decrees to include division of military retirement benefits). *See also* Balderson v. Balderson, 896 P.2d 956 (Idaho Sup. Ct. 1995) (review denied by the United States Supreme Court, 116 S. Ct. 179 (1996), affirming a lower court decision ordering a service member to pay spouse her community share of the military pension even though he had decided to put off retirement); Mosier v. Mosier, 830 P.2d 1175 (Idaho 1992); Walborn v. Walborn, 817 P.2d 160 (Idaho 1991).

Illinois

Divisible. *In re* Brown, 587 N.E.2d 648 (Ill. App. Ct. 1992) (court cites Congress's enactment of the USFSPA, PUB.L. No. 97-252, 96 Stat. 730-38 (1982), as the basis to permit the courts to treat pay of military personnel under the law of the jurisdiction of the court. *See also In re* Dooley, 484 N.E.2d 894 (Ill. App. Ct. 1985). The court in *Brown* held that a military pension may be treated as marital property under Illinois law and is subject to the division provisions of 5/503 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). (*See In re* Korper, 475 N.E.2d 1333 (Ill. App. Ct. 1985). *Korper* points out that under Illinois law a pension is marital property even if it is not vested. In *Korper*, the service member had not yet retired, and he objected to the spouse getting the cash-out value of her interest *In re* retired pay. The service member argued that the USFSPA allowed division only of "disposable retired pay," and state courts therefore were preempted from awarding the spouse anything before retirement. The court rejected this argument and raised the (unaddressed) question of whether a spouse could be awarded a share of "retired" pay at the time the member becomes *eligible* for retirement (even if he or she does not retire at that point); *see In re* Luciano, 164 Cal. Rptr. 93 (Ct. App. 1980) (for application of eligibility rule). *See also* Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allows modification of agreements and judgments that became final between 25 June 1981 and 1 February 1983 unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

Indiana

Divisible, but watch for vesting requirements. INDIANA CODE § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, inter alia, "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage"). The right to receive retired pay must be vested as of the date of the divorce petition in order for the spouse to be entitled to a share. Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990). However, courts should consider the nonvested military retired benefits in adjudging a just and reasonable division of property. *In re* Bickel, 533 N.E.2d 593 (Ind. Ct. App. 1989). *See also* Arthur v. Arthur, 519 N.E.2d 230 (Ind. Ct. App. 1988) (Second District ruled that § 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date, which was 1 September 1985). *But see* Sable v. Sable, 506 N.E.2d 495 (Ind. Ct. App. 1987) (Third District ruled that § 31-1-11.5-2(d)(3) can be applied retroactively).

Iowa

Under the authority of Iowa appellate court decisions, military retirement pay and benefits are divisible in divorce actions. *See In re* Howell, 434 N.W.2d 629 (Iowa 1989). The member had already retired in this case, but the decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the VA, paid in lieu of a portion of military retired pay, are not marital property. Finally, it appears that the court intended to award the spouse a percentage of *gross* military retired pay, but it actually "direct[ed] that 30.5% of [the husband's] *disposable retired pay*, except disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code." (emphasis added). The *Mansell* case noted at the beginning of this list may have overruled state court decisions that they have authority to divide gross retired pay. A disabled veteran may be required to pay alimony and child support, or both, in divorce actions, even where his only income is VA disability pay and supplemental security income. *See In re* Marriage of Anderson, 522 N.W.2d 99 (Iowa App. 1994), applying Rose v. Rose, 481 U.S. 619 (1987) (Iowa court of appeals ruled, "It is clear veteran's benefits are not solely for the benefit of the veteran, but for his family as well.")

Kansas

Divisible. KAN. STAT. ANN. § 23-201(b) (1987), effective 1 July 1987 (vested and nonvested military pensions are now marital property); *In re* Harrison, 769 P.2d 678 (Kan. Ct. App. 1989) (applies the statute and holds that it overruled the previous case law that prohibited division of military retired pay).

Kentucky

Divisible. Jones v. Jones, 680 S.W.2d 921 (Ky. 1984); Poe v. Poe, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); KY. REV. STAT. ANN. § 403.190 (1994), expressly defines marital property to include retirement benefits.

Louisiana

Divisible. Swope v. Mitchell, 324 So.2d 461 (La. 1975); Little v. Little, 513 So.2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property); Warner v. Warner, 651 So.2d 1339 (La. 1995) (confirming that the 10-year test found in 10 U.S.C. § 1408(d)(2) is a prerequisite to direct payment but not to an award of a share of retired pay to a former spouse); Gowins v. Gowins, 466 So.2d 32 (La. Sup. Ct. 1985) (soldier's participation in divorce proceedings constituted implied consent for the court to exercise jurisdiction and divide the soldier's military retired pay as marital property); Jett v. Jett, 449 So.2d 557 (La. Ct. App. 1984); Rohring v. Rohring, 441 So.2d 485 (La. Ct. App. 1983). *See also* Campbell v. Campbell, 474 So.2d 1339 (Ct. App. La. 1985) (a court can award a spouse a share of disposable retired pay, not gross retired pay, but a court cannot divide VA disability benefits paid in lieu of military retired pay; this approach conforms to the dicta in the *Mansell* concerning divisibility of gross retired pay).

Maine

Divisible. Lunt v. Lunt, 522 A.2d 1317 (Me. 1987). *See also* ME. REV. STAT. ANN. tit. 19, §722-A(6) (1989) (provides that the parties become tenants-in-common regarding property a court fails to divide or to set apart).

Maryland

Divisible. Nisos v. Nisos, 483 A.2d 97 (Md. Ct. App. 1984) (applies Md. Fam. Law Code Ann. § 8-203(b), which provides that military pensions are to be treated the same as other pension benefits; such benefits are marital property under Maryland law; *see* Deering v. Deering, 437 A.2d 883 (Md. 1981)). *See also* Ohm v. Ohm, 431 A.2d 1371 (Md. Ct. App. 1981) (nonvested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA. Andresen v. Andresen, 564 A.2d 399 (Md. 1989).

Massachusetts

Divisible. Andrews v. Andrews, 543 N.E.2d 31 (Mass. App. Ct. 1989). Here, the spouse was awarded alimony from military retired pay; she appealed, seeking a property interest in the pension. The trial court's ruling was upheld, but the appellate court noted that "the judge could have assigned a portion of the pension to the wife [as property]."

Michigan

Divisible. Keen v. Keen, 407 N.W.2d 643 (Mich. Ct. App. 1987); Giesen v. Giesen, 364 N.W.2d 327 (Mich. Ct. App. 1985); McGinn v. McGinn, 337 N.W.2d 632 (Mich. Ct. App. 1983); Chisnell v. Chisnell, 267 N.W.2d 155 (Mich. Ct. App. 1978). *See also* Boyd v. Boyd, 323 N.W.2d 553 (Mich. Ct. App. 1982) (only vested pensions are divisible, but what is a vested right is discussed broadly and discretion over what is marital property is left to trial court).

Minnesota

Divisible. Military retired pay is not specifically addressed in statute. Case law has treated it as any other marital asset, subject to equitable division. Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay, but *Mansell* may have overruled state court decisions that they have the authority to divide gross retired pay. *See also* Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible).

Mississippi

Divisible. Powers v. Powers, 465 So.2d 1036 (Miss. 1985). In July 1994, a deeply divided Mississippi Supreme Court formally adopted the equitable distribution method of division of marital assets. Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994); Hemsley v. Hemsley 639 So.2d 909 (Miss. 1994). Marital property for the purpose of a divorce is defined as being "any and all property acquired or accumulated during the marriage." *Id.* This includes military pensions which are viewed as personal property, and while the USFSPA does not vest any rights in a spouse, a military pension is subject to being divided in a divorce. Pierce v. Pierce, 648 So.2d 523 (Miss. 1995). In *Pierce*, the Mississippi Supreme Court expressly held that a claim for division of property can only be viewed as separate and distinct from a claim for alimony. Because property division is made irrespective of fault or misconduct, military pensions may be divided even where the spouse has committed adultery, assuming that the facts otherwise justify an equitable division of property.

Missouri

Divisible. Only disposable retired pay is divisible. Moon v. Moon, 795 S.W.2d 511 (Mo. Ct. App. 1990). Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (nonvested and nonmatured military retired pay are marital property); Coates v. Coates, 650 S.W.2d 307 (Mo. Ct. App. 1983).

Montana

Divisible. *In re* Marriage of Kecskes, 683 P.2d 478 (Mont. 1984); *In re* Miller, 609 P.2d 1185 (Mont. 1980), *vacated and remanded sub. nom.* Miller v. Miller, 453 U.S. 918 (1981).

Nebraska

Divisible. Ray v. Ray, 222 Neb. 324, 383 N.W.2d 756 (1986); Neb. Rev. Stat. § 42-366(8) (1993) (military pensions are part of the marital estate whether vested or not and may be divided as property or alimony).

