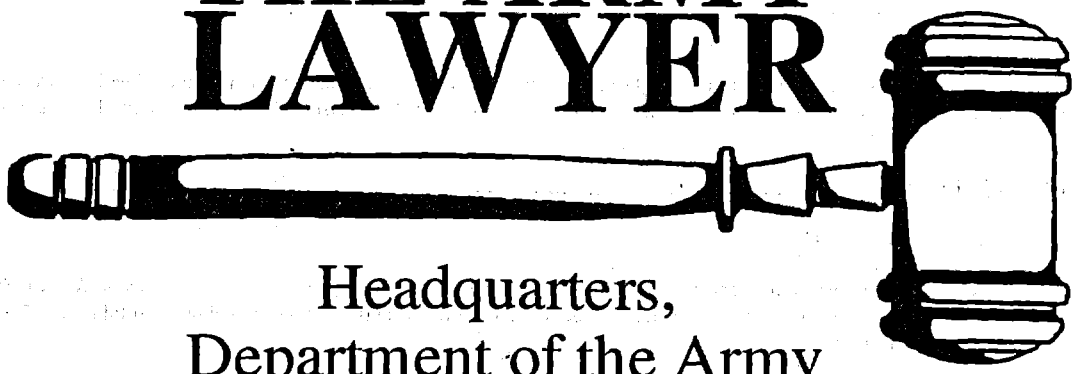
THE ARMY LAWYER



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Using the Status of Forces Agreement to Incarcerate United States Service Members on Behalf of Japan

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Introduction

On 29 September 1995, the United States Armed Forces in Okinawa, Japan relinquished custody of three American service members to the local police to face charges of premeditated kidnapping and rape of a twelve-year-old Japanese girl. For twenty-five days prior to this, the American service members, one sailor and two Marines, had been confined in Camp Hansen's brig by order of their commanding officer.[1] They received no probable cause hearing, no counsel, and no other due process normally accorded persons ordered into pretrial confinement by the military.[2]

As authority for this incarceration, the commander relied on the custody provisions of the Status of Forces Agreement (SOFA) between the United States and Japan.[3] The various services have interpreted these custody provisions to void the pretrial confinement due process guarantees of the United States Constitution and the regulatory requirements of the *Manual for Courts-Martial* (*Manual*).[4]

This article analyzes current United States practice regarding the handling of service members accused of crimes in Japan, challenges the authority of United States commanders to confine service members pursuant to the SOFA, and recommends a revision of United States policy in the area.

The facts mentioned above led many to call for a renegotiation of the SOFA with Japan. However, the primary concern of pundits ironically had nothing to do with the rights of military members.[5] Instead, the public outcry was premised on a growing belief among the Japanese that United States service members accused of crimes received preferential treatment under the SOFA.[6] Okinawan authorities were incensed that the United

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[1] Edward Desmond, *Rape of an Innocent, Dishonor in the Ranks*, TIME, Oct. 2, 1995, at 51; Mary Jordan & Kevin Sullivan, *Americans Charged with Rape Turned over to Police*, WASH. POST, Sept. 30, 1995, at A24.

[2] Desmond, *supra* note 1; Telephone Interview with Lieutenant Colonel Joseph Poirier, United States Marine Corps, Station Judge Advocate, Marine Corps Air Station, Iwakuni, Japan (Mar. 11, 1995).

[3] Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan Regarding Facilities and Areas and the Status of United States Armed Forces in Japan with Agreed Minutes, Jan. 19, 1960, U.S.-Japan, art. XVII, ¶ 5, 2 U.S.T. 1652 [hereinafter SOFA].

[4] For service members and civilians under the courts-martial jurisdiction of the Uniform Code of Military Justice, the *Manual* establishes a number of due process rights and procedures that reflect Fourth and Fifth Amendment guarantees. *See generally* MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 201, 202(c) (1995) (courts-martial jurisdiction attaches when service member is apprehended, restrained, restricted, arrested, confined, or charges are preferred); R.C.M. 203 discussion ("The rule enunciated in *Solorio v. United States*, 483 U.S. 435 (1987), is that courts-martial jurisdiction depends solely on the accused's status as a person subject to the Uniform Code of Military Justice, and not on the "service-connection" of the offense charged."); R.C.M. 304(a)(4) (defining pretrial confinement as physical restraint depriving a person of freedom pending disposition of offenses and mandating that it be ordered by competent authority); R.C.M. 304(b)(1), (2) (only a commanding officer may order pretrial restraint of an officer, and any commissioned officer may order pretrial restraint of an enlisted member); R.C.M. 304(c) ("No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that: (1) An offense triable by court-martial has been committed; (2) The person to be restrained committed it; and (3) The restraint ordered is required by the circumstances."); R.C.M. 305(b) ("Any person . . . may be confined if the requirements of this rule are met."); R.C.M. 304(c) discussion:

> The decision whether to impose pretrial restraint, and, if so, what type or types, should be made on a case-by-case basis. The factors listed in the Discussion of R.C.M. 305(h)(2)(B) should be considered. The restraint should not be more rigorous than the circumstances require to ensure the presence of the person restrained or to prevent foreseeable serious criminal misconduct.
>
> Restraint is not required in every case. The absence of pretrial restraint does not affect the jurisdiction of a court-martial. However, *See Manual* R.C.M. 202(c) concerning attachment of jurisdiction. *See Manual* R.C.M. 305 concerning the standards and procedures governing confinement.

[5] A twenty-five day incarceration prior to relinquishing custody in such cases is not out of the ordinary. The political sensitivities in Okinawa presumably led to a quicker than normal indictment response from the Japanese prosecutor. Telephone Interview with Lieutenant Colonel Joseph Poirier, United States Marine Corps, Station Judge Advocate, Marine Corps Air Station, Iwakuni, Japan (Mar. 11, 1995).

[6] Mary Jordan, *Rape Fans Okinawans' Anger at Continuing U.S. Military Presence*, WASH. POST, Sept. 20, 1995, at A15 (Okinawans believe Americans receiving preferential treatment). The true motive behind claims of preferential treatment is probably the reduction of United States forces in Okinawa. *See supra*, note 1, and *infra* notes 7, 8, 9 (sources cited therein).

States did not *immediately* relinquish custody of the accused service members,[7] and in response, both governments agreed to talks on jurisdiction issues covered by the SOFA.[8]

The United States adopted an apologetic and defensive posture, which was politically prudent in light of such horrific allegations.[9] With such a delicate political situation in Okinawa, the constitutional rights of service members were unlikely to be a primary concern of negotiators. However, in reassessing the SOFA with Japan, the United States Constitution should not be compromised to salvage political points. In our policy considerations, we must balance the interests of Japan, the United States and service members, while at the same time contemplating the legal requirements of the Constitution. The delicate political situation tends to cause parties to focus on the former while ignoring constitutional considerations.

The SOFA with Japan suffers from long-standing constitutional weaknesses unrelated to the current political difficulties. Moreover, treatment of preindictment confinement pursuant to a SOFA varies widely among the services. Thorough scrutiny of the SOFA's custody provisions should not simply result in politically oriented concessions but a more consistent and appropriate procedure for managing the custody of United States military personnel accused of crimes in Japan. Specious Okinawan claims of preferential treatment are politically driven, but scrutiny of the SOFA's custody provisions is indeed appropriate. If handled thoughtfully, this may be one occasion when bad facts lead to good law.[10]

Part I of this article deals with the current policy and practice regarding custody issues in foreign criminal jurisdictions. This section identifies a surprising lack of consistency among the services in their handling of these issues. Part II examines the legal underpinnings of various custody policies. By analyzing the interface between international law and domestic criminal procedure, this section identifies constitutional problems with current United States practice. Finally, in Part III, the article concludes by recommending a unified policy to rectify service inconsistencies and constitutional infirmities without undermining practical advantages of the current practice.

I. The Status of Forces Agreement and Current Practice

The current SOFA with Japan is an executive agreement that entered into force on 23 June 1960. It supports The Treaty of Mutual Cooperation and Security Between the United States of America and Japan.[11] Article XVII of this agreement discusses criminal jurisdiction and contains provisions aimed at safeguarding the rights of military personnel. It provides that when service members are alleged to have committed offenses that fall under Japan's primary jurisdiction,[12] they remain in United States

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[7] David Allen, *GIs' Arrest Rate Is High for Okinawa*, PACIFIC STARS & STRIPES, Sept. 27, 1995, at 1, 4; David Allen, *Rape Furor Grows in Okinawa*, PACIFIC STARS & STRIPES, Sept. 28, 1995, at 1, 4.

[8] Hal Drake, *Rape Spotlights Status of Forces Agreement*, PACIFIC STARS & STRIPES, Sept. 27, 1995, at 1; Joseph Owen & David Allen, *U.S., Japan Will Study SOFA Proviso*, PACIFIC STARS & STRIPES, Sept. 23, 1995, at 1, 4; Miyoshi Yoshikawa, *Japan, U.S. to Study Troops Pact After Rape Incident*, REUTERS WORLD SERV., Sept. 21, 1995. Discussions already have begun, the first round taking place on 25 September 1995. *See Japan, U.S. Experts Hold Talks on Criminal Jurisdiction Process*, DAILY YOMIURI, Sept. 26, 1995. The second round of talks was held on 5 October 1995. Telephone Interview with Lieutenant Colonel Philip W. Lindley, United States Army, Deputy Staff Judge Advocate, Camp Zama, Japan (Mar. 7, 1995).

[9] Hal Drake, *U.S. Military "Ashamed" of Rape, General Says*, PACIFIC STARS & STRIPES, Sept. 21, 1995, at 1; *U.S. Envoy Apologizes Over GIs Accused in Japan Rape*, REUTERS WORLD SERV., Sept. 19, 1995. The agreement to open discussions of the SOFA coincided with United States apologies. *See* Desmond, *supra* note 1.

[10] While the scope of this article extends only to Japan, the SOFA provisions in question are patterned after the North Atlantic Treaty Organization (NATO) SOFA, which, unlike other SOFAs, is not merely an executive agreement, but a treaty. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 2 U.S.T. 1792. The NATO SOFA's progeny includes several important agreements besides Japan's, such as agreements with Iceland, Australia, and the Philippines. All of these SOFAs contain nearly identical custody provisions. *See* Annex on the Status of United States Personnel and Property, May 8, 1951, U.S.-Iceland, art. 2, ¶ 6(c), 2 U.S.T. 1533; Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, U.S.-Australia, art. 8, ¶ 5(c), 1 U.S.T. 506; Military Bases in the Philippines: Criminal Jurisdiction Arrangements, Aug. 10, 1995, U.S.-Philippines, art. XIII, ¶ 5(c), 2 U.S.T. 1090. A similar provision covering several countries including Germany, Greece, and Korea allow for the sending state to retain custody throughout criminal proceedings. All of these agreements have the potential to put commanders in a similar quagmire. However, these SOFAs also contain provisions wherein the host country may request custody in unusual circumstances, thus not *requiring* the sending state to incarcerate on behalf of the host. *See* Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, U.S.-Germany, 1 U.S.T. 531; Agreement with the Kingdom of Greece Concerning the Status of United States Forces in Greece, Sept. 7, 1956, U.S.—Greece, art. III, ¶ 1, 3 U.S.T. 2555; Agreement under Article IV of the Mutual Defense Treaty with the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, Jul. 9, 1966, art. XXII, ¶ 5(c), 2 U.S.T. 1677. Additionally, local law may require a probable cause hearing take place in the foreign jurisdiction prior to a request for incarceration, thus mooting the most significant constitutional infirmity. *See, e.g.*, United States v. Thomas, 43 M.J. 62 (A.F. Ct. Crim. App. 1995) (hearing held in German court prior to lengthy period of U.S. incarceration).

[11] *See* SOFA, *supra* note 3, art. VI (stating that the status of United States Armed Forces in Japan will be governed by a "separate agreement").

[12] *See id.* art XVII, ¶ 5(c).

custody until Japanese authorities present an indictment. The applicable text reads as follows:

> The custody of an accused member of the United States Armed Forces . . . over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan.[13]

The Agreed Minutes pertaining to this paragraph further constrain the Japanese when they make an arrest. In most cases, they must relinquish custody to United States officials who shall, "on request, transfer [the accused's] custody to the Japanese authorities at the time he is indicted by the latter."[14] The SOFA also requires mutual assistance in investigations and the apprehension of accused persons.[15] These provisions do not specifically contemplate immediate confinement upon apprehension. Nor do they outline the appropriate factual predicate for any form of physical or moral restraint; they simply assign existing custody rights.[16]

The SOFA's jurisdiction and custody regime have understandably been interpreted to enjoin the United States from thwarting the exercise of Japanese jurisdiction. The United States ensures that members of the United States Armed Forces suspected of committing crimes under Japanese jurisdiction are available for prosecution by Japan. Policy normally prohibits reassigning suspect service members beyond the jurisdictional reach of Japan. However, more importantly, when the SOFA grants preindictment custody to the United States, there is an implied concomitant duty to guarantee to Japan the presence and eventual custody of those service members retained pursuant to the SOFA.[17] Thus, confinement may be deemed necessary to prevent an unauthorized absence and arguably a consequent SOFA violation.[18]

The *Manual* and the Uniform Code of Military Justice (UCMJ) do not address preindictment confinement[19] in contemplation of foreign criminal proceedings.[20] Yet, the SOFA's custody rubric becomes potentially unworkable without positive guarantees of an accused's presence by United States Armed Forces. When circumstances warrant confinement, faithful adherence to all unambiguous provisions of law can place commanders in a quandary. The SOFA imposes a responsibility to both safeguard and guarantee the presence of suspected service members,[21] but neither the *Manual* nor any other statute specifically imbues commanders with authority to incarcerate service members on behalf of another government.