Nevada

Probably divisible. Tomlinson v. Tomlinson, 729 P.2d 1303 (Nev. 1986) (the court speaks approvingly of the USFSPA in dicta but declines to divide retired pay in this case involving a final decree from another state). *Tomlinson* was legislatively reversed by the Nevada Former Military Spouses Protection Act (NFMSPA). Nev. Rev. Stat. § 125.161 (1987) (military retired pay can be partitioned even if the decree is silent on division and even if it is foreign). The NFMSPA has been repealed, however, effective 20 March 1989. *See* Senate Bill 11, 1989 NEV. STAT. 34. The Nevada Supreme Court subsequently ruled that the doctrine of res judicata bars partitioning military retired pay where "the property settlement has become a judgment of the court". Taylor v. Taylor, 775 P.2d 703 (Nev. 1989). Nonvested pensions are community property. Gemma v. Gemma, 778 P.2d 429 (Nev. 1989) (spouse has the right to elect to receive his or her share when the employee spouse becomes retirement eligible, whether or not retirement occurs at that point).

New Hampshire

Divisible. "Property shall include all tangible and intangible property and assets . . . belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes . . . employment benefits, [and] vested and non-vested pensions or other retirement plans . . . . [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution." N.H. REV. STAT. ANN. § 458:16-a (1987) (effective 1 January 1988). This provision was relied on by the New Hampshire Supreme Court in Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990), when it overruled Baker v. Baker, 421 A.2d 998 (N.H. 1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Divisible. Castiglioni v. Castiglioni, 471 A.2d 809 (N.J. Sup. Ct. App. Div. 1984); Whitfield v. Whitfield, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); Kruger v. Kruger, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 375 A.2d 659 (N.J. 1977). Post divorce cost-of-living raises are divisible; Moore v. Moore, 553 A.2d 20 (N.J. 1989) (police pension).

New Mexico

Divisible. Walentowski v. Walentowski, 672 P.2d 657 (N.M. 1983) (USFSPA applied); Stroshine v. Stroshine, 652 P.2d 1193 (N.M. 1982); LeClert v. LeClert, 453 P.2d 755 (N.M. 1969). *See also* White v. White, 734 P.2d 1283 (N.M. Ct. App. 1987) (court can award share of gross retired pay; however, the *Mansell* case noted at the beginning of this list may have overruled state court decisions that they have authority to divide gross retired pay). In Mattox v. Mattox, 734 P.2d 259 (N.M. Ct. App. 1987) (in dicta the court cited the California *Gillmore* case with approval, suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire even if the member elects to remain in active duty).

New York

Divisible. Pensions in general are divisible; Majauskas v. Majauskas, 463 N.E.2d 15, 474 N.Y.S.2d 699 (N.Y. 1984). Most lower courts hold that nonvested pensions are divisible; *see, e.g.*, Damiano v. Damiano, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division. *See* Lydick v. Lydick, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); Gannon v. Gannon, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation; West v. West, 475 N.Y.S.2d 493 (N.Y. App. Div. 1984).

North Carolina

Divisible but watch for vesting requirements. N.C. GEN. STAT. § 50-20(b) (1988) expressly declares *vested* military pensions to be marital property; the pension must be vested as of the date the parties separate from each other. In *Milam v. Milam*, 373 S.E.2d 459 (N.C. Ct. App. 1988), the court ruled that a warrant officer's retired pay had "vested" when he reached the 18-year "lock-in" point. In *George v. George*, 444 S.E.2d 449 (N.C. Ct. App. 1994), the court held that an enlisted member's right to retirement benefits vests when twenty years of service have been completed. In *Lewis v. Lewis*, 350 S.E.2d 587 (N.C. Ct. App. 1986), the court held that a divorce court can award a spouse a share of *gross* retired pay, but because of the wording (at that time) of the state statute, the amount cannot exceed 50% of the retiree's *disposable* retired pay. *Mansell* may have overruled the court's decision in part as to dividing gross pay. The parties are not, however, barred from a consensual division of military retired pay even though it is "nonvested" separate property, and an agreement or court order by consent that divides such pension rights will be upheld. Hoolapa v. Hoolapa, 412 S.E.2d 112 (N.C. Ct. App. 1992). Attorneys considering valuation issues should also review *Bishop v. Bishop*, 440 S.E.2d 591 (N.C. Ct. App. 1994), which held that valuation must be determined as of the date of separation and must be based on a present value of pension payments that the retiree would be entitled to receive if the service member retired on the date of marital separation, or when first eligible to retire, if later. Subsequent pay increases attributable to length of service or promotions are not included.

North Dakota

Divisible. Delorey v. Delorey, 357 N.W.2d 488 (N.D. 1984). *See also* Morales v. Morales, 402 N.W.2d 322 (N.D. 1987) (equitable factors can be considered in dividing military retired pay; so

17.5% award to 17-year spouse is affirmed); Knoop v. Knoop, 542 N.W.2d 114 (N.D. 1996) (confirms that "disposable retired pay" as defined in 10 U.S.C. § 1408 provides a limit on what states are authorized to divide as marital property but holds that the USFSPA does not require the term "retirement pay" to be interpreted as "disposable retired pay." *Knoop* is also of interest because it addresses a waiver of retirement pay associated with the Dual Compensation Act, and the court acknowledges that once 50% of "disposable retired pay" is paid out in satisfaction of one or more orders dividing military retired pay as property, the orders are deemed satisfied by federal law (referencing 1990 amendment to 10 U.S.C. § 1408(e)(1)).

Ohio

Divisible. *See* Lemon v. Lemon, 537 N.E.2d 246 (Ohio Ct. App. 1988) (nonvested pensions are divisible as marital property where some evidence of value is demonstrated). *But see* King v. King, 605 N.E.2d 970 (Ohio Ct. App. 1992) (trial court abused its discretion by retaining jurisdiction to divide a military pension that would not vest for nine years where no evidence of value was demonstrated); Cherry v. Figart, 620 N.E.2d 174 (Ohio Ct. App. 1993) (distinguishing *King* by affirming division of nonvested pension where parties had agreed to divide the retirement benefits, and suit was brought for enforcement only—the initial judgment incorporating the agreement had not been appealed); Ingalls v. Ingalls, 624 N.E.2d 368 (Ohio 1993) (affirming division of nonvested military retirement benefits consistent with agreement of the parties expressed at trial).

Oklahoma

Divisible. Stokes v. Stokes, 738 P.2d 1346 (Okla. 1987) (based on a statute that became effective on 1 June 1987). The state attorney general had earlier opined that military retired pay was divisible based on the prior law. Only a pension vested at the time of the divorce, however, is divisible. Messinger v. Messinger, 827 P.2d 865 (Okla. 1992). A former spouse is entitled to retroactive division of retiree's military pension pursuant to their property settlement agreement that provided that the property settlement was subject to modification if the law in effect at the time of their divorce changed to allow such a division at a later date.

Oregon

Divisible. *In re* Manners, 683 P.2d 134 (Or. Ct. App. 1984); *In re* Vinson, 616 P.2d 1180 (Or. Ct. App. 1980). *See also In re* Richardson, 769 P.2d 179 (Or. Ct. App. 1989) (nonvested pension plans are marital property). The date of separation is the date used for classification as marital property.

Pennsylvania

Divisible. Major v. Major, 518 A.2d 1267 (Pa. Super Ct. 1986) (nonvested military retired pay is marital property).

Puerto Rico

Not divisible as marital property. Delucca v. Colon, 119 P.R. Dec. 720 (1987) (citation to original Spanish version; English translation can be found at 119 P.R. Dec. 765). *Delucca* overruled *Torres v. Robles*, 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. In overruling *Torres*, the court reestablished retirement pensions as separate property of the spouses consistent with its earlier decision in *Maldonado v. Superior Court*, 100 P.R.R. 369 (1972). *See also* Carrero v. Santiago, 93 JTS 103 (1993) (cites *Delucca v. Colon* with approval). Note that pensions may be considered in setting child support and alimony obligations.

Rhode Island

Divisible. R.I. Pub. Laws § 15-5-16.1 (1988) gives courts very broad powers over the parties' property to effect an equitable distribution. Implied consent by the soldier cannot be used, however, to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4). Flora v. Flora, 603 A.2d 723 (R.I. 1992).

South Carolina

Divisible. *Tiffault v. Tiffault*, 401 S.E.2d 157 (S. C. 1991), holds that vested military retirement benefits constitute an earned property right which, if accrued during the marriage, are subject to equitable distribution. Nonvested military retirement benefits are also subject to equitable division. Ball v. Ball, 430 S.E.2d 533 (S.C. Ct. App. 1993) (noncommissioned officer acquired a vested right to *participate* in a military pension plan when he enlisted in the Army; this right, which is more than an expectancy, constitutes property subject to division). *But see* Walker v. Walker, 368 S.E.2d 89 (S.C. Ct. App. 1988) (wife lived with parents during entire period of husband's naval service; since she made no homemaker contributions, she was not entitled to any portion of the military retired pay).