In the early 1960s, the United States military branches were in agreement that preindictment confinement must be based on

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[13] *See also* SOFA, *supra* note 3, Agreed Minutes (referring to art. XVII, ¶ 5). This provision also applies to civilian component personnel. The United States does not have a parallel policy for preindictment confinement of Department of Defense employees or other civilians accompanying forces that are in United States custody.

[14] *Id.*

[15] *Id.* art. XVII, ¶ 5(a).

[16] *See also* UNITED STATES FORCES JAPAN POLICY LETTER 110-1 (2 June 1993).

[17] Lesser forms of restraint are not discussed here because military authority to limit liberty without specific authority has long been recognized. *See, e.g.*, United States v. Murphy, 18 M.J. 220, 229 (C.M.A. 1984) (daily requirements of military service "to some extent curtails [a service member's] freedom of will").

[18] An instruction from the commander of United States Naval Forces Japan states that, under the SOFA, United States forces are "required" to "keep United States Naval Forces personnel suspected of committing a crime available." Instruction, Commander, Naval Forces Japan, COMNAVFORJAPANINST 5820.16D, para. 0403 (undated) [hereinafter COMNAVFORJAPNINST 5820.16D].

[19] The term *preindictment confinement* is used in this article to mean confinement ordered by United States authorities pursuant to the SOFA prior to indictment by a Japanese court in a case where the Japanese are expected to exercise primary jurisdiction.

[20] It could be argued that Article 10 of the UCMJ prohibits mere custodial incarceration. Article 10 provides:

> When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

UCMJ art. 10 (1988). This article only discusses the constitutional argument against current construction of the SOFA because it is less easily assailed. *See generally* Gerald C. Coleman, *Custody Provisions of Status of Forces Agreements as Authority to Confine U.S. Military Personnel Abroad*, 17 MIL. L. AND L. OF WAR REV. 441 (1978) (rebutting claim of SOFA conflict with domestic statute).

[21] The Navy's instruction regarding confinement on behalf of Japanese authorities mentions United States embarrassment because of a failure to "impose sufficient restraint" in past instances. COMNAVFORJAPANINST 5820.16D, *supra* note 18, para. 0403.

the UCMJ to be lawful.[22] Since that time, the Departments of the Army and Navy have completely reversed their positions, viewing the SOFA itself as authority to confine.[23] The shift, while convenient in providing a basis for United States pretrial confinement assistance to the Japanese, appears haphazard in its evolution. Each service has a different policy, none of which adequately addresses all legal concerns.

The Air Force prohibits commanders from confining airmen solely in contemplation of a foreign prosecution.[24] If confinement is deemed necessary, but there is no basis for charges pursuant to the UCMJ, Air Force regulations prohibit commanders from exercising custody on behalf of foreign authorities.[25] While this is perhaps the most constitutionally defensible policy, it appears to violate the SOFA's mandate that the United States "shall" retain custody until indictment by Japan.[26]

By contrast, Navy and Marine Corps policy, which affects the greatest number of service members in Japan, gives unlimited authority to the commander.[27] The Department of the Navy has issued no written instruction on preindictment confinement,[28] and the local instruction governing naval forces in Japan simply provides a pithy advisement that commanders are not bound by the *Manual* when they dictate the terms of preindictment custody. In selecting an appropriate form of restraint, commanders are guided by the following:

> Should restraint be considered appropriate, it should be the minimum necessary to ensure: (a) that the goals of justice and discipline are met; and (b) *that the command will fulfill the obligation of the United States to produce the accused when required.*[29]

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[22] In his article, "Custody Provisions of Status of Forces Agreements as Authority to Confine U.S. Military Personnel Abroad," Lieutenant Colonel G.C. Coleman cites two memoranda revealing the history of the military's position (Memorandum, Staff Judge Advocate, United States Army, Europe, subject: Confinement of United States Forces Personnel (19 Jan. 1962); Memorandum, The Judge Advocate General, United States Air Force, to The Judge Advocate General, United States Army, subject: Confinement Authority of United States Commanders in Germany (15 Jan. 1962) (on file at Headquarters, Department of the Army, Office of The Judge Advocate General). Lieutenant Colonel Gerald C. Coleman, *Custody Provisions of Status of Forces Agreements As Authority to Confine U.S. Military Personnel Abroad*, 17 MIL. L. AND L. OF WAR REV. 441 (1978), *See also* R. Heath, *Status of Forces Agreements As a Basis for United States Custody of an Accused*, 49 MIL. L. REV. 45 (1970) (describing earlier position that the SOFA did not confer authority to confine).

[23] The Department of the Navy was first to adopt the stance that the various SOFAs were self-executing and thus provided independent authority for preindictment confinement. *See* Coleman, *supra* note 20. Coleman cites authority for the Navy shift as: "Opinion JAG:101:GEH:SRR, from Judge Advocate General, United States Navy, to Commandant of the Marine Corps." *Id.*; *see* COMNAVFORJAPANINST 5820.16D, *supra* note 18. The United States Army subsequently reexamined the nature of the various SOFA custody provisions and similarly concluded that the SOFA itself authorized preindictment confinement. Coleman, *supra* note 20.

[24] Telephone Interview with Mr. Richard Erickson, Deputy Director, International and Operational Law Division, United States Air Force (Oct. 10, 1995). DEP'T OF AIR FORCE, REG. 110-25, JUDGE ADVOCATE GENERAL ACTIVITIES: PRETRIAL CUSTODY POLICY OVERSEAS, para. 3 (23 Apr. 1973), stated, in part, the following:

> The Air Force will not incarcerate an individual as the result of a sentence or other order of a foreign court or request of foreign government authorities. Therefore, if there is no basis for confinement pursuant to charges under the UCMJ, Air Force authorities will not seek or accept custody of Air Force personnel from foreign authorities in the following circumstances:
>
> a. When release of custody by foreign authorities is on the condition that the individual be placed in an Air Force confinement facility.
>
> b. When, because of the nature and gravity of the offense charged or other factors, the USAF commander concerned determines that pretrial confinement is necessary.

Air Force Regulation 110-25 and *Air Force Regulation 110-28, Judge Advocate General Activities: Military Legal Advisers in Foreign Criminal Jurisdiction Cases* (12 Dec. 1974), were combined recently in *Air Force Instruction 51-703, Foreign Criminal Jurisdiction* (6 May 1994), as part of the Air Force initiative to streamline regulations. The policy cited in paragraph 3 of *Air Force Regulation 110-25* was not repeated in the new instruction—not because it is no longer valid, but for the sake of brevity in the new system of instructions. Interview with Mr. Erickson, *supra*.

[25] This is rarely the case, however, since serious offenses calling for confinement are also likely to warrant charges pursuant to the UCMJ. While asserting a policy of not confining purely on behalf of a foreign country, the Air Force is not deterred from claiming that rationale for confinement in defending a speedy trial claim. *See* United States v. Thomas, 43 M.J. 62 (1995) (Under German procedures, Thomas received both German and U.S. probable cause hearings promptly after confinement).

[26] SOFA, *supra* note 3, art. XVII, ¶ 5(c).

[27] COMNAVFORJAPANINST 5820.16D, *supra* note 18, para. 0403.

[28] *See generally* SEC'Y OF NAVY, INST. 5820.4G, LEGAL SERVICES: STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (15 Dec. 1989). *Instruction 5820.4G*, a joint regulation, discusses the exercise of foreign jurisdiction against United States citizens, but only clarifies the various roles and rights of those citizens. It does not discuss command authority regarding accuseds under United States custody. *See also* DEP'T OF ARMY, REG. 27-50, LEGAL SERVICES: STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (15 Dec. 1989). Ironically, while pertinent orders and practice in the field regularly leads to confinement pursuant to the SOFA, Headquarters, Marine Corps, Military Justice Section, issued a written opinion that the United States Marine Corps *cannot* legally confine a military member for a host government under authority of a SOFA agreement. *See* 2 RES IPSA LOQUITUR 93, 14-15 (June 1993).

[29] COMNAVFORJAPANINST 5820.16D, *supra* note 18, para. 0403.

The above considerations regarding the imposition of preindictment restraint are clearly less restrictive than those found in Rule for Courts-Martial (R.C.M.) 305 covering statutorily authorized confinement.[30] Ironically, in almost all cases, it is Japanese law that accords an accused his or her first hearing to assess the need for confinement.[31] Thus, this SOFA provision—designed to protect the rights of service members—actually can undermine normal safeguards contemplated by the *Manual* and Japanese law.[32]

Army policy concerning preindictment confinement attempts to split the difference. The Army confines troops on behalf of the Japanese[33] while utilizing a deliberative procedure that mimics but also supplants the due process provided by the *Manual.* Conspicuously absent from this procedure is a probable cause review or a hearing determination that can mandate release.[34] The Army's hearing looks only into the circumstances of confinement and seems to presume the propriety of continued incarceration. Army commanders may disregard hearing officer recommendations for release and are actually prohibited from releasing a soldier without first forwarding the matter to the secretariat level.[35]

II. Interface of Domestic and International Law

Although implicitly upheld by military courts in several cases, the legality of preindictment confinement based solely on the SOFA custody provisions is highly suspect.[36] It has rarely been attacked by an interested party, and it is unlikely that the issue will frequently arise because, viewed as a practical concern of the accused, preindictment confinement is relatively innocuous compared to the forthcoming substantive charges and custody transfer.[37] Nevertheless, the current policy may be subject to

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[30] *See generally* MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 305 (1995) (providing various procedural safeguards to service members including a probable cause hearing before a neutral magistrate).

[31] Telephone interview with Ichiro Miyoshi, Japanese Jurisdiction Officer, Marine Corps Air Station, Iwakuni, Japan (Sept. 15, 1995) (explaining that Japanese law requires a judicial hearing prior to continued pretrial confinement). *See also* SOFA, *supra* note 3, ¶ 1(a); *id.* Agreed Minutes (referencing ¶ 9) (confirming right to hearing for United States service members in Japanese pretrial confinement). Some would argue that the Army procedure provides due process, but Fourth Amendment concerns are still not met. *See also* Heath, *supra* note 22, at 74 (arguing that the Constitution does not require due process for this type of "non-punitive" confinement); Coleman, *supra* note 20, at 456 (arguing flexibility regarding due process and that a staff judge advocate and magistrate's review would adequately address due process considerations).

[32] The irony here is that the SOFA provision was clearly meant to benefit service members. Constitutional protections *should* attach once the United States actively participates in the incarceration, and Japanese protections *would* attach when incarceration is based on Japanese charges. The SOFA nullifies both protections under current interpretations.

[33] Confining "on behalf of the Japanese" is used here as a term of art. All relevant service regulations state that the decision whether or not to confine rests with the commander involved and is independent of any Japanese request for confinement. Ironically, this militates against Heath's argument. *See infra* notes 40-44 and accompanying text. Furthermore, as a matter of practice, commanders often claim to be incarcerating "on behalf" of the Japanese. However, the alleged rape mentioned at the beginning of this article did *not* result in a formal request from Japan for confinement. Telephone interview with Lieutenant Colonel Joseph Poirier, United States Marine Corps, Station Judge Advocate, Marine Corps Air Station, Iwakuni, Japan (Mar. 12, 1995). Lieutenant Colonel Poirier was also previously the appellate defense counsel in the COMA case of *United States v. Murphy,* 18 M.J. 220 (C.M.A. 1984) where the government of Japan did make such a request.

[34] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 17-3 (8 Aug. 1994) (IO1, 22 Feb. 1995) [hereinafter AR 27-10].

[35] *Id.* The Army provides a probable cause hearing attended by similar rights to those found in R.C.M. 305 for statutorily authorized confinement. However, unlike normal pretrial confinement hearings, the magistrate is directed not to inquire into probable cause to believe that the accused has committed an offense under foreign law. The magistrate determines whether there is probable cause to believe that confinement is necessary to ensure the accused's presence at trial or to obviate concerns regarding serious future criminal misconduct. *Id.* Thus, for confinement under the SOFA according to the supplemental agreement (*See supra* note 11), a probable cause hearing would have presumably taken place at indictment and the above regime would appear to comport with similar *Manual* provisions. *See* MANUAL FOR COURTS-MARTIAL, United States, pt. III (1984). However, in countries like Japan, this procedure results in incarceration without a probable cause hearing regarding the commission of an offense. Unlike parallel *Manual* provisions, commanders are not bound by a hearing officer's determination in the Army regulation. *See* AR 27-10, *supra* note 34. Thus, any claim to have complied with appropriate due process considerations must fail in those situations where the commander disregards the magistrate's recommendation.