South Dakota

Divisible. Gibson v. Gibson, 437 N.W.2d 170 (S.D. 1989) (the court states that military retired pay is divisible; in this case, it was Reserve Component retired pay where the member had served 20 years but had not yet reached age 60); Radigan v. Radigan, 17 Fam. L. Rep. (BNA) 1202 (S.D. Sup. Ct. Jan. 23, 1991) (husband must share with ex-wife any increase in his retired benefits that result from his own, post divorce efforts); Hautala v. Hautala, 417 N.W.2d 879 (S.D. 1987) (trial court awarded spouse 42% of military retired pay, and this award was not challenged on appeal); Moller v. Moller, 356 N.W.2d 909 (S.D. 1984) (the court commented approvingly on cases from other states that recognize divisibility but declined to divide retired pay here because a 1977 divorce decree was not appealed until 1983). *See generally* Caughron v. Caughron, 418 N.W.2d 791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); Hansen v. Hansen, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); Stubbe v. Stubbe, 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible; the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

Tennessee

Divisible. TENN. CODE ANN. § 36-4-121(b)(1) (1988) specifically defines all *vested* pensions as marital property. In 1993, the Tennessee Supreme Court affirmed a trial court's approval of a separation agreement after determining that the agreement divided a non-vested pension as marital property. Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993). In 1994, the Tennessee Court of Appeals held that the Tennessee code's reference to vested pensions was illustrative and not exclusive. As a result, the court determined that *nonvested* military pensions can be characterized as marital property. Kendrick v. Kendrick, 902 S.W.2d 918 (Tenn. Ct. App. 1994) In divorce actions, a disabled veteran may be required to pay alimony, child support, or both even where his only income is VA disability pay and supplemental security income. *See* Rose v. Rose, 481 U.S. 619, 107 Sect. 2029, 95 L.Ed.2d 599 (1987) (Supreme Court upheld exercise of contempt authority by Tennessee court over veteran who would not pay child support finding that VA benefits were intended to take care of immediate family members and not just the veteran. Justice White, in dissent, argued unsuccessfully that the state's authority was preempted by the bar to garnishing Veterans Administration disability payments and federal discretion to divert some of the Veterans Administration benefits to family members in certain cases.)

Texas

Divisible. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982). *See also* Grier v. Grier, 731 S.W.2d 936 (Tex. 1987) (a court can award a spouse a share of gross retired pay, but after divorce pay increases constitute separate property; *Mansell* may have overruled *Grier* in part). Pensions need not be vested to be divisible. *Ex Parte Burson*, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide Veterans Administration disability benefits paid in lieu of military retired pay; this ruling is in accord with *Mansell*.

Utah

Divisible. Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988) (clarifies that nonvested pensions can be divided under Utah law, and in dicta it suggests that only disposable retired pay is divisible, not gross retired pay). *But see* Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990) (because of a stipulation between the parties, the court ordered a military retiree to pay his ex-wife one-half the amount deducted from his retired pay for taxes).

Vermont

Probably divisible. Vt. Stat. Ann. tit. 15, § 751 (1988) provides that the "court shall settle the rights of the parties to their property by . . . equit[able] divi[sion]. All property owed by either or both parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property . . . shall be immaterial, except where equitable distribution can be made without disturbing separate property." *Id.* The Connecticut Supreme Court recently held in *Krafik v. Krafik*, 21 Fam. Law Rep. 1536 (1995), that vested pension benefits are divisible as marital property in divorce. Although not involved in *Krafik*, the court noted that the legislative and logical basis for dividing vested pension benefits would apply to unvested pension benefits as well.

Virginia

Divisible. VA. ANN. CODE § 20-107.3 (1988) defines marital property to include all pensions, whether or not vested. *See also* Mitchell v. Mitchell, 355 S.E.2d 18 (Va. Ct. App. 1987); Sawyer v. Sawyer, 35 S.E.2d 277 (Va. Ct. App. 1985) (these cases hold that military retired pay is subject to equitable division); Owen v. Owen, 419 S.E.2d 267 (Va. Ct. App. 1992) (settlement agreement's guarantee/indemnification clause requires the retiree to pay the same amount of support to the spouse despite the retiree beginning to collect VA disability pay—held not to violate *Mansell*).

Washington

Divisible. Konzen v. Konzen, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); Wilder v. Wilder, 534 P.2d 1355 (Wash. 1975) (nonvested pension held to be divisible); Payne v. Payne, 512 P.2d 736 (Wash. 1973); *In re* Smith, 657 P.2d 1383 (Wash. 1983).

West Virginia

Divisible. Butcher v. Butcher, 357 S.E.2d 226 (W. Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution, and a court can award a spouse a share of gross retired pay; however, the *Mansell* case noted at the beginning of this list may have overruled state court decisions that they have authority to divide gross retired pay).

Wisconsin

Divisible. Thorpe v. Thorpe, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); Pfeil v. Pfeil, 341 N.W.2d 699 (Wis. Ct. App. 1983). *See also* Leighton v. Leighton, 261 N.W.2d 457 (1978) (nonvested pension held to be divisible); Rodak v. Rodak, 442 N.W.2d 489, (Wis. Ct. App. 1989) (portion of civilian pension that was earned *before* marriage is included in marital property and subject to division).

Wyoming

Divisible. Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property; a 10-year test is a prerequisite to direct payment of military retired pay as property but not to division of military retired pay as property). *See also* Forney v. Minard, 849 P.2d 724 (Wyo. 1993) (Affirms award of 100% of "disposable retired pay" to former spouse as property but acknowledges that only 50% of this award can be paid directly. This holding is inconsistent with the 1990 amendment to the USFSPA at 10 U.S.C. § 1408(e)(1), which deems all orders dividing military retired pay as property are satisfied once a threshold of 50% of the "disposable retired pay" is reached—*see* the discussion in *Knoop v. Knoop* referenced under the North Dakota section of this guide.)

Canal Zone

Divisible. Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978).

Ruminations on "Public Interests": Government Use of Minimum Experience Requirements in Medical Service Contracts

Over the past year, attorneys from the Protest Branch and the United States Army Medical Command (MEDCOM) have litigated, in several cases before the General Accounting Office (GAO), the use of minimum corporate and management experience requirements for MEDCOM's standard hospital housekeeping service contracts. The first purpose of this article is to advise contract attorneys of a recent Comptroller General decision affecting the use of these experience requirements as definitive responsibility criteria in medical service contracts. The second purpose is to examine the legal effects of government use of minimum experience requirements.

The Comptroller General approved MEDCOM's minimum corporate experience requirement in the protest of *Industrial Maintenance Services, Inc.*[1] This decision expands the so-called "safety rule" to medical service contracts, making it easier to use definitive responsibility criteria in these situations.[2] Now that such criteria are more easily defended before the GAO, their inclusion can be anticipated in similar service contracts. Accordingly, this article discusses additional areas of concern, especially the proper application of experience requirements, their impact on small businesses, and the broader "public interests" in such minimum requirements in the military health care context.

A solicitation requirement that a prospective contractor have a specified number of years of experience in particular areas constitutes "definitive responsibility criteria."[3] Definitive responsibility criteria are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor's ability to perform the contract.[4] The criteria limit the class of eligible contractors to those meeting specified qualitative or quantitative, or both, criteria necessary for adequate contract performance.[5]

In *Industrial Maintenance*, a potential small business contractor was attempting to expand into hospital housekeeping services from the food service industry without any relevant prior corporate experience. In allowing the Army to restrict Industrial Maintenance from competing, the Comptroller General extended its so-called "safety rule" to medical service contracts. This rule states that "with respect to solicitation provisions relating to human safety, an agency has the discretion to set its minimum needs so as to achieve not just reasonable results, but the highest possible reliability and effectiveness."[6]

The specific corporate experience requirement at issue in *Industrial Maintenance* was "*contractor* . . . experience in providing hospital housekeeping services in health/patient care environments" during "twenty-four months within the previous thirty-six months from the date initially established for submission of proposals."[7] There was also a separately evaluated requirement for the executive housekeeper proposed by the contractor (*i.e.*, one year of prior management experience as an executive housekeeper within the last three years). The Army asserted the following key points before the Comptroller General:

(1) Such minimum requirements were established by technical experts—including the MEDCOM Program Manager, Mr. Gerald Stepman, and MEDCOM Contract Attorney, Mr. Robert "Dean" Hamel—to ensure compli-ance with the Occupational Safety and Health Administration's (OSHA) Bloodborne Pathogens Standard,[8] effective 6 July 1992; The Occupational Safety and Hazard Agency Hazard Communications Standard[9]; and the Joint Commission's *1995 Accreditation Manual for Hospitals.*

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[1] B-261671; B-261840; B-261847 (Oct. 3, 1995).

[2] While defense of all such criteria always has entailed a necessary to meet minimum needs standard, application of the safety rule allows the government to set its minimum needs at a higher level. For an example of a health-related case where the safety rule was not applied *See* Cardiometrix, B-260536 (June 29, 1995).

[3] Western Roofing Serv., B-232666.3 (Apr. 11, 1990).

[4] *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG., § 9.104-2 (1 Apr. 1984) [hereinafter FAR].

[5] Townsco Contracting Co., Inc., B-240289 (Oct. 18, 1990).

[6] *See also* Harry Feuerberg & Steven Steinbaum, B-261333 (Sept. 12, 1995).

[7] *Id.*

[8] 29 C.F.R. § 1910.1030 (1995).

[9] *Id.* § 1911.1200.