[36] *See, e.g.*, United States v. Murphy, 18 M.J. 220 (C.M.A. 1984); United States v. Frostell, 13 M.J. 680 (N.M.C.M.R. 1982) (detention under SOFA did not represent confinement for which government was accountable for speedy trial purposes).

[37] The practice of preindictment confinement by the United States military in Japan is rarely, if ever, legally attacked for several reasons. First, military courts in the region have no jurisdiction without referral to court-martial. Second, an accused has no practical access to counsel (under the SOFA, the Japanese eventually provide the accused counsel, paid for by the United States, but this does not occur until after indictment and the consequent custody transfer). Third, a Writ of Habeas Corpus in federal district court is the only feasible judicial remedy and it is impractical considering problems of counsel and geography. Fourth, even if the above did not present barriers, an accused is likely to be more concerned about the substance of the Japanese charges than the relatively short period of incarceration in a military correctional facility (the SOFA is more likely to be seen as a help, an insulator from Japanese authority, rather than a hindrance with respect to the ultimate issue to be decided by a Japanese court). Fifth, any gains gleaned from an attack on the confinement would be short-lived because the Japanese can gain custody by merely indicting the accused. Finally, most accused would probably rather be confined in a military facility than in a foreign facility.

abuse,[38] and the likelihood of an accused's successful legal attack should not determine United States policy. The strength of the United States republic is grounded in individual liberty and, most importantly, the rule of law. Where the law is ambiguous or contradictory to individual liberty and due process, commanders and legal advisors must identify dominant principles and norms and work toward change. Therefore, analysis of the competing domestic and international legal concerns is both appropriate and necessary.

The varied treatment among the services reflects a divided opinion regarding the legality of preindictment confinement on behalf of Japan. Academic work in the area has consistently favored the practice.[39] A thoughtful discussion of the issue is found in a 1970 article by Major R. Heath where he opines that the SOFAs he examined, including Japan's, were (1) self-executing, (2) constituents of the "supreme law of the land" under Article VI, Clause 2 of the Constitution, and (3) not violative of any constitutional rights of an accused.[40] Several aspects of Heath's argument are subject to debate, such as his "self-executing" analysis and the relevance of the executive agreement status of the SOFA as opposed to that of a treaty.[41] A thorough critique, however, is not necessary here. The most important weakness in Heath's argument is found in his constitutionality explication, a flaw that moots other concerns.

International agreements cannot confer on United States officials authority beyond the reach of constitutional constraints.[42] It has long been established that the Constitution applies to both United States citizens abroad[43] and military personnel.[44] Confinement ordered by a commander implicates Fourth Amendment and due process protections, which are not adequately addressed by current United States policy regarding preindictment confinement. Therefore, United States commanders cannot claim confinement authority under the SOFA without adequately addressing applicable constitutional concerns.

Heath skirted this issue by likening preindictment confinement to internment. He relied on cases that distinguish temporary internment for security reasons and imprisonment as a punitive measure.[45] The attending circumstances of preindictment confinement elucidate the weakness of the internment argument. Unlike internment, service members are apprehended because of criminal allegations, and the SOFA provision clearly contemplates a custody transfer for the eventual purpose of punishment.[46] Likewise, the Navy instruction cited above discusses the "goals of justice and discipline" as constituent in the decision to confine.[47] Unlike internment for security, the custody in question closely parallels that of pretrial restraint under the UCMJ.

Though ultimately unpersuasive, Heath's internment analogy points to what is probably the strongest argument in favor of finding inherent authority to incarcerate under the SOFA.[48] The argument proceeds as follows. Absent any international agreement to the contrary, Japanese law applies within Japanese terri-

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[38] Although probably rare, a Japanese court could deny pretrial confinement in a situation where a United States commander might confine the service member to avoid the potential for international friction. Likewise, commanders could theoretically abuse their authority by using preindictment confinement as punishment when the commander is aware that the Japanese charges are *unlikely* to result in confinement. Finally, even with a completely appropriate application of preindictment confinement, neither Japanese courts nor courts-martial (following *Murphy*) need grant an accused with "timed served" sentence credit for time served in SOFA imposed preindictment confinement. *See* COMNAVFORJAPANINST 5820.16D, *supra* note 18, para. 0403.

[39] *See* Coleman, *supra* note 20; Heath, *supra* note 22.

[40] *See* Heath, *supra* note 22, at 87; Coleman, *supra* note 20 (arguing same conclusion).

[41] The concern regarding the executive agreement status is presumably mitigated by the NATO SOFA qualifying as a treaty, which has, in relevant areas, identical language to Japan's SOFA. Also, Japan's SOFA was included among the collateral documents submitted to the United States Senate during ratification of the Mutual Defense Treaty. *See supra* note 10. *See also* Wilson v. Girard, 354 U.S. 524, 526 (1957).

[42] *See, e.g.*, Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (treaties and other international agreements must conform to the Constitution). "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.", Reid v. Covert, 354 U.S. 1, 16 (1957).

[43] *See Reid*, 354 U.S. at 16.

[44] *See* United States v. Hiatt, 141 F.2d 664, 666 (3d Cir. 1944); United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993).

[45] *See* Heath, *supra* note 22, at 73. *See also Ex parte Toscano*, 208 F. 938 (S.D. Cal. 1913) (upholding custody provisions of the Hague Treaty of 18 October 1907 regarding the interning of belligerents by a neutral power prior to returning them).

[46] If the military is doing nothing more than interning its members on behalf of the Japanese, then the SOFA, as a "self executing" agreement should also apply to Department of Defense civilians. The fact that no one seriously considers this proposition evidences the bankruptcy of the argument.

[47] COMNAVFORJAPANINST 5820.16D, *supra* note 18, para. 0403.

[48] Heath's reliance on *Toscano* is not persuasive in light of radically different facts. The facts of *Toscano* involved United States officials interning Mexican troops who had crossed into the United States seeking asylum during the Mexican Civil War. The Supreme Court upheld the constitutionality of the act because internment was not "punishment." *Ex Parte Toscano*, 208 F. at 941. This scenario is significantly different from that in which United States citizens already are under the protections of the Constitution.

tory.[49] Japanese law properly sanctions preindictment confinement without regard for military rules of procedure or even American sensibilities. When the SOFA authorizes United States authorities to retain custody of service members, it delegates a small portion of Japanese authority to the United States. Military personnel and confinement facilities are simply used to assist the Japanese. The prisoner is still being held under authority of Japanese law and United States constitutional rules do not apply.[50]

The problem with this justification for incarceration is the absence of an agency relationship. United States authorities are often the first to apprehend or detain an individual. Viewing United States officials as mere "agents" of the Japanese does deflect some constitutional attacks on the preindictment confinement practice, but the United States has never disavowed, under any service policy or regulation, its authority to make an independent decision regarding the propriety of confinement.[51] Moreover, even Japanese law requires a judicial determination to continue custody.[52] If United States military commanders were acting only under Japanese law made applicable by the SOFA, a Japanese judicial determination would be required. Thus, Japan clearly does not view military confinement as a Japanese action. If they did, they would conduct their normal detention hearing, which does not occur under the current system until custody transfer.[53]

Finally, if confinement of service members was grounded in Japanese law and an agency relationship created by the SOFA, there would be no rational basis for the civilian versus military distinction regarding a commander's authority to incarcerate. Following the internment theory, Heath argued in favor of such authority as inherent in the SOFA. He saw no import in the confinee's status as civilian or military.[54] Yet, no commander would readily confine a civilian citizen of the United States based solely on authority presumably granted by the SOFA. This logical inconsistency undermines current Department of Defense policy regarding preindictment confinement under the SOFA.

Once the services admit that preindictment confinement by the military is a United States government action, constitutional limitations and guarantees apply. Here, the inadequacy of current procedures is manifest. Since 1970, the United States Supreme Court has expanded the sophistication of military pretrial confinement jurisprudence. In *Gerstein v. Pugh*,[55] the Court held that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended physical restraint following a warrantless arrest. The military falls squarely

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[49] *See* AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206, comment (b) (1986) (defining sovereignty as "a state's lawful control over its territory generally to the exclusion of other states"); *See also* Wilson v. Girard, 354 U.S. 524, 529 (1957) (finding that a sovereign nation has "exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or implicitly consents to surrender its jurisdiction"); Schooner Exchange v. McFaddon, 7 Cranch (1812) ("The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself.").

[50] At one time, the doctrine of "extra-territoriality" held that permission to station foreign troops was deemed a ceding of a portion of jurisdiction. *See* Coleman v. Tennessee, 97 U.S. 509, 515 (1878). This doctrine is currently in question. *See* Lauritzen v. Larsen, 345 U.S. 571, 584-85 (1952); *See also* DEP'T OF ARMY, PAMPHLET 27-161-1, LAW OF PEACE, 11-1 (Sept. 1979). *But See* MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 201(d) analysis, app. 21, at A21-8 (1995) ("With respect to the exercise of jurisdiction by the United States or a foreign government, *Wilson v. Girard*, 354 U.S. 524 (1957), establishes that the determination of which nation will exercise jurisdiction is not a right of the accused.") The doctrine of extra-territoriality of jurisdiction recently was discussed favorably as a necessary constituent to the discipline and accountability of forces deployed in foreign jurisdictions. *See also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, 352 (1995). Under this doctrine, the argument against using the internment analogy proceeds *a fortiori* because the foundation of Japanese sovereign jurisdiction must be specifically identified in the SOFA.

[51] For example, the Army's regulation clearly imbues the designated commanding officer with discretion to confine or release. Even the decision of whether to coordinate with the host country authorities is a matter within the commander's discretion. AR 27-10, *supra* note 34.

[52] Article 203, paragraph 1, of the Japanese Code of Criminal Procedure, requires apprehending law enforcement personnel to present sufficient evidence of probable cause to a prosecutor within forty-eight hours. Under Article 205, the prosecutor then has twenty-four hours to either release the accused or secure a judicial probable cause determination and order of confinement. Finally, Article 208 requires prosecutors to indict within ten days of the judicial determination to confine. The court can grant a ten-day extension, but the accused ultimately must be released in the absence of an indictment. Telephone interview with Ichiro Miyoshi, Japanese Jurisdiction Officer, Marine Corps Air Station, Iwakuni, Japan (May 21, 1996); Keiji Soshoho, Code of Criminal Procedure, Law No. 131 of 1948, arts. 203-208 (author did not personally review this authority, but relied on the translation by Mr. Miyoshi).

[53] This may represent a significant distinction regarding other SOFAs. For example, in *United States v. Thomas*, 43 M.J. 62 (A.F. Ct. Crim. App. 1995), a probable cause hearing was conducted by a German court despite the fact that the United States retained actual custody. This is not, however, a "routine" practice in Germany. Such cases are so rare that there is simply no regular process for troops held in United States custody on behalf of Germany. Interview with Mr. Frank Burkhardt, Assistant Director, International Agreements and Policy Directorate, German Ministry of Defense (Sept. 10, 1996).

[54] Both Heath and Coleman's arguments militate in favor of not only the confinement of service members but also civilian component forces. Heath boldly encourages such a policy. Coleman begs the question, confining his discussion to incarceration of service members. *See* Heath, *supra* note 22, at 84-87; Coleman, *supra* note 20, at 443.

[55] 420 U.S. 103 (1975).

the purview of this requirement.[56] *United States v. Rexroat*[57] reaffirms the holding of *Courtney v. Williams*[58] that the Fourth Amendment's requirement for a probable cause determination is binding on the military. Rule for Courts-Martial 305 was designed to strike a balance between individual liberty and the protection of society.[59] It is ultimately the Constitution that dictates military pretrial confinement procedures; even the expansive protections of R.C.M. 305 are inadequate.[60]

Rexroat clarifies the timing of probable cause review and requires an independent decision by a neutral and detached commissioned officer within forty-eight hours of confinement;[61] the *Manual's* independent review officer hearing within seven days of confinement is inadequate.[62] While it was long believed that the *Manual's* stringent pretrial confinement procedures mooted any constitutional concerns, *Rexroat* is clearly not rooted in any *Manual* requirement but was fashioned in accordance with the constitutional forty-eight hour rule pronounced by the Supreme Court in *County of Riverside v. McLaughlin.*[63]

When early defenses of SOFA-based confinement were formulated, it is quite possible that there was a greater perception that pretrial confinement procedures were regulatory concerns. Current law, however, reaffirms that the higher authority of the Constitution governs incarceration imposed by United States military commanders. Because no service procedure provides a probable cause hearing, current policies do not comply with constitutional requirements.[64]

The United States Court of Military Appeals (COMA)[65] has notably, though tangentially, ruled contrary to the above constitutional analysis while deciding a speedy trial claim in 1984. In *United States v. Murphy*,[66] the commanding officer of a Marine Corps Air Station in Japan directed the confinement of a Marine on behalf of Japanese authorities who were investigating drug charges that fell under Japan's primary jurisdiction. Although never prosecuted by the Japanese, Murphy was tried and convicted at a court-martial for related charges. On appeal, the question arose as to whether pretrial confinement initiated at the request of the Japanese amounted to illegal physical restraint as a constituent in a speedy trial calculation.[67] In reaching its decision that the speedy trial provisions were not violated, the COMA held as follows:

> The power of the commander to confine a serviceperson at the request of a foreign government for the purpose of the exercise of foreign criminal jurisdiction is included within the definition of "custody" which comes from the treaties in force and exists independently of the Uniform Code of Military Justice.[68]

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[56] *See, e.g.*, United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993) (applying to the military the forty-eight hour hearing requirement of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)).