(2) Recent increases in the number and complexity of federal and state regulations de-monstrate public concerns over the occu-pational and environmental hazards posed by medical waste (e.g., Hepatitis B), bloodborne pathogens (e.g., HIV and AIDS), and the use of chemical and toxic substances (e.g., cleaning products). Many of these regulations *target hospital housekeepers specifically* and impose severe fines and penalties for violations (including loss of hospital accreditation).

(3) Several unfortunate experiences in hospital housekeeping service contracts over the past few years showed that recent corporate experience in the hospital housekeeping field is essential for successful corporate oversight by any prospective contractor. Errors are costly to the Agency and potentially harmful to patients and health care workers.

Based on these arguments, the Comptroller General approved the contractor experience requirement. Nevertheless, despite the Army's use such definitive responsibility criteria, legal issues remain. For example, even though an agency has discretion in determining whether a particular offeror has met a definitive responsibility criterion, the agency may only find compliance based upon adequate objective evidence obtained from the offeror.[10]

One problem area concerns when it is appropriate to use the experience of a contractors proposed program manager to satisfy "corporate" experience requirements. The answer is, where there are separate requirements for corporate experience and management experience (e.g., executive housekeeper), imputing one to the other is inappropriate because such dilution of experience can jeopardize quality control and perhaps successful completion of the contract.[11] For example, in the hospital housekeeping context, numerous new regulations and requirements necessitate knowledgeable corporate oversight and involvement as well as a knowledgeable manager. Such dual requirements are upheld by The Comptroller General where they are clear and reasonable.[12]

Another result of the use of such minimum experience requirements is that many prospective offerors are excluded from competition. To avoid disqualification, offerors may protest, citing the "new contractor" exception to agency experience requirements. This exception allows a new business to impute the experience of its officers or key employees to the corporate entity to satisfy a corporate experience requirement.[13] However, this exception—allowing an offeror to impute key employee experience to a new corporation—is inappropriate where the services to be provided under a contract are critical to human safety.[14] As the Comptroller General stated in *Industrial Maintenance*, the experience requirements for hospital housekeeping are "provisions relating to human safety," making the "new contractor" exception inapplicable.[15]

Accordingly, the foregoing aspects of the standard hospital housekeeping solicitation for the MEDCOM are defensible before the GAO primarily because of the separate corporate and executive housekeeper experience requirements, which are bolstered by human safety concerns. Any relaxation of these requirements by installation contracting activities is not recommended without prior coordination with the MEDCOM program manager and contract attorney.

One inescapable effect of using minimum experience requirements (or such minimum requirements in general) is their tendency to exclude small businesses. The effect could be viewed as positive or negative, depending on an activity's past experience. However, there are several pitfalls to avoid and options to consider:

(1) If a contracting officer finds a small business nonresponsible using a definitive responsibility criterion, he or she must forward the matter to the Small Business Administration immediately (SBA) for review under its Certificate of Competency (COC) procedures.[16] The SBA has up to fifteen business days to render a decision, after which the contracting officer may proceed without limitation.[17]

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[10] The Mary Kathleen Collins Trust, B-261019.2 (Sept. 29, 1995), 1995 WL 579836 (C.G.); Topley Realty Co., Inc., B-221459 (Apr. 23, 1986).

[11] Atlantic Coast Contracting, Inc., B-270491, B-270590 (Mar. 13, 1996); Management Plus, Inc., B-26582 (Dec. 29, 1995).

[12] Ameriko-OMSERV, B-252879.5 (Dec. 5, 1994), 94-2 ¶ CPD 219; Decision Systems Technologies, Inc., B-257186.6 (Sept. 7, 1994).

[13] *See, e.g.*, Technical Resources, Inc., B-253506 (Sept. 16, 1993).

[14] Hawco Manufacturing Company, B-265795 (Oct. 26, 1995), 1995 WL 627965 (C.G.) (citing Scientific Industries, Inc., B-208307 (Apr. 5, 1983)).

[15] Industrial Maintenance Services, Inc., B-261671; B-261840; B-261847 (Oct. 3, 1995).

[16] FAR, *supra* note 4, § 19.602-1(a)(2). The SBA recently revised its Government Contracting Programs regulations codified in 13 C.F.R. pt. 125. *See* 61 Fed. Reg. 3310-3316 (Jan. 31, 1996).

[17] *Id.* § 19.602-4(c).

(2) In negotiated procurements, a minimum experience requirement will only qualify as a definitive responsibility criterion—requiring SBA COC referral—where it is applied on a go or no-go basis. For example, a go or no-go qualification criterion, such as a specified min-imum experience level, that offerors are re-quired to satisfy in order to be considered for award is essentially a definitive responsibility criterion. When not submitted by the closing date for receipt of initial proposals as required by a solicitation, an agency is allowed to exclude such an offeror from further con-sideration.[18] Where used in this manner, an SBA COC referral is required.[19]

(3) On the other hand, where an agency rejects a proposal from a small business as technically unacceptable on the basis of factors not related to responsibility, as well as responsibility related ones (*e.g.*, corporate and key employee experience levels), the agency is not required to refer the matter to the SBA under its COC procedures.[20] In other words, the Comptroller General has held that the SBA COC procedures do not apply where experience is evaluated "comparatively" during technical evaluation of proposals with a view to which proposal has the best experience—rather than on a go or no-go minimum basis up front—and experience is not the sole basis on which a proposal is not selected for award.[21]

(4) Which option will ultimately meet an agency's needs depends heavily on both the strength of the agency s file and confidence that the SBA will uphold the government's position on the COC referral. An agency may appeal an adverse COC decision on procure ments in excess of $100,000 to the SBA Central Office.[22] Once issued, however, a COC is generally conclusive as to all elements of re sponsibility.[23] Moreover—in deciding whether or not to issue a COC—the SBA is not required by law to follow the precise wording of definitive responsibility criteria as stated in an agency's solicitation.[24] Accordingly, where an activity refers a small business to the SBA because of the business's failure to meet a definitive responsibility criterion, it should detail the precise reasons for the requirement and why it is imperative to the agency that the particular business referred satisfy it. However, use of definitive responsibility is risky if the regional SBA office issuing the COCs does not share an activity's concern for a certain minimum experience or other requirement.

(5) Finally, if the SBA denies a COC to a small business, the ultimate result may be insufficient small business competition available to satisfy the stated criteria. It is a standing rule in the SBA set-asides that once a particular product or service is acquired successfully through a small business set-aside, it must normally be acquired on the basis of a repetitive set-aside.[25] The agency may resolicit the requirement as unrestricted if only two or less responsible small business offerors whose proposals are priced at fair market value or less qualify.[26]

The foregoing explanation of the SBA COC procedures usually evokes questions of how contracting officers can avoid or minimize SBA scrutiny. As previously detailed,[27] evaluating responsibility-type factors (e.g., minimum experience) "comparatively" is one option. It is clear, though, that such an approach risks diluting, and may call into question, the need for minimum agency requirements—in the health care context, perhaps to a dangerous degree. Further exacerbating this difficult problem is the SBA's rule of two. As a general rule, a procurement must be set-aside for small businesses where the contracting officer determines prior to a procurement that there is a reasonable expectation that offers will be received from at least two responsible small businesses and award will be made at a fair market price.[28] Once

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[18] CB Commercial Government Services Group, B-259014 (Feb. 28, 1995), 1995 WL 111375 (C.G.), *on reconsideration*, B-259014.2 (Apr. 3, 1995), 1995 WL 150464 (C.G.).

[19] Docusort, Inc., B-254852 (Jan. 25, 1994).

[20] A & W Maintenance, Inc., B-258293.2 (Jan. 6, 1995).

[21] Applied Engineering Services, Inc., B-256268.5 (Feb. 22, 1995), 1995 WL 75802 (C.G.); F & H Manufacturing Corp., B-244997 (Dec. 6, 1991).

[22] FAR, *supra* note 4, § 19.602-3.

[23] The Royal Group, Inc., B-270614.2 (Nov. 30, 1995).

[24] Micrographics International, Inc., B-202043 (Mar. 4, 1981) (citing Baxter & Sons Elevator Co., Inc., B-197595 (Dec. 3, 1980)).

[25] FAR, *supra* note 4, § 19.501(g).

[26] *Id.* §§ 19.501(g), 19.507 (set-aside is automatically dissolved if no award can be made); Cariometrix, B-256407 (May 27, 1994).

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

[28] FAR, *supra* note 4, § 19.502-2(a); *See also* Bollinger Machine Shop and Shipyard, Inc., B-258563 (Jan. 31, 1995) (wherein the Army Corps of Engineers lost a protest because it was found not to have a "reasonable basis" for its decision to not set aside a procurement for small businesses).

successfully set-aside through one or more contract awards, it is difficult to withdraw a requirement from the set-aside program. The answer to this dilemma, perhaps, rests in articulating what are—and what are contrary to—the "public interests" in military health care.

Specifically, the rule for withdrawing set-asides provides: "If, before award of a contract involving a set-aside for small business, the contracting officer considers that the award to a small business concern would be detrimental to the public interest (e.g., payment of more than a fair market price), the contracting officer may withdraw the set-aside determination."[29] Excessive price is merely illustrative of what is not in the "public interest." Although—as yet—untested beyond a simple review of price proposals, the subject provision lends itself to a broader discussion.