[57] 38 M.J. 292 (C.M.A. 1993).

[58] 1 M.J. 267 (C.M.A. 1976).

[59] *See* MANUAL FOR COURTS-MARTIAL, United States, app. 21-16, Analysis Rule 305, para. 2. (1995).

[60] *Id.*

[61] *Id.*

[62] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 305 (1995) (providing various procedural safeguards to service members including a probable cause hearing before a neutral magistrate).

[63] 500 U.S. 44 (1991).

[64] Although beyond the purview of this article, an interesting issue is the relevance of other aspects of pretrial confinement procedure in current military practice. That is, to what extent are other regulatory requirements constitutionally based?—a question not addressed by the Supreme Court so long as the regulatory requirements are met and potential plaintiffs or accuseds lack standing. For example, R.C.M. 305, besides mandating a probable cause determination, requires a finding that confinement is necessary under the circumstances. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 305 (1984). The area of counsel rights is also likely to yield fertile ground for analysis.

[65] On 5 November 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For purposes of this article, the name of the court at the time that a particular case is decided is the name that will be used in referring to that decision. *See* United States v. Sanders, 41 M.J. 485, 485 n.1 (1995).

[66] 18 M.J. 220 (C.M.A. 1984).

[67] *See also* United States v. Thomas, 43 M.J. 62 (A.F. Ct. Crim. App. 1995) (The legality of preindictment confinement on behalf of a foreign government is not addressed); United States v. Frostell, 13 M.J. 680 (N.M.C.M.R. 1982) (military not accountable for detention pursuant to SOFA under speedy trial analysis).

[68] United States v. Murphy, 18 M.J. 220, 233 (C.M.A. 1984).

In *Murphy*, the COMA relied heavily on the reasoning of Heath's article.[69] The article cited federal cases addressing the authority of the United States Armed Forces to return service members who have fled a foreign jurisdiction during proceedings.[70] The COMA's argument lacks cogency because the cited instances of government action do not necessarily run afoul of constitutional guarantees as does the preindictment confinement discussed here.[71] While upholding a common-sense approach to the SOFA in the absence of implementing regulations, *Murphy* begs the hard questions regarding the SOFA's constitutionality in the preindictment confinement context.[72]

Even assuming that the COMA's finding in *Murphy* was both legally sound and persuasive for preindictment scenarios, the inconsistent preindictment confinement practices among the three service departments is not justifiable. In upholding the military's authority to incarcerate under the SOFA in *Murphy*, Senior Judge Cook made the unusual recommendation that the Departments of Defense and State establish procedures to limit excesses in the area.[73] Unfortunately, in over ten years since *Murphy*, little if anything has been done toward that end.

III. Conclusion

It is time that the United States correct an inconsistent and legally discreditable policy regarding overseas preindictment confinement pursuant to the SOFA. While actual injury wrought against military members may be extremely rare, the current policies and practices do violence to American notions of fairness and constitutional principles. Service members are incarcerated without due process under the rationale that the United States is protecting their interests as well as international comity concerns. At the same time, Japanese society offers due process protections which are at least technically adequate but are bypassed by the absence of an alternative procedure. Under such a policy, the United States loses on every front: service members are denied constitutional protections, yet Japan complains of preferential treatment for military personnel. The SOFA with Japan, or at least the attendant understandings, should be modified to allow flexibility regarding the United States decision to take custody.[74] This should be coupled with a Department of Defense implementing regulation that ensures the SOFA cannot be used to defeat a service member's rights under the Constitution.

In October 1995, the United States, without reopening the SOFA for negotiation, agreed to a policy in which the United States will give "sympathetic consideration" to any request by Japan for the transfer of custody prior to indictment of the accused in "specific cases of heinous crimes of murder or rape."[75] While this policy obviates the specific constitutional issues of some cases discussed earlier, it leaves intact the same concerns for cases involving lesser crimes or those situations not involving a Japanese request for custody transfer. Moreover, this policy fails to remedy the disparate service positions and does nothing to correct similar problems associated with other SOFAs. Most importantly, this remedy abandons the practical protections embraced by United States custody policy.

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[69] Heath, *supra* note 22.

[70] *See, e.g.*, United States *Ex rel.* Stone v. Robinson, 309 F. Supp. 1261 (W.D. Pa. 1970) (denying writ of habeas corpus challenging Air Force apprehension and return to Japan of airman who had illegally fled Japan after Japanese conviction for robbery and attempted rape). A postconviction case does not implicate the same constitutional concerns, especially when the military is dealing only with apprehension as opposed to continued, indefinite preindictment confinement. *See also* Holmes v. Laird, 459 F.2d 1211, 1216 n.32 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (citing several cases sanctioning surrender of American servicemen for foreign trial pursuant to the SOFAs).

[71] Judge Rosenberg suggested that slightly different circumstances than those in *Stone* might indeed warrant review. "I hold, however, that it is incumbent upon Federal courts to examine the legal custody of members of the Armed Forces under exceptional circumstances in order to preserve the constitutional rights of such individuals." *Murphy*, 18 M.J. at 233.

[72] Realizing that in the majority of instances an accused is arguably better off in United States custody, we should recognize that *most* procedural safeguards are designed to prevent abuse in the rare instance when it might occur. Both Japanese and United States law require a hearing to continue pretrial confinement. This is not because a hearing is a particularly pleasurable experience for the accused but to prevent arbitrary and capricious denial of liberty.

[73] To Senior Judge Cook's credit, he mentions in a footnote in *Murphy* that one of the "troublesome areas is whether some form of preconfinement hearing is required." Unfortunately, he then declares the need redundant because the Japanese indictment serves as a probable cause determination. *Murphy*, 18 M.J. at 234 n.16. Judge Cook missed the relevant aspect of the Japanese SOFA. While the facts of *Murphy* left the accused in United States custody *after* indictment, that fact pattern was an aberration from the one envisioned by the language of the SOFA which would primarily involve *preindictment* custody.

[74] This flexibility probably already exists in the understanding of both parties to the SOFA, but a strict reading of the SOFA and its attendant understandings implies no discretion. *See supra* note 25.

[75] Press Office, United States Information Service American Embassy, Tokyo, United States Embassy Press Statement (Oct. 25, 1995) (on file with author). In Japanese criminal court, the Marines and sailor were eventually indicted, tried, and convicted of "rape resulting in injury." On 7 March 1996, the Japanese court awarded seven years confinement to two of the service members and six and one half years to the third. *See The Status Quo Remains on Trial; Sentencing in Rape Case Will Not Solve the Okinawa Problem*, LOS ANGELES TIMES, Mar. 8, 1996, at B8; Telephone interview with Captain Troy Taylor, United States Marine Corps, Office of the Staff Judge Advocate to the Commandant (May 20, 1996).

We need not remedy this constitutional deficiency at the expense of the practical benefits service members receive by avoiding Japanese custody. Apologists for the SOFA's confinement authority have compared preindictment confinement to internment under the Hague Treaty.[76] If an analogous model is sought, I suggest looking to prisoner transfer treaties[77] and the legislation implementing the various prisoner transfer agreements between the United States and foreign governments.[78]

These procedures both accord prisoners the ability to avoid foreign confinement and protect the government from constitutional attack by requiring consent of the prisoner prior to any United States action.[79] Americans can obtain the benefit of having United States authorities execute some of the foreign state's governmental functions but only through knowing and voluntary consent. Regulations implementing United States confinement of preindictees could follow this pattern by requiring the consent and the concomitant waiver of applicable due process rights before the United States would agree to incarcerate on behalf of the Japanese government. Under such a system, the "protections" negotiated in international agreements are potentially available to the service member, but they can never be used to undermine a constitutional right.

The prisoner transfer model is but one of many constitutionally defensible solutions. Status of Forces Agreements could be renegotiated to confer all preindictment custody authority on the host government, but this would fail to address practical concerns of service members in countries with less than admirable judicial processes. Adequate procedural safeguards could be incorporated into current practice, but this might put United States international agreements at risk due to Supreme Court decisions in the criminal procedure realm.[80]

I believe the best policy is one that requires either consent or a hearing identical to that found in R.C.M. 305. Consent could in fact take the form of a waiver of the probable cause hearing so no unusual procedures need be added to the assembly of hearings currently practiced under the *Manual*. Should an accused elect the hearing, the command must be bound by the decision of the hearing officer. However, a decision to release can, pursuant to the SOFA, be essentially transformed into a transfer of custody. Under any circumstance, the accused controls his or her own fate. If an accused is confined, it will only be because he or she elected to waive a pretrial confinement hearing, failed to obtain release during a constitutionally adequate hearing, or was turned over to the host country authorities in accordance with international law.

Regardless of the remedy chosen, there is no justification for differing policies among the services. Preindictment SOFA-based confinement procedures should derive from a single Department of Defense regulation. That policy should consider the interests of our service members, international comity, *and* the mandates of the United States Constitution.

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[76] *See supra* note 45 and accompanying text.

[77] *See, e.g.*, Treaty on the Execution of Penal Sentences, Nov. 25, 1976, U.S.-Mex., 28 U.S.T. 7399; Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, arts. 2, 3, 7, T.I.A.S. 10824 (requiring prisoner consent prior to transfer) [hereinafter Transfer Treaty].

[78] *See, e.g.*, 18 U.S.C. § 4108 (1977 & Supp. 1988) (requiring verification of consent of offender prior to transfer to United States including verifying officer inquiry into voluntariness and advice of right to counsel); *See also* 10 U.S.C. § 955 (1977 & Supp. 1980) (discussing transfer of military prisoners and requiring they be treated as sentenced prisoners under the UCMJ).

[79] *See, e.g.*, Pfeifer v. United States Bureau of Prisons, 615 F.2d 873 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980) (consent to transfer in the U.S.-Mexico transfer treaty equates to waiver of any constitutional rights regarding conviction). *See generally* Gregory Gelfand, *International Penal Transfer Treaties: The Case for an Unrestricted Multilateral Treaty*, 64 B.U. L. Rev. 563 (1984) (discussing constitutionality of prisoner transfer treaties). The Convention on the Transfer of Sentenced Persons requires that consent be voluntary with "full knowledge of the legal consequences thereof." Transfer Treaty, *supra* note 77, art. 7.

[80] Most current SOFAs provide an example of this potential conflict. A Supreme Court decision may mandate a probable cause hearing, but most SOFAs do not limit United States responsibility for custody and guaranteed presence at trial based on the results of such a hearing. Thus a constitutionally mandated hearing may require release, but the United States may be enjoined from effecting that release by SOFA provisions requiring custody. Of course this could be remedied by turning the "release" into a "transfer of custody." The practical effect of such a policy would probably be the same as that of a rights waiver; *i.e.*, accused might regularly waive a hearing so as to avoid the potential of custody transfer. However, accuseds might elect the hearing if they thought the Japanese would not actually require preindictment confinement. The accused's success at a hearing would serve as a valuable check on an overly cautious command decision to confine.

Business Entertainment Expense Deductions by Service Members

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Introduction

The two martini lunch is probably the best known, if not the most controversial, tax deduction taken by the business community. Civilian professionals customarily conduct business during lunch, dinner, or parties with clients, associates, and staff members. Expenses incurred during these occasions, which involve entertainment and social activities, are deductible generally as ordinary and necessary costs of doing business.[1]

The military community also has its own unique customs and ways of doing business. These rules of military occupational and social engagement are both regulatory[2] and traditional.[3] This article examines some of these customs and discusses the application of sections 162 and 274[4] of the Internal Revenue Code (Code) to the expenses incurred by service members at command and staff socials.[5]

Statutory and Regulatory Provisions

Under the Code, tax deductible "entertainment" expenses include any amusement or recreation activity.[6] Entertainment activities can occur in a taxpayer's home,[7] as well as at theaters, social clubs, sporting events, and vacation trips. The activity does not have to be particularly entertaining nor does the activity have to qualify as public relations or as advertising to qualify as a deductible business expense.

The Internal Revenue Service (IRS) uses an objective test in considering the trade or business in which the taxpayer is engaged to determine whether an activity is "entertainment" under the Code. Entertainment expenses are deductible if (1) they are ordinary and necessary expenses of the taxpayer's business that qualify for deduction under section 162[8] *and* (2) they meet the strict deduction rules of section 274. Some entertainment business expenses are excluded by section 274 and will be discussed below.

Broadly defined, "ordinary and necessary expenses" are customary expenses that are appropriate and helpful to one's trade or business. "Customary expenses" are those incurred in normal day-to-day business activities. In the military, ordinary and necessary business expenses are those personal costs required by military custom and courtesy, such as purchasing calling cards[9] and money spent at social activities such as dinings, balls, ceremonies, professional development seminars, and other like social events.

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*This article originally was begun when the author was the Deputy of the Legal Assistance Division, Office of The Judge Advocate General.

[1] *See* 26 U.S.C. § 162 (1993).

[2] *See* DEP'T OF ARMY, REG. 600-25, SALUTES HONORS AND VISITS OF COURTESY (1 Oct. 1993) [hereinafter AR 600-25].

[3] *See* L.P. CROCKER, THE ARMY OFFICER'S GUIDE 11-19, 58-76 (46th ed. 1993).

[4] 26 U.S.C. §§ 162, 274 (1993).

[5] The scope of this article is limited to business entertainment expenses. For a general overview of employee business expenses, *see* Forrester, *Deducting Employee Business Expenses*, 132 MIL. L. REV. 289 (1991).

[6] *See generally* 26 U.S.C. § 274 (1993).

[7] *See, e.g.*, Andress v. C.I.R., 423 F.2d 679 (5th Cir. 1970).

[8] I.R.C. § 162(a) reads in part: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

[9] *See supra* note 2 at para. 4-2.

Although the general rule is that a taxpayer must engage in an activity for profit to be considered a trade or business, the term "trade or business" includes professional services or trades like military service even though it is a salaried occupation.[10] Accordingly, service members and other government employees may deduct their ordinary and necessary business expenses under section 162 just like civilian professionals.[11]

Once an entertainment expense meets the broad ordinary and necessary business expense test of section 162, it must then pass the stringent requirements of section 274 to qualify as a deductible expense.[12]

The Code clearly creates two classes of entertainment expenses. Generally, entertainment expenses must be "directly related" to the pursuit of one's trade or business. However, in the case of an expense "directly preceding or following a substantial and bona fide business discussion," it must only be "associated with" the taxpayer's business to qualify as a tax deduction. Correctly applying the "directly related" and "associated with" standards of section 274(a) is essential to determine whether a purported entertainment expense qualifies as a business expense deduction.

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[10] *See* 26 U.S.C. § 7701 (a)(26)(1986); Frank v. United States, 577 F.2d 93 (9th Cir. 1978). When the court examined the issue of whether the individual seeking the deduction received compensation for those duties, it referred to an analysis of Section 48(d), the predecessor to Section 7701(a)(26). "Thus, full-time and many part-time military and civilian officers and employees of the Government are regarded as engaged in a trade or business, even though they are not compensated for their services." *Frank*, 577 F.2d at 96, *citing* Rev. Rul. 109, 1995-1 Cum. Bul. 262.

[11] *Frank*, 577 F.2d at 95-96.

[12] I.R.C. § 274 states in part:

(a) ENTERTAINMENT, AMUSEMENT, OR RECREATION.

(1) IN GENERAL. No deduction otherwise allowable under this chapter shall be allowed for any item—

(A) Activity. With respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), that such item was associated with the active conduct of the taxpayer's trade or business, or

(B) Facility. With respect to a facility used in connection with an activity referred to in subparagraph (A).

In the case of an item described in subparagraph (A), the deduction shall in no event exceed the portion of such item which meets the requirements of subparagraph (A).

(2) SPECIAL RULES. For purposes of applying paragraph (1)—

(A) Dues or fees to any social, athletic, or sporting club or organization shall be treated as items with respect to facilities.

(B) An activity described in section 212 shall be treated as a trade or business.

(C) In the case of a club, paragraph (1)(B) shall apply unless the taxpayer establishes that the facility was used primarily for the furtherance of the taxpayer's trade or business and that the item was directly related to the active conduct of such trade or business.

(3) DENIAL OF DEDUCTION FOR CLUB DUES. Notwithstanding the preceding provisions of this subsection, no deduction shall be allowed under this chapter for amounts paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose.

. . . .

(d) SUBSTANTIATION REQUIRED. No deduction or credit shall be allowed—

. . . .

(2) for any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity,

. . . .

unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility . . . , (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of the persons entertained . . . .

(e) SPECIFIC EXCEPTIONS TO APPLICATION OF SUBSECTION.

(A) Subsection (a) shall not apply to—

(1) Food and Beverages for Employees. Expenses for food and beverages (and facilities used in connection therewith) furnished on the business premises of the taxpayer primarily for his employees.

. . . .

(k) BUSINESS MEALS.

(1) IN GENERAL. No deduction shall be allowed under this chapter for the expense of any food or beverage unless—

(A) such expense is not lavish or extravagant under the circumstances, and

(B) the taxpayer . . . is present at the furnishing of such food or beverages.

Legislative History

The "associated with" requirement of section 274(a)(1)(A) is the result of congressional compromise. Section 274 was enacted in 1962[13] under pressure from the President to end abuse associated with entertainment expense tax deductions.[14]

The House of Representatives responded with a bill to disallow any deduction for the cost of entertainment expenses associated with a business or trade unless it was "directly related" to the "active conduct" of the business or trade.[15] The Senate, agreeing with the President in principle, determined that the House's bill was too harsh. Believing that "goodwill" entertainment fostered business income, which in turn produced more taxable revenue, the Senate proposed the "associated with" standard for entertainment expense tax deductions if the taxpayer could substantiate "a reasonable expectation of deriving some income" because of the expenditure.[16]

The House version was modified and adopted with the "associated with" language[17] Congress rejected the vague concept that an expense should be deductible if some reasonable expectation of deriving income was present in favor of the more readily definable "active conduct of business" standard. Therefore, an entertainment expense associated with the active conduct of business, regardless of whether business is actually transacted during the entertainment, is deductible if the entertainment directly precedes or follows a substantial and bona fide business discussion.

"Directly Related" Standard

Treasury Regulations following section 274 of the Code emphasize the "active pursuit of business" intent of the statute and state the following:

> At the time the taxpayer made the entertainment expenditure (or committed himself to make the expenditure), the taxpayer had more than a general expectation of deriving some income or other specific trade or business benefit (other than the goodwill of the person or persons entertained) at some indefinite future time from the making of the expenditure. A taxpayer, however, shall not be required to show that income or other business benefit actually resulted from each and every expenditure for which a deduction is claimed.[18]

The requirement that the expenditure be more than a goodwill venture with hopes of future business income is further emphasized in *Treasury Regulation 1.274-2(c)(7)* as follows:

> Expenditures for entertainment, even if connected with the taxpayer's trade or business, will generally be considered not directly related to the active conduct of the taxpayer's trade or business if the entertainment occurred under circumstances where there was little or no possibility of engaging in the active conduct of trade or business. The following circumstances will generally be considered circumstances where there was little or no possibility of engaging in the active conduct of a trade or business:
>
> (i) The taxpayer was not present;
>
> (ii) The distractions were substantial, such as—(a) A meeting or discussion at night clubs, theaters, and sporting events, or during essentially social gathering such as cocktail parties, ...[19]

Without the active involvement of the taxpayer seeking the deduction in a bona fide business discussion, the entertainment expense will not pass the "directly related" test of section 274.

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[13] Revenue Act of 1962, Pub. L. 87-834, § 4; 76 Stat. 960.

[14] S. REP. No. 87-1881 (1962) *reprinted in* 1962 U.S.C.C.A.N. 3304, 3327.

[15] H.R. REP. No. 87-1447 (1962) *reprinted in* 1962-63 C.B. 495, 423-430; *See generally*, St. Petersburg Bank & Trust Co. v. United States, 362 F. Supp. 674, 677 (M.D. Fla. 1973), *cert. denied*, 423 U.S. 834 (1975).

[16] *St. Petersburg Bank & Trust Co.*, 362 F. Supp. at 678.

[17] H.R. CONF. REP. No. 87-2508 (1962) *reprinted in* 1962 U.S.C.C.A.N. 3723, 3735-36; *St. Petersburg Bank & Trust Co.*, 362 F. Supp. at 678.

[18] Treas. Reg. § 1.274-2(c)(3)(i) (1985).

[19] *Id.* § 1.274-2(c)(7).

"Associated With" Standard

The less strict "associated with" standard of section 274 permits some deductions of essentially goodwill gestures. Treasury regulations define "associated entertainment" as follows:

> Generally, any expenditure for entertainment, if it is otherwise allowable under chapter 1 of the Code, shall be considered associated with the active conduct of the taxpayer's trade or business if the taxpayer establishes that he had a clear business purpose in making the expenditure, such as to obtain new business or to encourage the continuation of an existing business relationship. However, any portion of an expenditure allocable to a person who engaged in the substantial and bona fide business discussion . . . shall not be considered associated with the active conduct of the taxpayer's trade or business. The portion of an expenditure allocable to the spouse of a person who engaged in the discussion will, if it is otherwise allowable under chapter 1 of the Code, be considered associated with the active conduct of the taxpayer's trade or business.[20]

Limiting the "associated with" deduction is the requirement that the entertainment expense directly precede or follow a substantial and bona fide business discussion. The IRS makes a case-by-case determination whether a meeting or discussion is a "substantial and bona fide business discussion."[21] The timing of such discussions also is reviewed:

> Entertainment which occurs on the same day as a substantial and bona fide business discussion will be considered to directly precede or follow such discussion. If the entertainment and the business discussion does not occur on the same day, the facts and circumstances of each case are to be considered, including the place, date and duration of the business discussion, whether the taxpayer or his business associates are from out of town, and if so, the date of arrival and departure, and the reasons the entertainment did not take place on the day of the business discussion. For example, if a group of business associates comes from out of town to the taxpayer's place of business to hold a substantial business discussion, the entertainment of such business guests and their wives on the evening prior to, or on the evening of the day following the business discussion would generally be regarded as directly preceding or following such discussion.[22]

After qualifying as a deductible entertainment expense under sections 162 and 274, the amount of the deduction is limited. The allowable deductible amount for any food or beverage may not exceed fifty percent of the amount otherwise claimed as a deduction.[23]

Application to the Military

Expenses for the entertainment of employees (soldiers and civilians) incurred by an employer (whether a commander, staff section chief, or the head of a branch office or comparable unit) are deductible provided the entertainment is not lavish nor extravagant. Buying subordinates a meal during duty hours, when unit or office business is discussed, should be considered as engaging in the active pursuit of one's profession under section 162 of the Code. Section 274(e)(1) exempts application of the entertainment expense rules to this business expense if the meal was eaten in a facility conducive to a business discussion. An officer's club or unit dining facility should qualify as such an establishment.

Meals or drinks furnished to members of the staff directly preceding or following the duty day would also qualify as deductible entertainment expenses if the leader intended the gathering to produce a direct benefit to his or her organization. Improved morale, esprit de corps, and the development of junior officers are all tangible benefits derived from such gatherings, which further the organization's productivity. Although there is rarely, if ever, an office social hour where business is not discussed, which may satisfy the "directly related" test, expenses for after-duty beverages or food would clearly be "associated with" the active conduct of morale, welfare, and recreation and thus be deductible.

Entertainment of employees or subordinates outside the military's customary workday setting becomes more tenuous to the "active conduct" of the military profession. In the civilian sector, expenditures for employee entertainment at picnics,[24]

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[20] *Id.* § 1.274-2(d)(2).

[21] *Id.* § 1.274-2(d)(3)(i)(a).

[22] *Id.* § 1.274-2(d)(3)(ii).

[23] 26 U.S.C. § 274(n)(1) (1993).

[24] *See* Bowman v. C.I.R., 16 B.T.A. 1157 (1929).

dances,[25] and Christmas parties[26] have been held to be deductible. The rationale in each case was that the event, while not business in nature, provided a direct business benefit through improved morale and served as an inducement to efficient job performance. In the military, similar activities produce the same results for soldiers, civilian employees, and their families. Consequently, leaders who provide social gatherings for all or selected organizational members and their families should be entitled to deduct those reasonable costs associated with the function as a business entertainment expense.[27]

On the other hand, a taxpayer is not allowed to deduct the expense of a party merely because he or she invited a few employees to attend.[28] Cocktail or dinner parties are by definition social occasions that must pass the "directly related" to or "associated with" business tests of section 274, unless the occasion complies with the narrow exceptions of section 274(e). Parties for the benefit of friends, even if there is a possibility of working with or for one of the individuals at a later date, do not pass the test for the "active conduct" of one's current trade or business. Inviting a few associates or employees to an otherwise purely social affair will not pass the "associated with" standard of section 274 merely because these employees might discuss business with their host, employee, or other guests.[29]

Cost of entertainment provided for soldiers, civilian employees, and family members should be deductible business expenses, regardless of whether the entertainment occurs at the conclusion of a duty day.[30] Like any business expense, the taxpayer must have an expectation of deriving some specific professional benefit as a result of the activity. Fostering goodwill alone will not suffice. In the case of Saturday or Sunday cocktail or dinner parties, the affair must be "directly related" to the conduct of one's business. The "associated with" standard, which is the exception and not the general rule, does not apply because the party does not immediately follow a business discussion or workday.[31] The specific directly-related benefit to be derived from such gatherings is the morale-boosting, interpersonal relationships developed between the boss and his or her subordinates and among the subordinates and their families, all of which leads to greater harmony, understanding and office productivity.