The meaning of the term "public interest" is made easier by the Comptroller General's recent special interest in military health care. Specifically, in the report "DEFENSE HEALTH CARE: *Issues and Challenges Confronting Military Medicine*,"[30] the GAO considered many of the public interest challenges facing military health care. Among those detailed were: (1) inequitable health benefits packages because of military hospitals that vary significantly in size, medical sophistication, and available services; (2) the difficulty of obtaining civilian health care services because of a cumbersome and contentious procurement process; and (3) lack of agreement among the military services regarding the medical chain of command and the size and structure of the medical force necessary to maintain readiness and meet wartime requirements. The GAO report concludes that "readiness is the primary mission" of military medical care.[31] The report emphasized that agreement by the military services regarding the chain of command, size, and structure of the medical force will drive the combination of physician specialties, the number of hospitals and clinics, and the training and experience that medical personnel need to achieve the appropriate level of readiness. However, the report also views as a follow-on challenge the issue of deciding the most equitable arrangement for all those affected while controlling escalating military health expenses.

As the GAO report indicates, many of the problems with current military medical care are due to inequitable services, lack of focus, and cost containment. In such a context, the requirement to continue accepting marginal health services from a multitude of small businesses simply because they were previously obtained through small business set-asides makes little sense. To implement TRICARE,[32] the Department of Defense reorganized its medical facilities into twelve health care regions, each having a lead agent and an administrative structure to oversee the delivery of health care within the region.[33] The GAO report emphasizes that the success of TRICARE depends on quality and cost containment. Perhaps the place to begin is with each region.

To further the "public interest," MEDCOM should review all health care services in each region to determine if better quality and cost containment can be achieved through a large region-wide bundled requirement.[34] For example, single-hospital contracts for housekeeping services could be replaced with a region-wide procurement. Fewer contracts and businesses operating in a region would lessen overhead costs. The only remaining question, then, is whether such a proposal would enhance quality. Enhancement of quality may be achieved by including certain minimum standards in government contracts, such as minimum experience requirements. The purpose of this note, however, is not to decide what minimum standards are appropriate. Rather, a contracting officer's decision to withdraw a small business set-aside and open competition may not be as limited as once thought. Opening competition to larger health care firms under region-wide contracts or setting appropriate minimum quality standards that make award to small businesses unfeasible based on documented concerns of

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[29] FAR, *supra* note 4, § 19.506(a).

[30] GAO/HEHS-95-104, B-260741 (Mar. 22, 1995), 1995 WL 121694 (C.G.) [hereinafter GAO Report].

[31] One problem area in the subject GAO report, however, is its application of "readiness." The report appears to limit readiness considerations to only service member medical care. However, one vital aspect of readiness is the elimination of service members' mission distracters. Within this definition lies the legitimate readiness concern that a service member's family is well cared for in his or her absence. It perhaps must be conceded, however, that retiree health care is more a matter of recruitment and retention, as opposed to readiness.

[32] The TRICARE program is a new system of military health care emphasizing managed care, improved access, quality service, and cost control. The contracts awarded under this new system contain numerous bundled requirements, often limiting competition to only the largest health care firms. Nevertheless, such contracts have been upheld. *See, e.g.*, QualMed, Inc., B-257184.2 (Jan. 7, 1995).

[33] *See* GAO Report, *supra* note 30, at 21.

[34] Such a review could also incidentally address the GAO's routine concerns regarding restrictions on competition that result from contract bundling. Contract bundling based on mere administrative convenience or unsupported claims of economy will not be upheld by the GAO. However, a real enhancement of quality and the avoidance of unnecessarily duplicative costs can provide legitimate bases for contract bundling. For an excellent comprehensive review of contract bundling requirements, *see* Daniel D. Pangburn, *The Impact of Contract Bundling and Variable Quantity Contracts on Competition and Small Business*, 25 PUB. CON. L.J. 69, 112 (Fall 1995).

marginal past quality and future cost containment, are options facially defensible under the *Federal Acquisition Regulations* and before the GAO in the military health care context. The decision to make and implement such reform now rests with the lead agents for each TRICARE region.

In conclusion, the GAO's decision in *Industrial Maintenance* validates using definitive responsibility criteria in medical service contracts. It also has broader public interest implications that serve to highlight the difficulties in the military s current health care system. Reduced to its lowest common denominator, big problems call for big solutions. The argument can be made that the military can no longer afford a multitude of small business set-asides in its health care system without sacrificing quality, maintaining standards, and cost containing in its managed care options. If this is true, the decision also recognizes a key principle that is easily applied in many situations: Army soldiers and their family members in Army medical care facilities deserve more than the minimum; they deserve the best care possible. Captain Bryant S. Banes, Trial Attorney, Protest Branch, United States Army Contract Appeals Division, Office of The Judge Advocate General, Washington, D.C.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin* (*Bulletin*), which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically, appearing in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 3, number 9, dated June 1996, is reproduced below.

Species Listing Moratorium Lifted

On 10 May 1996, the President waived the congressional moratorium on listing actions under § 4 of the Endangered Species Act (ESA).[1] In response, the Director of the United States Fish and Wildlife Service (USFWS), Mollie Beattie, stated that the USFWS will resume listing actions.[2]

In the news release, the USFWS notes that a total of 243 species proposed for listing await completion of final rules and another 182 candidate species have been identified. A partial listing of these species (238 species for which proposed rules to list have been issued, and all 182 candidate species) was published in the *Federal Register* on 28 February 1996.[3] The news release also notes that, due to fiscal restraints, it is unlikely that final decisions can be made on all 243 proposed species by the end of Fiscal Year 1996.

Installation Environmental Law Specialists (ELSs) should note several issues concerning this announcement. First, federal agencies have a legal obligation to "confer" with the USFWS or the National Marine Fisheries Service (NMFS) on any action likely to jeopardize a species proposed for listing.[4] Second, *Army Regu-*

[1] Determination of Threatened and Endangered Species, 16 U.S.C. § 1533 (1988).

[2] Office of Public Affairs, U.S. Fish and Wildlife Service, Department of the Interior, News Release: Congressional Moratorium Lifted on Endangered Species Listings; Fish and Wildlife Service Sets Priorities for Resuming Program (May 10, 1996).

[3] Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species, 61 Fed. Reg. 7596-613 (1996) (to be codified at 50 C.F.R. pt. 17).

[4] Interagency Cooperation, 16 U.S.C. § 1536(a)(4) (1995).

lation 200-3 requires installations to consider candidate species in making decisions that may affect those species.[5] Last, the number of species that the USFWS previously considered as candidate species has dropped significantly.

Previously, the USFWS categorized species as Categories 1, 2, or 3 with the result that approximately 1400 species were considered candidate species. In the past, Category 1 candidates consisted of proposed species and species for which the USFWS had sufficient information on file to support issuance of a proposed rule.[6] Present practice is to identify these species simply as proposed species and candidate species. Also in the past, Category 2 candidates were those species that the USFWS had information on file to suggest that a listing action was possibly appropriate. The USFWS is discontinuing the designation of these species as Category 2 species and does not regard these species as candidates.[7] The USFWS plans to refer to these previous Category 2 species as *species of concern*. The USFWS does not plan to take the lead in managing *species of concern*, but requests federal and state agencies to act on their own to implement cooperative efforts that would alleviate the necessity for future listing actions.[8] The USFWS also clarified that Category 3 species, species that were once considered for listing but are no longer under such consideration, are not to be considered candidates for listing.[9] Major Ayres.

1996 Texas Initiative

The Department of Defense Regional Environmental Coordinator (DODREC) for Texas and the Air Force Center for Environmental Excellence (AFCEE) hosted an important environmental conference on 30 April 1996 in Austin, Texas. The "Texas Initiative" accomplished three important objectives. First, the DODREC announced the formation of the Texas Initiative Environmental Partnering Group (Partnering Group). Second, speakers from a variety of federal facilities provided updates on recent developments affecting federal facilities in Texas. Finally, a discussion session was held with the Texas Natural Resource Conservation Commission (TNRCC), which allowed senior members of the TNRCC and representatives from federal facilities in Texas to interface.

The morning session was devoted to federal facility issues, and representatives were present from all branches of the Department of Defense as well as the Coast Guard and the National Aeronautical and Space Agency. The Air Force's regional environmental coordinator briefed attendees about the formation of the Partnering Group. The Partnering Group will be a centralized point of contact for resolving issues arising from new or revised legislation or regulatory initiatives. It will also work with senior members of the regulatory community to provide a network to share information and technology, as well as to reduce duplication of effort among the federal facilities in Texas.

While some organizational issues are still being resolved, the Partnering Group will consist of an executive committee and several active working groups. Working groups have already been established to address issues relating to pollution prevention, air, water, hazardous materials and waste, legal, and restoration and Base Realignment and Closure. Each working group has a Steering Committee comprised of representatives from the Army, Air Force, and Navy regional environmental coordinator offices, as well as other interested members. The working groups plan to meet on an as needed basis to resolve environmental issues affecting federal facilities in Texas. If necessary, the working groups will seek legislative or regulatory changes.

The afternoon session was devoted to presentations from senior members of the TNRCC, and emphasized TNRCC's willingness to partner with federal facilities in an effort to achieve environmental compliance while keeping costs at a minimum.

The Texas Initiative signals a major change in the way federal facilities will achieve environmental compliance in Texas. The key to the new system is partnering. Federal facilities can now partner with other federal facilities to share resources and technology. They can also partner with the new Partnering Group, especially if assistance is needed at the senior levels of the regulatory community. Finally, the TNRCC has signaled a desire to partner with federal facilities in an effort to reduce litigation and compliance costs.

Fort Hood is already experiencing success in partnering with the TNRCC. The TNRCC recognized Fort Hood's recent record of environmental success by adding the installation to its Clean Cities 2000 program. This program recognizes cities that have committed themselves to actively promote and implement programs that protect the environment as well as purchase recyclable materials. So far, Fort Hood is the only military installation to have been selected for the Clean Cities 2000 program.

Fort Hood is also experiencing success in negotiating settlements in cases pending before the TNRCC. As a result of partnering with state regulators, Fort Hood has resolved four cases and avoided paying more than $210,000 in assessed fines. Fort Hood's success is based on entering into Agreed Orders wherein

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[5] DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES: LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 11-4(a) (28 Feb. 1995).

[6] 61 FED. REG. 7597.

[7] *Id.*

[8] Interagency Candidate Species Coordination Meeting convened by Jay Slack, USFWS, Department of Interior, in Washington, D.C. (May 15, 1996).

[9] 61 FED. REG. 7597.

the state is allowed to list Fort Hood's alleged violations while Fort Hood is allowed to assert denials. In two enforcement actions taken under the Clean Air Act, the TNRCC waived the assessed fines following Fort Hood's assertion of sovereign immunity. In two Resource Conservation and Recovery Act enforcement actions totaling almost $170,000 in assessed fines, the TNRCC agreed to offset the majority of the fines by permitting Fort Hood to complete a tire recycling project as a Supplemental Environmental Project (SEP). In this manner, the TNRCC achieves compliance and satisfaction that it has subjected Fort Hood to punitive expenditure, while Fort Hood can deny culpability, implement a beneficial project, and finance the effort with Forces Command P2 funds versus scarce Operational and Management dollars.

Army installations should copy the partnering approach of the Texas Initiative by looking for partnering opportunities in their state. Remember, we are all seeking the same objective: environmental compliance at the lowest cost. Lieutenant Colonel Hunter.

New Study Reveals Basis for State Soils and Groundwater Standards

Since federal activities often are bound to abide by state clean up standards, it is helpful to understand the basis for the standards to determine how flexible states may be in adjusting the standards. The General Accounting Office (GAO) recently investigated and published a report regarding the factors that states consider when establishing standards. In its report, the GAO concluded that states were more likely to be flexible in adjusting soil standards than groundwater standards and that most states base their cleanup standards on health risks posed by chemical waste exposure.

The GAO's investigation found that twenty-one states had established either water or soil cleanup standards. Twenty of these states had based their standards on estimates of human risk from exposure to chemicals.

When evaluating whether states considered other factors in setting standards, the GAO concluded that many did consider factors such as cost and technical feasibility of achieving the cleanup. Many states set their ground water standards at levels similar to the federal drinking water standards. Some states set more stringent standards.

The study raised the concern that standards should be adjusted to site-specific conditions. Although over half of the states considered site-specific factors when setting soil standards, fewer than one-fourth of the states allow this flexibility with regard to groundwater.

A copy of the report may be obtained from the United States GAO by contacting: U.S. General Accounting Office, P.O. Box 6015, Gaithersburg, Maryland, 20884, telephone (202) 512-6000. Mrs. Greco.

The Environmental Law Forum

The Environment Law Forum is now open on the LAAWS BBS. The forum is an arena for environmental law attorneys and support staff to discuss cases, issues, and other environmental law issues. Access is restricted to Army attorneys and technical personnel whose work involves issues pertaining to environmental law. Each person seeking access to the forum must have already completed the "Attorney" or "Legal Support Staff" questionnaire prior to requesting access. After completing the appropriate questionnaire, e-mail should be sent to the forum manager (Captain DeRoma) requesting access. The LAAWS BBS may be reached via computer modem by dialing commercial (703)806-5791 or DSN 656-5791. 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. See the Current Materials Section of this issue of *The Army Lawyer* for more details on the LAAWS BBS. Captain DeRoma.

EPA Amends 40 C.F.R. Part 123 to Ensure Public Participation in Clean Water Act Permitting Process

The Environmental Protection Agency (EPA) has amended 40 C.F.R. Part 123 to require all states that administer or seek to administer a National Pollutant Discharge Elimination System (NPDES) program to provide for an opportunity for state court review of the final approval or denial of permits that is sufficient to provide for, encourage, and assist public participation in the permitting process. The amended rule is a response to past instances in which citizens have been barred from challenging state-issued permits due to narrow and restrictive standing requirements under state law. The new change expands the standing of potential plaintiffs in state-permit actions to include parties facing potential injury to aesthetic, environmental, or recreational interests. As such, the rule incorporates principles of standing expressed in *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The rule applies any time a state seeks modification, revocation and reissuances, or termination of permits, as well as the initial approval or denial of permits. This change will be effective on 7 June 1996. Captain DeRoma.

HWIR-Media Update

On 29 April 1996, the EPA proposed new regulations for Resource Conservation and Recovery Act (RCRA) regulated contaminated media, which include contaminated soils, ground water, and sediments that are managed during government-overseen cleanups. In the new rule, entitled "Requirements for Management of Hazardous Contaminated Media," commonly referred to as hazardous waste identification rule for contaminated media (HWIR-Media), the EPA seeks to develop more flexible standards for wastes and contaminated media generated during cleanup activities by establishing a "bright line" for distinguishing hazardous contaminated media from non-hazardous contaminated media.[10]

[10] Requirements for Management of Hazardous Contaminated Media (HWIR-Media), 61 Fed. Reg. 18,780 (April 29, 1996).

To provide greater flexibility to existing RCRA oversight of low-risk hazardous wastes, the EPA published a proposed hazardous waste identification rule in 1992 that exempted certain lower risk wastes and contaminated media from regulation under Subtitle C of the RCRA.[11] The proposed rule, however, met with strong challenges from the regulated community, environmental groups, and the hazardous waste treatment industry. The EPA subsequently withdrew the proposed rule to develop less controversial rules for both newly generated hazardous waste and waste resulting from or contained in contaminated media during remediation actions. To address the first of these, the EPA proposed the hazardous waste identification rule (HWIR-Waste), which established exit levels for constituents found in low-risk solid wastes that are designated as hazardous because they are mixed with, derived from, or contain a listed hazardous waste.[12] The Army, as the Department of Defense leader for developing comments, submitted comments coordinated by the Army Environmental Center on 22 April 1996.

The proposed HWIR-Media rule would apply only to wastes and contaminated media generated during remediation activities. Key aspects of the proposed rule are as follows. First, the EPA and the authorized states will be granted the authority to remove low-risk contaminated media (those constituents whose concentrations fall below the "bright line") from regulation as hazardous waste from most of the RCRA Subtitle C. The bright line values are not the same as the exit levels proposed in the recent HWIR-Waste rule, and there are different bright lines for soil and for ground and surface waters. No bright line exists for sediments, but rather hazardous waste determinations are made site-by-site. Second, Land Disposal Restriction (LDR) treatment requirements would be modified to exempt those media determined to be nonhazardous prior to excavation. Third, permitting procedures for those high-risk media remaining subject to the RCRA will be established. This will be accomplished through Remedial Management Plans (RMPs), which are enforceable documents subject to public participation and which the EPA will require prior to management of hazardous or nonhazardous contaminated media. Fourth, the existing regulations for Corrective Action Management Units (CAMUs) would be withdrawn and replaced. Finally, the proposal exempts from Subtitle C for contaminated sediments dredged and managed according to permits issued under the Clean Water Act and the Marine Protection Research and Sanctuaries Act.

At the EPA's HWIR-Media public hearing on 4 June 1996 in Washington, D.C., all oral commentators from the regulated community, as well as the representative from the Association of State and Territorial Solid Waste Management Officials, condemned the proposed rule's use of the "bright line" that defines, by constituent, which media are regulated and which are not. The commentators broadly favored an industry backed "unitary approach," which would exempt all cleanup wastes and contaminated media from Subtitle C if they meet certain conditions set out in a site-specific remedial action plan (RAP) approved by the EPA or an authorized state. Like the RMP, the RAP would be enforceable and would have to exceed the RCRA's minimum public participation requirements, but would not serve as a RCRA permit because all of the remediation wastes and contaminated media would be exempted from Subtitle C. All commentators agreed that the bright line rule creates unnecessary confusion, complexity, and inflexibility and has questionable legal bases. The commentators support the unitary approach because it provides a flexible, simple approach to exiting contaminated cleanup media from the RCRA.