Entertaining guests who are at a location on temporary duty, a common military tradition, falls under the "associated with" standard of section 274. Provided the expense was associated with the active pursuit of business, a business entertainment expense deduction would be allowed even if the entertainment was not provided on the day business was transacted.[32]

Individual Expenses

Questions are often asked about expenses borne by the individual service member that are business related and of a quasi-entertainment nature. Such expenses include officer club dues, the costs of dining-ins or dining-outs, hails and farewells, promotion parties, retirement parties, and similar functions of a "mandatory" nature.

Dues paid by service members to officer's and noncommissioned officer's clubs are not deductible business expenses.[33] Membership in these clubs is voluntary.[34] Service members generally use these clubs for personal recreation and enjoyment more than for the purpose of conducting or attending business meetings. While some might contend that their use or enjoyment of the club is limited to those occasions where their attendance is expected, monthly club dues *permit* use of the facility for a wide variety of activities and not just those select occasions.

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[25] *See* Popular Dry Goods Co. v. C.I.R., 6 B.T.A. 78 (1972).

[26] *See* Haman v. C.I.R., T.C. Memo. 1972-118, *aff'g and rev'g in part*, 500 F.2d 401 (9th Cir.1974).

[27] *See* 26 U.S.C. § 274(e) (1993); Treas. Reg. § 1.274-2(f) (1985).

[28] *See* Brecker v. C.I.R., T.C. Memo. 1972-061; St. Petersburg Bank & Trust Co. v. United States, 362 F. Supp. 674 (M.D. Fla. 1973), *cert. denied*, 423 U.S. 834 (1975).

[29] *St. Petersburg Bank & Trust Co.*, 362 F. Supp at 681.

[30] I.R.C. § 274(e)(1) only exempts meals and beverages furnished on the employer's premises. With the numerous regulatory restrictions in the Army concerning the serving of food and drink to soldiers and their families in the unit area, a literal interpretation of this section to military employers would violate the statute's intent.

[31] *St. Petersburg Bank & Trust Co.*, 362 F. Supp. at 680.

[32] *See* Treas. Reg. § 1.274-2(d)(3)(ii) (1985).

[33] Rev. Rul. 55-250, 1995-1 CB 270.

[34] Dep't of Army, Reg. 230-60, The Management and Administration of the US Army Club System, para. 4-1b (1 Mar. 1981) [hereinafter AR 230-60].

Military customs and traditions[35] virtually dictate attendance at certain social functions such as hails and farewells and formal dining occasions. This expectation of attendance is reinforced by the same Army regulation that makes club membership voluntary. While use of club facilities is generally denied to those who are not members, non-members are specifically permitted to attend functions held at Army clubs that are command sponsored or directed.[36]

Expenses incurred as a result of obligatory social functions are directly related to a soldier's profession and should be deductible as business expenses. Being a good soldier is more than putting in eight to ten hours at the unit or office each day. The camaraderie associated with traditional military functions improves both unit and individual morale and is necessary to the complete fulfillment of a soldier's job in light of the Army's high expectations and demands.

The IRS, however, will review deductions for such expenses very closely to determine if they were merely voluntary personal expenses or truly ordinary and necessary expenses directly associated with the active conduct of the military profession.

Application to the Military Profession

Case law is rather limited in examining the application of the entertainment expense rules to the military profession. *Preston v. C.I.R.*[37] and *Adamson v. C.I.R.*[38] are two of the early cases that examined the deductibility of expenses related to entertainment by military personnel.

In *Preston*, an Air Force colonel, who had been the commander of several United States Air Force Hospital units and a base surgeon, deducted certain entertainment expenses for the tax years 1957 and 1958. The expenses claimed by Colonel and Mrs. Preston generally were club dues, food and drink expenditures, moneys spent on attending parties, and nursery fees for child care. The food and drink expenses were spent on behalf of themselves and associates and visitors to the base.

The Tax Court determined that Colonel and Mrs. Preston offered no evidence to prove that these expenses were ordinary or necessary business expenses. In his brief, Colonel Preston quoted from guides prepared for Air Force officers and their wives about the advisability of entertaining and attending social functions. He failed to offer these or his own statement of his understanding of the customs of the Air Force on entertainment responsibilities into evidence. The court determined that even if it assumed that such entertainment expenses were customary in the Air Force, the record presented by the Prestons contained no evidence that the expenses were necessary. "[T]he presumptive nondeductibility of personal expenses may be overcome only by clear and detailed evidence as to each instance that the expenditure in question was different from or in excess of that which would have been made for the taxpayer's personal purposes."[39]

In *Adamson*, the petitioner was the commanding officer of a naval reserve unit. Among other expenses deducted that were unrelated to his role as a military officer, he also deducted certain entertainment expenses for the cost of a dinner he gave at his home. The dinner was for all of the officers in the unit and their wives. The Tax Court noted that Navy regulations did not require a naval officer to entertain junior officers. However, Adamson believed that his actions would increase morale in the unit and help the unit function better.

The court, in rather summary fashion, denied the deduction for the party. It relied on the opinion in *Bercas v. C.I.R.*[40] in which the United States Court of Appeals for the Fourth Circuit held that a voluntary expense of an Army officer was a personal expenditure and not ordinary and necessary when the expenditure was not required by regulation or order. The decision seemed to contradict the *Preston* court's opinion that "custom" could establish the "ordinary" prong of the ordinary and necessary test.

The Tax Court resolved this difference between *Preston* and *Adamson* in *Fogg v. Commissioner of Internal Revenue*.[41] *Fogg* involved the deductibility of a Marine Corps colonel's expenses for a change of command ceremony, contributions to the squadron officers' fund, and dues for the officers' club and the Blue Angels Association.

The court held that the change of command ceremony expenses, including the cost of the reception, were deductible business expenses. The court found that the change of command

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[35] *See* CROCKER, *supra* note 3, at 83-84.

[36] AR 230-60, *supra* note 34, para. 4-5a(6)(b).

[37] T.C. Memo 1961-250.

[38] T.C. Memo 1973-107.

[39] Preston v. C.I.R., T.C. Memo 1961-250, *citing* Sutter v. C.I.R., 21 T.C. 170, 173 (1953).

[40] 165 F.2d 521 (4th Cir. 1948).

[41] 89 T.C. 310 (1987); *contra* Adamson v. C.I.R., T.C. Memo 1973-107 (cost of dinner given at personal residence by commander of naval reserve unit for the officers and spouses of the unit not deductible because expenditure was not required by naval regulations).

was directly related to Colonel Fogg's "business" of being a military officer. The court also found that the expenses were ordinary and necessary because Colonel Fogg's career might have been threatened if he had not incurred these expenses.

The court also permitted Colonel Fogg's payments to the squadron officers' fund for this same reason. However, the dues he paid to the officers' club and the Blue Angel Association were not deductible. The court found that the officers' club had a social purpose that outweighed its "business" purpose. The court did not have enough information about the Blue Angels Association to determine whether it had a business purpose and therefore held against Colonel Fogg. Remember that the taxpayer has the burden of proof to substantiate his or her deductions.

After *Fogg*, it appears that military professionals can rely on customs of the service as well as regulations and orders to establish that certain entertainment expenses are ordinary and necessary in the military profession. This would support deductions for expenses related to promotion parties and retirement parties if the military taxpayer can show that the expenses also were necessary to prove the custom of the service "requiring" such entertainment.

Another instance of recognition by the IRS that there are certain deductible expenses incurred by those in the military profession is in *Revenue Ruling 77-350* regarding personal money allowances.[42] The personal money allowance is authorized by federal statute[43] and is a flat amount paid to certain flag officers to assist them in paying for certain increased expenses—such as entertainment—that they incur because of their rank and position. Officers must be in the rank of lieutenant general or vice admiral unless they are serving in one of the positions listed in the statute. These officers receive the personal money allowance monthly without regard to the expenses they actually incur for that month. The recipients are responsible for keeping adequate records to support their personal tax returns.

Revenue Ruling 77-350 held that the personal money allowance is taxable to the extent it exceeds the actual expenses the recipient incurs. Section 162 of the Code was changed after this ruling. Now, those receiving the personal money allowance must include the entire amount in gross income and deduct the expenses associated with the personal money allowance as miscellaneous deductions. The military services must withhold income tax each month as the allowance is paid. That these expenses are recognized as deductible miscellaneous expenses supports the argument that military professionals, like civilian business professionals, do incur expenses while engaging in the "business" of defending the country.

Substantiation

Section 274(d) requires that the taxpayer keep adequate records to corroborate his or her deduction. In particular, the amount expended, the date and location of the event, the business purpose of the expense, and the business relationship of those entertained by the taxpayer must be recorded. Without this documentation, the deduction may be disallowed.[44]

In maintaining their records, service members must be cognizant of the rules that disallow a deduction for personal living expenses under the theory that they are necessary business entertainment expenses.[45] If a leader expends $100 entertaining subordinates at a party, he or she may not deduct the cost of his or her own meal or that of his or her spouse's meal because those meals are considered personal living expenses. Assuming that the leader in the above example normally spent ten dollars for personal meals, the business expense deduction would be ninety dollars. If a hail and farewell with heavy hors d'oeuvres replaces a service member's evening meal, then no deduction will be permitted for the cost of the expense.

Conclusion

In general, entertainment expenses are deductible under the Internal Revenue Code if they are incurred to obtain a relatively specific business benefit and are customary in the taxpayer's trade, business, or profession. An examination of the military's customs and traditions reveals many occasions where leaders are expected to provide social entertainment and subordinates are expected to attend. Expenses incurred in fulfilling these obligations, which are integral, long-standing requirements of our proud heritage and profession, may be deductible as business entertainment costs.

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[42] Rev. Rul. 77-350, 1977-2 C.B. 21.

[43] 37 U.S.C. § 414 (1988).

[44] *See, e.g.*, Andress v. C.I.R., 51 T.C. 863, *aff'd per curiam*, 423 F.2d 679 (5th Cir. 1970).

[45] *See* Rev. Rul. 63-114, 1963-2 C.B. 129.

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, Virginia 22903-1781.

Family Law Note

National Defense Authorization Act for Fiscal Year 1997 Affects Aspects of Uniformed Services Former Spouses' Protection Act

The 1997 Fiscal Year Defense Authorization Act included some amendments to the United States Code affecting the rights of former spouses. Some of these amendments were to the Uniformed Services Former Spouses' Protection Act itself; however, the most significant substantive change was to the federal employee retirement system in Title 5. Legal assistance attorneys should be aware that these changes may impact how they advise clients regarding distribution of military retirement pay.

First, Congress amended 10 U.S.C. § 1408(b)(1)(A) to allow for service on the Defense Finance and Accounting Service (DFAS) by facsimile, electronic transmission, or regular mail.[1] As a result, the application for payments and transmission of documents will be easier. Previously, certified mail return receipt requested was required for all service on DFAS. Though not substantively significant, this change will ease communications with DFAS.

Second, Congress wanted to eliminate forum shopping involving the submission of competing court orders and modifications of orders that complicated the payment of divided retirement pay. Therefore, it amended 10 U.S.C. § 1408(d) by adding section 1408(d)(6)(A), which prohibits DFAS from accepting or complying with a court order that is an out-of-state modification of an order upon which section 1408 payments are based. The only exception to this new rule is when the out-of-state court has jurisdiction over both the military member and the spouse or former spouse in compliance with 10 U.S.C. § 1408(c)(4) (*i.e.*, domicile, residence other than by reason of military orders, or consent).[2]

In the most substantively important amendment, Congress amended the Civil Service Retirement Act[3] and the Federal Employees Retirement Act,[4] allowing former military spouses to collect their portion of retirement pay based on the military service of the employee.[5] Prior to this amendment, former military spouses lost their interest in retirement benefits if the military member retired or separated from the service and then took a federal job. The years of military service counted toward the thirty years for federal retirement; however, once the employee retired, there was no "military retired pay" to divide. Under the amendments to these acts, an employee cannot count his military years of service towards a federal retirement unless he authorizes the Director of the Office of Personnel Management (OPM) to deduct some of his retirement pay for the former spouse. The amount of the deduction will be equivalent to the amount of retirement pay that the former spouse would have received had the service member not taken a federal civil service job and counted his military service toward the number of years necessary for civil service retirement. The OPM will promulgate regulations to implement the processing of these new amendments. These amendments affect federal retirements after 1 January 1997. Major Fenton.

Consumer Law Note

The Fair Debt Collection Practices Act Can Still Help with Government Contracted Debt Collectors

The United States Court of Appeals for the Ninth Circuit recently held that the Fair Debt Collection Practices Act (FDCPA)[6]

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[1] DOD Authorization Act for fiscal year 1997 (FY 97), § 636, Pub. L. No. 104-201, 110 Stat. 2503.

[2] *Id.*

[3] 5 U.S.C. § 8332 (Supp. V 1993).

[4] *Id.* § 8411.

[5] DOD Authorization Act for FY 97, § 637, Pub. L. No. 104-201, 110 Stat. 2503.