While the bright line versus unitary approach issue is certainly an important one, there are other issues that could affect your remediation operations. Army comments will be submitted through the Deputy Under Secretary of Defense for Environmental Security (DUSD (ES)), who has requested initial comments during the month of June. The Army Environmental Center will collect Department of Army comments for submission through the Assistant Chief of Staff for Installation Management to the DUSD(ES) by 29 July 1996. You are encouraged to read the proposed rule and forward any comments you have to Bob Shakeshaft by mail at Commander, Army Environmental Center (ATTN: SFIM-AECECC, Mr. Shakeshaft), Aberdeen Proving Ground, MD 21010-5401; by fax DSN 584-3132 or (410) 671-3132; or by E-mail rashakes@aec1.apgea.army.mil. Captain Anders.

[11] Hazardous Waste Management System; Identification and Listing of Hazardous Waste, 57 Fed. Reg. 21,450 (May 20, 1992).

[12] Hazardous Waste Management System: Identification and Listing of Hazardous Waste: Hazardous Waste Identification Rule (HWIR), 60 Fed. Reg. 66,344 (Dec 21, 1995).

Claims Report

United States Army Claims Service

Tort Claims Note

Most Common Exceptions to the FTCA

The enactment of the Federal Tort Claims Act (FTCA) constitutes a limited waiver of sovereign immunity in tort actions against the United States. Particular instances in which sovereign immunity has not been waived are referred to as "exceptions" to the FTCA and are currently codified in 28 U.S.C. § 2680(a) through (h). The most commonly used exceptions in resolving claims filed with the United States Army are discretionary function, assault and battery, false arrest, libel and slander, and misrepresentation.

The discretionary function exception to the FTCA bars claims based on acts or omissions involving the exercise of discretion in the furtherance of public policy goals. The first issue that the claims attorney must analyze is whether the challenged governmental action involves an element of judgment or choice. Where law or regulation requires a specific action, no discretion is involved. If discretion is allowed, is the choice or judgment based on, or susceptible to, considerations of public policy that Congress intended to insulate from judicial scrutiny?

The discretionary function exception may arise in situations involving investigations or the determination of whether to conduct an investigation.[1] The exception frequently arises in premises liability situations concerning the installation or maintenance of safety features. The exception may apply in a variety of situations involving the allocation of resources among competing interests. The exception may be raised in conjunction with a recreational use statute to bar claims involving injuries sustained in areas open to public recreation.[2]

The discretionary function exception applies in limited factual circumstances. At the outset of the investigation of every claim in which the discretionary function exception may apply, the claims attorney must identify and review any relevant statutes, regulations, guidelines, directives, or policy statements. The claims attorney also should be prepared to articulate what policy considerations (social, political, economic, or military factors) influenced the discretionary activity.

The assault and battery exception, 28 U.S.C. § 2680(h), bars claims that sound in negligence but stem from an assault or battery committed by a government employee. However, this exception does not bar a claim based on an assault or battery by a federal employee acting outside the scope of employment when there is an independent duty from the employment relationship.[3] An independent duty situation may arise when there is a duty to a victim or a "Good Samaritan" duty.[4] Therefore, in claims based on assault or battery, the claims attorney should investigate whether there is a pre-existing special relationship between the parties in which state law imposes a duty.

Under the 1974 amendment to 28 U.S.C. § 2680(h), assault and battery by federal investigative or law enforcement officers in the scope of official duties are outside the exception and impose liability in the United States under the FTCA. A federal law enforcement officer is an official who possesses the power to execute searches, seize evidence, and make arrests for violations of federal law. A military policeman is a federal law enforcement officer, but a post exchange detective detaining a combative suspect or a physician forcibly restraining a violent patient are not law enforcement officers. The amendment also takes law enforcement officers of the United States outside of the exception for actions arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process. In a claim involving such allegations, the investigation should address the nature, amount and justification for the use of force, and whether defenses such as good faith, reasonable belief, and probable cause, apply.[5]

Claims arising out of libel and slander are not covered by the FTCA. Whether phrased as an unwarranted invasion of privacy

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[1] Blakely v. U.S.S. Iowa, 780 F. Supp. 350 (E.D. Va. 1991), *aff'd* 991 F.2d 148 (4th Cir. 1993) (conduct of Navy investigation of explosion aboard ship); United States v. Gaubert, 111 S. Ct. 1267 (1991).

[2] Baum v. United States, 986 F.2d 716 (4th Cir. 1993) (National Park Service judgments regarding maintenance of bridges and guardrails on the Baltimore-Washington Parkway involved considerations of economic, social, and political policy protected under the exception); Childers v. United States, 40 F.3d 973 (9th Cir. 1994) (absence of warning signs on winter trails).

[3] Sheridan v. United States, 487 U.S. 392 (1988).

[4] Doe v. United States, 838 F.2 220 (7th Cir. 1988) (duty to adequately supervise and safeguard children in West Point Child Development Center); Bembenista v. United States, 866 F.2d 493 (D.C. Cir. 1989) (duty by Army Medical Center to protect blind and comatose patient).

[5] The exception similarly does not apply to assault and battery by medical, dental, and health care personnel. See 10 U.S.C. § 1089e (1995); 38 U.S.C. § 7316 (1995); Franklin v. United States, 999 F.2d 1492 (10th Cir. 1993) (nonconsensual surgery is considered a battery).

or damage to reputation, the communication of defamatory information by a government employee acting within the scope of employment falls within the exception of 28 U.S.C. § 2680(h). The defamation may be intentionally or negligently inflicted. The tort of defamation, as recognized by most states, requires some act of communication or publication. Thus, an allegation of mere negligent record keeping may not be a tort under state law but may have a remedy under the Tucker Act. The alleged defamatory material may be communicated verbally or contained in an investigation report, a medical report, or a personnel action.

The misrepresentation exception to the FTCA applies to claims based on a claimant's reliance on governmental misinformation or failure to communicate correct information. A claim based on the misrepresentation exception may be based on deliberate and negligent acts.[6] The courts have broadly construed the exception in such diverse situations as negligent inspections, failure to warn of the criminal propensities of a federal witness, wrongful induction into military service, and salary and benefits misinformation conveyed by a recruiter. The exception does not usually apply to medical malpractice claims.[7] Thus, claims based on allegations of lack of informed consent, negligent diagnosis, or untimely diagnosis are not barred by the exception. In cases in which this exception may apply, the claims attorney should investigate the nature of the government acts or omissions and the information on which the claimant may have detrimentally relied.

Claims attorneys must be cautious not to interpret the "intentional" tort exceptions too broadly. Not all intentional torts are barred. Intentional infliction of emotional stress is actionable under the FTCA.[8] These exceptions are viable defenses to many FTCA claims and are not meant to be circumvented by a claimants artful pleading. The claims attorney should look beyond the language of the claim to determine whether it is barred by one of the statutory exceptions. A more detailed discussion of these, as well as the other exceptions to the FTCA's waiver of sovereign immunity, will be in Section V of Chapter 2 of the future publication of *Department of the Army Pamphlet 27-162*. Ms. Schulman.

[6] United States v. Neustadt, 281 F.2d 596 (4th Cir. 1960), *cert. denied*, 366 U.S. 696 (1961).

[7] Hill v. United States, 751 F. Supp. 909 (D. Colo. 1990), *aff'd in part* and *rev'd in part*, 81 F.3d 118 (10th Cir. 1996).

[8] Truman v. United States, 26 F.3d 592 (5th Cir. 1994); Santiago-Ramirez v. Secretary, Department of Defense, 984 F.2d 922 (1st Cir. 1993).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

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

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 all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to 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 Juan Rivera, 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.

Academic Year 1996-1997 On-Site CLE Training

The Academic Year 1997 On-Site is fast approaching with the onset of the 90th Regional Support Command's, Dallas, Texas conference scheduled for 20 through 22 September at the Stouffer-Dallas Hotel. This promises to be a splendid kick off which will be followed by conferences at sixteen additional sites across the country.

On-Site instruction provides an excellent opportunity for practitioners to obtain CLE credit while receiving instruction in a variety of legal topics. In addition to instruction provided by professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to hear career information from the Guard and Reserve Affairs Division, Forces Command, and United States Army Reserve Command. Most On-Site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army. Many feature distinguished guests from the local community.

Army Regulation 27-1, paragraph 10-10, requires United States Army Reserve judge advocate officers assigned to JAGSO units or to Judge Advocate sections organic to other United States Army Reserve units to attend at least one On-Site conference annually. Individual Mobilization Augmentees, Individual Ready Reserve, Active Army Judge Advocates, National Guard Judge Advocates and Department of Defense civilians are also strongly encouraged to attend and take advantage of this valuable program.

Major Eric Storey was reassigned from the position of Chief, Unit Training and Liaison Office, effective 15 July 1996. His replacement will be Major Juan Rivera effective on or about 15 August 1996. If you have any questions regarding the On-Site Schedule, contact the local action officer listed below or call the Guard and Reserve Affairs Division at (800) 552-3978, extension 380.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,
Director ..... tromeyto@otjag.army.mil

COL Keith Hamack,
USAR Advisor ..... hamackke@otjag.army.mil

LTC Peter Menk,
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Dr. Mark Foley, Ch,
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Mrs. Margaret Grogan,
Secretary, Director ..... groganma@otjag.army.mil

THE JUDGE ADVOCATE GENERAL'S RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE, ACADEMIC YEAR 1996-1997

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
20-22 Sep 2.5 days	Dallas, TX 90th RSC Stouffer-Dallas 2222 Stemmons Freeway Dallas, TX 75207	MAJ Linda L. Sheffield 4500 Carter Crk., Ste 103 Bryan, TX 77802 (409) 846-1773 (Fax 1719)
2-3 Nov	Bloomington, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th St. Bloomington, MN 55425	MAJ John P. Kingrey MHHP 2550 West University Suite 350, South St. Paul, MN 55114-1900 (612) 641-1121
9-10 Nov	Willow Grove, PA 153d LSO/99th RSC Willow Grove Naval Air Station Reserve Pgms Bldg. 601 Willow Grove, PA 19090	LTC Donald Moser 153d LSO Willow Grove USAR Center Woodlawn & Division Aves. Willow Grove, PA 19090 (215) 925-5800

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
16-17 Nov	New York, NY 4th LSO/77th RSC Fordham University School of Law 160 West 62d Street New York, NY 10023	LTC Myron J. Berman 77th RSC Bldg. 637 Fort Totten, NY 11359 (718) 352-5703
4-5 Jan 97	Long Beach, CA 78th MSO	LTC Andrew Bettwy 10541 Calle Lee, Ste 101 Los Alamitos, CA 90720 (714) 229-3700
1-2 Feb	Seattle, WA 6th MSO	MAJ Frank Chmelik Chmelik & Associates 1500 Railroad Avenue Bellingham, WA 98225 (360) 671-1796
8-9 Feb	Columbus, OH 9th MSO Clarion Hotel 7007 N. High St. Columbus, OH 43085 (614) 436-0700	LTC Timothy J. Donnelly 9th MSO 765 Taylor Station Rd. Blacklick, OH 43004 (419) 625-8373
22-23 Feb	Salt Lake City, UT 87th MSO	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
22-23 Feb	Denver, CO 87th MSO	LTC David L. Shakes 3255 Wade Circle Colorado Springs, CO 80917 (719) 596-3326
22-23 Feb	Indianapolis, IN IN ARNG Indianapolis War Memorial 421 N. Meridian St. Indianapolis, IN 46204	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
1-2 Mar	Charleston, SC 12th LSO	LTC Cary Herin 81st RSC 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9304
8-9 Mar	Washington, DC 10th MSO NWC (Arnold Aud.) Fort Lesley J. McNair Washington, DC 20319	CPT Robert J. Moore 10th MSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
15-16 Mar	San Francisco, CA 75th LSO	LTC Joe Piasta Shapiro, Galvin, et. al. 640 Third St., Second Floor P.O. Box 5589 Santa Rosa, CA 95402-5589 (707) 544-5858
22-23 Mar	Rolling Meadows, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Rd. Rolling Meadows, IL 60008	MAJ Ronald C. Riley P.O. Box 1395 Homewood, IL 60430 (312) 443-4550
4-6 Apr	Jacksonville, FL 174th MSO/FL ARNG	LTC Henry T. Swann P.O. Box 1008 St. Augustine, FL 32085 (904) 823-0131
26-27 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Training Center 360 Eliott Street Newport, RI 02841	MAJ Katherine Bigler HQ, 94th RSC ATTN: AFRC-AMA-JA 695 Sherman Avenue Fort Devens, MA 01433 (508) 796-6332 (Fax 2018)
3-4 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 E. Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Cary Herin 81st RSC 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9304

CLE News

1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are 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

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

June 1996

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

July 1996

21-26, APA:	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
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 A305239	Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (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 A308640	Family Law Guide, JA 263-96 (544 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 A308341	The Law of Federal Employment, JA-210-96 (330 pgs).

*AD A308754 The Law of Federal Labor-Management Relations, JA-211-96 (330 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 St. Louis, Missouri, stocks and distributes all 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
1655 Woodson Road
St. Louis, MO 63114-6181

(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 St. louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. 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 Form 12-99 through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(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 DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(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 DA Form 12-99 through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) ROTC elements. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 through their supporting installation and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA Form 12-99 through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

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-LM, Room 1040, 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 St. Louis USAPDC at (314) 263-7305, ext. 268.

(*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 the Defense Data Network (DDN), the telephone order publications system (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(*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, 1655 Woodson Road, St. Louis, MO 63114-6181. You may reach this office by telephone at (314) **263-7305, ext. 268**

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

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic online information service (often referred to as a BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS Online Information Service, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 134.11.743 or Domain Names laawsbbs @otjag.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D),

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps,

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues,

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: OIS Sysop
9016 Black Rd., Ste 102
Fort Belvoir, VA 22060-6208

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended).

Novelle LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 134.11.74.3

Host Name = laawsbbs@otjag.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(*1*) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(*2*) Choose "S" to select a library. Hit Enter.

(*3*) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(*4*) Choose "F" to find the file you are looking for. Press Enter.

(*5*) Choose "F" to sort by filename. Press Enter.

(*6*) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(*7*) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(*8*) Once your file is highlighted, press Control and D together to download the highlighted file.

(*9*) You will be given a chance to choose the download protocol. If you are using a 2400 -4800 baud modem, choose option "1". If you are using a9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(*10*) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(*11*) Once you have completed al the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of file appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress , or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

4. 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	May 1996	A Listing of Legal Assistance Resources, May 1996.
ALLSTATE.ZIP	January 1996	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	January 1996	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, February 1996.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
DEPLOY.EXE	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1994.
FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FOIA.2.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
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	January 1996	Defensive Federal Litigation, August 1995.
JA210DOC.ZIP	May 1996	Law of Federal Employment, May 1996.
JA211DOC.ZIP	May 1996	Law of Federal Labor-Management Relations, May 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, Volumes I and II, September 1995.
JA235.ZIP	January 1996	Government Information Practices Federal Tort Claims Act, August 1995.
JA241.ZIP	January 1996	Federal Tort Claims Act, August 1994.
JA260.ZIP	January 1996	Soldiers' & Sailors' Civil Relief Act, January 1996.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, March 1993.
JA262.ZIP	January 1996	Legal Assistance Wills Guide, June 1995.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.ZIP	January 1996	Uniform Services Worldwide Legal Assistance Office Directory, February 1996.
JA268.ZIP	January 1996	Legal Assistance Notarial Guide, April 1994.
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses Protection Act Outline and References, November 1992.

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JA275.ZIP	August 1993	Model Tax Assistance Program, August 1993.
JA276.ZIP	January 1996	Preventive Law Series, December 1992.
JA281.ZIP	January 1996	15-6 Investigations, November 1992 in ASCII text.
JA301.ZIP	January 1996	Unauthorized Absences Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1995.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA5082.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.

FILE NAME	UPLOADED	DESCRIPTION
JA510-3.ZIP	January 1996	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.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
OPLAW95	January 1996	Operational Law Deskbook 1995.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995. Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 199 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	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. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (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, SGT James Stewart, 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

5. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is now available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 3. The following instructions are based on the MicroSoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

(a) Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

(b) For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing application, select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP APR96.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, MicroSoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. Above in paragraph 3, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396.

6. Articles

The following information may be useful to judge advocates:

Gunn Shuffield Milton, Judge, *Increasing Courtroom Effectiveness: 20 Tips for the Inexperienced Trial Attorney*, 59 TEX. B. J. 462 (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. Nelda 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:

U.S. Army Legal Services Agency
Law Library, Room 203
ATTN: Melissa Knowles
Nassif Building
5611 Columbia Pike
Falls Church, VA 22041-5013
POC Melissa Knowles
COM (703) 681-9608

* Code of Virginia 1950 Annotated, Volume 11 1995–Replacement Volume

* District of Columbia Code Annotated 1981 edition, Volume 4, 1995 Replacement Title 6-Health and Safety

* District of Columbia Code Annotated 1981 edition, Volume 4A 1995 Replacement Title 7-Highways, Streets, Bridges; Title 8-Parts and Playgrounds, etc.

* District of Columbia Court Rules Annoted 1995 edition, Volume 1, Court Reporter Rules

*U.S. Government Printing Office: 1996 - 404-577/40005

* District of Columbia Court Rules Annotated 1995 edition, Volume 2, Superior Court-Family Division to Federal Rules

* District of Columbia Code Annotated 1981 edition, Volume 12, 1995 Replacement Index

* District of Columbia Code Annotated 1981 edition 1995 Cumulative Supplement (Pocket Parts) for Volumes 1, 2, 2A, 3, 3A, 5, 5A, 6, 7, 7A, 8, 9, 10, and 11

* United States Supreme Court Reports 2d, Lawyers edition Interim Volume 114, 1994

* United States Supreme Court Reports 2d, Lawyers edition Interim Volume 115, 1994

* United States Supreme Court Digest 1996 Pocket Parts Complete Set (West Pub. Co.)

* West's Federal Practice Digest 4th December 1994, Part 1 Supplementing 1995 Pocket Parts (2 paper copies)

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