[6] 15 U.S.C.A. § 1692(o) (West 1982 & Supp. 1996).

applies to private organizations performing collection actions pursuant to a government contract. *Brannan v. United Student Aid Funds, Inc.*[7] dealt with alleged violations of the FDCPA by United Student Aid Funds, Inc. (USA Funds) during its attempt to collect a defaulted student loan that it had guaranteed under the government's Guaranteed Student Loan (GSL) Program.[8] USA Funds allegedly violated the FDCPA "by threatening to cause [Ms. Brannan] to lose her job, by communicating with third parties about the debt, and by refusing to communicate about the debt through her attorney."[9]

In district court, USA Funds sought summary judgment claiming that it was exempt from the requirements of the FDCPA under the so-called government actor exception. That exception provides that the term "debt collector"[10] under the FDCPA does not include "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties."[11] The district court granted USA Funds' request for summary judgment. Ms. Brannan appealed.

In the circuit court, USA Funds conceded that it would ordinarily be a "debt collector" as that term is defined in the FDCPA,[12] but USA Funds continued to rely on the government actor exception to exclude it from the FDCPA. The circuit court was not persuaded.

The court found that the government actor exception "applies only to an individual government official or employee who collects debts as part of his government employment responsibilities. USA Funds is a private, nonprofit organization with a government contract; it is not a government agency or employee."[13] Thus, it should be treated like any other private debt collector and must comply with the FDCPA.[14]

The interesting aspect of this case from the legal assistance perspective is that its holding was fairly broad, limiting the government actor exception strictly to collections by actual employees of the government and not extending it to contractors.[15] Consequently, for clients with debt collection problems based upon government guaranteed loans,[16] the FDCPA should not be overlooked or immediately cast aside. Look closely at the relationship between the organization conducting the collection and the government. If the debt collector is a private contractor, the FDCPA may still provide valuable protections to your client. Major Lescault.

Tax Note

Importance of Using IRS Forms

Although the use of forms provided by the Internal Revenue Service (IRS) is not required, it is highly advisable to use them always. A recent case demonstrates why.[17]

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[7] 94 F.3d 1260 (9th Cir. 1996).

[8] It should be noted that the GSL program was restructured by the Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992). Under this restructuring, a new generic name encompassing all major forms of student loans was created—Federal Family Education Loans (FFELs). The "current GSL program encompasses loans guaranteed directly by the Department of Education." *Brannan*, 94 F.3d at 1262 n.1.

[9] *Brannan*, 94 F.3d at 1262.

[10] The FDCPA defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C.A. § 1692a(6) (West 1982 & Supp. 1996).

[11] 15 U.S.C.A. § 1692a(6)(C).

[12] *Brannan*, 94 F.3d at 1262. *See supra* note 10 for the text of the definition. Do not expect that all guaranty agencies would so readily concede that they are debt collectors. Whether they meet the definition or not will depend on how they are structured and how they are related to the government entity administering the student loan program. For a discussion of this issue, *see* NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION § 10.4.4.1 (2d ed. 1991 and Supp. 1995).

[13] *Brannan*, 94 F.3d at 1263.

[14] The court briefly mentions another exception that may be raised by those collecting debts acquired from the original debtor. *Id.* at 1262. The FDCPA specifically excludes a person from the definition of "debt collector" if that person is "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C.A. § 1692a(6)(F)(iii). The obvious problem for most companies guaranteeing loans is that they only acquire the loan after the debt is already in default.

[15] The court's decision did not have to be so broad. The Secretary of Education had already stated that the FDCPA continues to apply to third-party collectors under the GSL program. *Brannan*, 94 F.3d at 1262. The court could have simply deferred to the agency's reasonable interpretation of the statutory authorization for and regulatory implementation of the GSL program. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). Instead, the court chose to address the government actor exception and its applicability to government contractors in general.

[16] While student loans may involve a potential scenario where a legal assistance attorney would see a collection based upon a government-guaranteed loan, the most likely example would probably be home mortgages guaranteed by the Veterans Administration.

[17] White v. Commissioner, 72 T.C.M. (CCH) 786 (1996).

In *White v. Commissioner*,[18] Mr. White claimed his children from a prior marriage as dependents on his income tax return. Because he was not the custodial parent, he was required to obtain a waiver of the former spouse's right to claim the children and attach it to his income tax return.[19] Typically, IRS Form 8332 is used to obtain this waiver. Rather than using IRS Form 8332, Mr. White had his former spouse sign a letter allowing him to claim the children on his tax return. He attached this letter to his tax return. The IRS disallowed the dependency deduction. The letter was not a sufficient waiver because it failed to state that the former Mrs. White would not take the exemption on her return. One of the requirements of the waiver is that it must state the person signing the waiver will not take the exemption.[20] IRS Form 8332 meets this requirement. The letter also failed to state the time period for which the waiver was in effect. The Tax Court agreed with the IRS and disallowed the dependency exemptions on Mr. White's return.

Legal assistance attorneys should advise clients to use the tax forms that the IRS provides. The forms were designed by the IRS and contain all the necessary information to comply with the Internal Revenue Code and the Treasury Regulations. Major Henderson.

Veterans' Reemployment Rights Note

Employers Cannot Require Reservists to Use Vacation Time and Pay for Military Duty

Recently, the United States District Court for the Northern District of Mississippi held that an employer cannot require a reservist employee to use vacation time or pay to perform military duty, and that one cannot be fired for protesting to an employer about improper employer directives that require the Reservist to use his vacation time and pay for his military absence from the workplace.[21]

Tennessee Air National Guard member Mr. Mike Graham worked as a machinist for the Hall McMillen Company (HMC) of Oxford, Mississippi, and was granted absence for military duty for the period of 20-24 January 1992. On Friday, 31 January 1992, Mr. Graham received his pay stub for the previous week, which indicated that he was paid vacation pay for the time he missed work due to military training. On the check stub, under the column marked "Earnings," appeared the words "Vacation Hours." The stub indicated that forty vacation hours were debited from Mr. Graham's vacation pay hours, leaving forty-eight vacation hours remaining for the year. Mr. Graham protested to his supervisor that he had not requested vacation pay for his military time and that the company was trying to force him to use his vacation pay and time for his military duties in violation of the Veteran's Reemployment Rights Act (VRRA).[22] Mr. Graham refused to accept the check. When HMC's owner, David McMillen, overheard Mr. Graham's protests with his supervisor, he called Mr. Graham into his office and requested Mr. Graham to resign within two weeks. Mr. Graham refused to resign and told Mr. McMillen that he would have to fire him.[23]

The situation further deteriorated on 5 February 1992 when Mr. Graham recorded a conversation with his supervisor, Larry Kain, regarding the vacation pay dispute. When Mr. Kain informed Mr. McMillen of Mr. Graham's conduct regarding the recorded conversation, Mr. McMillen called Mr. Graham into his office and immediately terminated his employment.[24]

At trial, HMC claimed that it had a flexible time policy that allowed employees to receive holiday or vacation pay at a different time than the days of vacation actually used; and thus, it did not wrongly ask Mr. Graham to use his vacation pay or time for his military duty. Mr. Graham denied that he had requested vacation pay or time for his military leave. The court looked at the plain wording of the check stub, which indicated that vacation pay was deducted for the period of military duty in January. Furthermore, HMC's attendance records indicated that the company marked Mr. Graham's January military training time as vacation time, rather than as military leave time.[25]

Finally, the court reviewed a transcript of the 5 February 1992 recorded conversation between Mr. Graham and his supervisor,

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[18] *Id.*

[19] I.R.C. § 152(e)(2) (RIA 1996).

[20] Temp. Treas. Reg. § 1.152-4T, Q & A-3 (1984).

[21] Graham v. Hall-McMillen Company, Inc., 925 F. Supp. 437 (N.D. Miss. 1996).

[22] Veterans' Reemployment Rights Act (VRRA), 38 U.S.C. §§ 2021-27 (1994). The VRRA was renumbered as Chapter 43, §§ 4301-07 by Pub. L. No. 102-568, Title V, § 506(a), 106 Stat. 4340 (Oct. 29, 1992). The VRRA was subsequently replaced by the Uniformed Services Employment and Reemployment Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3150 (Oct. 13, 1994) (codified at 38 U.S.C. §§ 4301-33 (1994)). The VRRA citations in the case were to the original 1982 section numbers to avoid confusion with the USERRA statute section numbers.

[23] *Graham*, 925 F. Supp. at 439.

[24] *Id.* at 439-40.

[25] *Id.* at 440.

Mr. Kain, wherein Mr. Kain confirmed that he did not give Mr. Graham an option about using his vacation pay or time for military duty:

> Kain: We have never denied you time off to serve with the Guard. The only thing we have asked you to do is take vacation for this week.
>
> Mr. Graham: I was told that it was not an option. I will take vacation time. Is that not the situation?. I don't have a choice.
>
> Kain: No, I'm not giving you a choice.[26]

The court found that HMC's actions violated section 2024(d) of the VRRA, which states in part:

> Upon such employee's release from a period of such active duty for training or inactive duty training . . . , such employee shall be permitted to return to such employee's position with such . . . pay, and vacation as such employee would have had if such employee had not been absent for such purposes.[27]

The court determined that had Mr. Graham not gone on military duty he would not have had the vacation hours deducted from his pay and time records.[28]

The court determined that HMC also violated the Reserve anti-discrimination provision of the VRRA[29] by firing Mr. Graham for asserting his rights under the VRRA and by denying him use of his vacation time and pay. While HMC presented evidence of Mr. Graham's substandard work performance, the court was not convinced that he was discharged for cause unrelated to his military duties.[30] The court found that the evidence was very clear that Mr. Graham's military status was a motivating factor in HMC's decision to discharge him.[31]

While this case was basically decided under pre-Uniformed Services Employment and Reemployment Act (USERRA) law, the VRRA civilian job status protection and Reserve anti-discrimination statute sections relied on by the court were incorporated in the new USERRA. This is the only reported case where a Reservist was wrongly discharged in retaliation for asserting his right not to have to use vacation time or pay for military absences from his civilian employer. Major Conrad.

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[26] *Id.*

[27] 38 U.S.C. § 2021(b)(3) (1982). Similar provisions were incorporated into the new USERRA at 38 U.S.C. §§ 4312, 4316 (1994). The USERRA provisions do not spell out that vacation time or pay is protected, but have broad language that "all rights and benefits" of employment are protected. The definition of "rights and benefits" at 38 U.S.C. § 4303(2) includes "vacation." The legislative history of the USERRA indicates that Congress intended to continue prohibiting employers from requiring reservist employees to use their vacation time or pay for military duty. *See* H.R. REP. No. 103-65, at 35 (1993) (citing with approval *Hilliard v. New Jersey Army Nat'l Guard*, 527 F. Supp. 405, 412 (D.N.J. 1981) (holding that employers may not require employees to use their vacation pay or time for military absences)).

[28] *Graham*, 925 F. Supp. at 442. Under USERRA, Reservists may elect to use vacation time/pay to conduct their military duties. *See* 38 U.S.C. § 4316(d) (1996).

[29] Veterans' Reemployment Rights Act of 1974, 38 U.S.C. § 2021(b)(3) (1982); subsequently renumbered as 38 U.S.C. § 4311 (1994), Uniformed Services Employment and Reemployment Act of 1994. Wrongful discharge of Reserve member cases are subject to the three-prong "burden shifting" analysis set forth in *McDonald Douglas v. Green*, 411 U.S. 792 (1973). The Reservist plaintiff must demonstrate a prima facie case of discrimination under the VRRA or USERRA; if successful, the burden shifts to the employer to show a legitimate and nondiscriminatory rationale for the adverse employee action; and finally, the Reservist is entitled to rebut the employer's rationale as a pretext or unworthy of belief. *See* Novak v. Mackintosh & Dakota Indus., Inc., 919 F. Supp. 870, 878-79 (D.S.D. 1996); Tukesbrey v. Midwest Transit, Inc., 822 F. Supp. 1192, 1194-95 (W.D. Pa. 1993).

[30] *Graham*, 925 F. Supp. at 442. The USERRA standard of proof for Reserve wrongful discharge discrimination cases is currently found at 38 U.S.C. § 4311(b), which provides for "a motivating factor" test, overruling dicta in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981); *Clayton v. Blachowske Truck Lines, Inc.*, 640 F. Supp. 172, 174 (D. Minn. 1986), *aff'd*, 815 F.2d 1203 (8th Cir. 1987); and *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988), which indicated that the proper test for Reserve employer discrimination was a "sole motivating factor" test under the VRRA. Congress explicitly found that the courts misinterpreted the intent of Congress in creating the "sole motivating factor" test for 38 U.S.C. § 2021(b)(3) [VRRA] and thereby rejected it in the successor anti-discrimination provision of the USERRA. *See* H.R. REP. No. 103-65, at 24 (1993). The court in *Graham* held that the more liberal test adopted in the USERRA was retroactive and applied despite the fact that the incident which led to the lawsuit occurred prior to the adoption of USERRA by the Congress. The court based its decision on the legislative history of the USERRA, which indicated that the USERRA "motivating factor" test applied to all cases pending at the time of USERRA's enactment. *See* H. R. REP. No. 103-65, at 21 (1993), Gummo v. Village of Depew, New York, 75 F.3d 98, 104-07 (2d Cir. 1996); Novak v. Mackintosh & Dakota Indus., Inc., 919 F. Supp. at 878.

[31] *Graham*, 925 F. Supp. at 443.

New Developments in the Whistleblower Protection Act: Some Relief for Federal Managers

Introduction

The Whistleblower Protection Act of 1989 (WPA)[1] has become a major headache for federal managers. Employment protections for "whistleblowers," a term introduced in the Civil Service Reform Act of 1978[2] to describe "federal employees who disclose illegal or improper government activities,"[3] have increased substantially with the passage of the WPA in 1989 and its 1994 amendments.[4] My purpose is to outline these changes and discuss the significance of the increasingly expansive interpretation of WPA provisions.

Background

The WPA was passed in 1989 in large part because the Office of Special Counsel (OSC), whose job it was to protect whistleblowers from retaliation by managers, was perceived as ineffectual.[5] Instead of abolishing the OSC, as some had urged, Congress strengthened it and gave it another chance to act aggressively on behalf of whistleblowers.[6]

The WPA gave the OSC a new charter, mandating that its primary role should be to "protect employees, especially whistleblowers, from prohibited personnel practices"[7] and that it should "act in the interests of employees" who seek its assistance.[8] Moreover, of keen interest to federal managers, Congress charged the OSC to protect whistleblowers by "disciplining those who commit prohibited personnel practices."[9] To assist the OSC, the WPA made it easier for whistleblowers to prove retaliation by their agencies, and it *required* the OSC to work in the interest of whistleblowers.[10]

Despite these improvements, advocates for whistleblowers clamored for more "teeth" in the WPA. The Government Accountability Project, a "nonprofit advocacy group working on behalf of whistleblowers," took a survey of federal employees who had sought help from the OSC.[11] The results were not encouraging to whistleblowers.[12] The General Accounting Office (GAO) also studied the attitude of federal employees who had sought whistleblower reprisal protection from the OSC. It produced disturbing results: 81% of the complainants surveyed by the GAO gave the OSC a generally low to very low rating for overall effectiveness.[13]

In response to these studies, Congress amended the WPA in 1994 to provide increased protection for whistleblowers.[14] The

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[1] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201-1222 (Supp. V 1993)).

[2] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C.).

[3] S. REP. No. 95-969, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2731.

[4] An Act to Reauthorize the Office of Special Counsel, and for Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994).

[5] *See* S. REP. No. 103-358, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3549, 3550.

[6] *Id.* In its report, the Committee on Government Affairs stated that whistleblowers had urged the Committee to abolish the OSC.

[7] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b)(2)(A), 103 Stat. 16.

[8] *Id.* § 2(b)(2)(B).

[9] *Id.* § 2(b)(2)(C).

[10] S. REP. No. 103-358, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3550.

[11] *Id.* at 2-3.

[12] Of thirty-three people who alleged reprisal for whistleblowing, eleven said that OSC had disclosed information without their consent, and only two said that OSC had contacted witnesses supporting the whistleblowers. *Id.*

[13] *Id.* at 3.

[14] An Act to Reauthorize the Office of Special Counsel, and for Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994).

legislative history of the WPA leaves no doubt that Congress intended that the OSC "act aggressively on behalf of whistleblowers."[15] One version of the 1994 amendment even proposed to limit the authorization for the OSC to only two years (instead of three) "to put the office on notice that the [Governmental Affairs] Committee intended to monitor OSC's performance closely in the expectation that it will become more aggressive in its efforts to protect whistleblowers from unlawful retaliation."[16]

Aggressive Action from the Special Counsel

Judging from recent cases, the Special Counsel has heeded well the criticism heaped on the OSC by the self-described advocates for the protection of whistleblowers. The Special Counsel now acts very aggressively on behalf of putative whistleblowers using a very expansive interpretation of the WPA to prosecute federal managers. Federal managers with no recent experience with the Special Counsel may have no idea just how seriously she takes her charter to protect whistleblowers from unlawful retaliation. The law requires the OSC to be extremely "customer oriented." There is no doubt who the customers are: putative whistleblowers. In her most recent report to Congress, the Special Counsel stated that the OSC will "treat allegations of reprisal for whistleblowing as its highest priority."[17] Because those "allegations of reprisal" are always aimed directly at federal managers, they should pay close attention to any claims made against them by disgruntled employees.

In one recent case, the OSC filed a Complaint for Disciplinary Action under 5 U.S.C. § 1215 against a federal manager alleging ten counts of violating the WPA.[18] The OSC's interpretation of the WPA in that case was expansive. The whistleblower, who had obtained the information from another employee, had anonymously written a letter to the installation's Chief of Staff asserting that a manager had committed various acts of misconduct. Because the WPA specifically requires a whistleblower to have a "reasonable belief" that he or she is disclosing fraud, waste, or abuse, or other "whistleblowing misconduct" to receive its protections,[19] one would think that the WPA would not apply to the case.

The Special Counsel disagreed, arguing that the doctrine of "mistaken retaliation"[20] required the Merit Systems Protection Board (the Board) to discipline the manager because he *believed* that his employee had given information to the anonymous whistleblower. She even went so far as to argue that the Board should discipline the manager because he interfered with the "integrity of the anonymous whistleblowing process,"[21] even though nowhere in the legislative history is there any mention of an "anonymous whistleblowing process."

The Special Counsel's argument has limited support in case law. The Board had previously held that an employee who had not engaged in protected activity could be covered by the WPA when a retaliatory action was taken because of a manager's belief that the employee had engaged in protected activity.[22] That case, however, involved *corrective* action pursuant to 5 U.S.C. § 1214, not *disciplinary* action against a manager pursuant to 5 U.S.C. § 1215 for retaliation against a whistleblower.

This expansive interpretation of the WPA poses a real threat to federal managers. Under this interpretation, a manager who takes an adverse action against an employee must worry not only whether the employee has actually engaged in protected activity (*i.e.*, "blown the whistle on fraud, waste, or abuse"), but also whether the Special Counsel believes that the manager *thought* that the employee had engaged in protected activity, regardless of whether the employee had actually done so. Managers who make these decisions risk having their disciplinary actions reversed by corrective action initiated by the Special Counsel. They also risk being subjected to disciplinary action for making bad decisions.

Even more worrisome for federal managers is the Special Counsel's inclination to charge managers with "recommending" or "threatening" an adverse personnel action against an employee because of a protected disclosure. In *Special Counsel v. Spears*,[23]

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[15] S. REP. No. 103-358, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3550.

[16] *Id.* at 4, *reprinted* in 1994 U.S.C.C.A.N. at 3552.

[17] UNITED STATES OFFICE OF SPECIAL COUNSEL, FISCAL YEAR ANNUAL REPORT 3 (1995).

[18] Special Counsel v. Milton G. Spears, MSPB Case No. CB1215940023TI (currently pending decision by the Board).

[19] 5 U.S.C. § 2302(b)(8)(A) (Supp. V 1993).

[20] *Spears*, MSPB Case No. CB1215940023TI at 10.

[21] *Id.* at 11.

[22] Special Counsel v. Dep't of the Navy, 46 M.S.P.R. 274 (1990).

[23] *Spears*, MSPB Case No. CB1215940023TI.

seven of the ten counts against the supervisor were for recommending, failing to recommend, or threatening a personnel action because of a protected disclosure. The OSC even went so far as to charge the manager with "recommending" that the civilian personnel office (CPO) take an adverse action against the employee, even though the CPO had no statutory or regulatory authority to do so. The Special Counsel had support for these positions from the Board, whose members also seem to be sensitive to the criticisms from whistleblower advocacy groups. In *Frederick v. Department of Justice*,[24] the Board held that *recommending* a personnel action *could* be the basis for a charge of retaliation, stating:

> [T]he Board has construed the exercise of supervisory or personnel authority under 5 U.S.C. § 2302(b) quite broadly . . . . When Congress amended the Whistleblower Protection Act of 1989, amending 5 U.S.C. § 2302(b), it was presumed to have knowledge of this broad construction . . . . And, neither the amended statute or the legislative history shows that Congress wished to mandate a more restrictive interpretation.[25]

Thus, following *Frederick*, federal managers can be disciplined by their own agencies after investigation (and instigation) by the OSC or they could be prosecuted by the OSC pursuant to its own authority under 5 U.S.C. § 1215 for merely "recommending" a personnel action *with retaliatory intent*. The *Spears* case demonstrates that the OSC is inclined to file such a charge even when the "recommendation" is made to the manager's servicing personnel office.

Under this view of the law, a cautious federal manager would be well advised not to take any adverse actions against an employee known to have made any disclosures which could be construed as whistleblowing activity. Indeed, such an atmosphere might disuade a manager from taking adverse action against an employee if the manager *merely believed* that the employee had engaged in whistleblowing activity. A cautious manager also would not make any recommendations, or make any statements to the employee that could be construed as a threat of adverse action. In effect, when any possibility exists that the WPA may be implicated, federal managers would, in essence, be forced to abandon their responsibilities to discipline their employees even when discipline may be necessary for proper reasons. Under the Board's decision in *Frederick*,[26] federal managers would not even be able to pass their responsibilities up their chain of command because such action could be construed as "recommending" adverse action.

The United States Court of Appeals for the Federal Circuit appears to be the only restraining influence in the rush to protect the interests of whistleblowers at the expense of managers. In *Eidmann v. Merit Systems Protection Board*,[27] the court held that disciplinary actions under 5 U.S.C. § 1215 require the OSC (and agencies) to prove that the protected disclosure was a "significant factor" in the prohibited personnel action.[28] The OSC had argued, and the Board had held, that disciplinary actions employed the same (lower) "contributing factor" standard applicable in corrective actions under 5 U.S.C. § 1214 and that the OSC had only to prove that the protected disclosure was a "contributing factor" in the prohibited personnel action to force an agency to reverse an adverse action taken against an employee.[29]

Recently, the Federal Circuit again brought a moderating influence to bear on the Board and on the OSC. In January 1996, the court reversed the Board's disciplinary decision in *Frederick v. Department of Justice*[30] and lessened the risk to federal managers in maintaining discipline. The court held that a supervisor does not violate the WPA by "recommending" a personnel action, regardless of the motives for the recommendation. The following language from *Frederick* should be reprinted in every federal government supervisory manual:

> The WPA specifically distinguishes between those who *recommend* personnel actions and those who *take or fail to take* personnel actions . . . In terms of being within the scope of the WPA, the act applies to those who have authority to *recommend* a personnel action . . . However, the WPA under section 2302(b)(8) only attaches liability to those who *take or fail to take* a personnel action . . . Supervisors such as Frederick are fully encouraged to make honest recommendations concerning employees, but they must be more careful of actions they take (or fail to take) concerning employees.

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[24] Frederick v. Dep't of Justice, 65 M.S.P.R. 517 (1994).

[25] *Id.* at 528.

[26] *Id.* at 517.

[27] 976 F.2d 1400 (Fed. Cir. 1992).

[28] *Id.* at 1405.

[29] *Id.* at 1406.

[30] Frederick v. Dep't of Justice, 73 F.3d 349 (Fed. Cir. 1996).

> Frederick did not take or fail to take a personnel action against Womack. On the contrary, his C & E evaluation was merely a recommendation to the agency. It is only when one takes or fails to take a personnel action against an employee because of a protected disclosure that liability attaches under the relevant section of the WPA, and no such action occurred here.[31]

Under this interpretation, a federal manager can discuss discipline of an employee with the servicing personnel office and send the action to a higher level supervisor with an honest recommendation, even if the employee is under WPA protection.

Though the Federal Circuit restored some balance to the law of whistleblower retaliation, congressional action is still necessary. Congress has previously emphasized the protection of whistleblowers above all other values. This emphasis and the elevation of a newly aggressive OSC as the primary enforcer of the WPA have effectively removed federal managers' power to deal with disciplinary problems whenever the WPA is implicated. Disgruntled employees trying to avoid justified adverse actions are learning to invoke the WPA even where there is no management fraud, waste, or abuse.

The current system suffers from a fundamental structural defect. The OSC's mission is to protect the rights of whistleblowers; its success as a bureaucratic organization is measured, in part, by how well it "satisfies" its customers, that is, federal employees who claim to have "blown the whistle" on fraud, waste, or abuse. Unlike the commander of an installation or a federal agency manager, the OSC has no interest in maintaining discipline to accomplish a federal mission. It appears that the OSC's standard of success is measured only by how well it protects whistleblowers and not how well a particular agency operates. The current system therefore effectively separates the responsibility to get a job done from the authority necessary to discipline employees to achieve the desired result. This is a recipe for bad management.

The overly prudent, cautious manager will avoid any disciplinary action that may arouse the interest of the OSC, even where effective disciplinary action is necessary. The truly outstanding manger will take the action appropriate for the circumstances, regardless of the employee's "protected" status—albeit with a bit more caution when that protection is under the WPA. William D. Kimball, General Attorney (Labor), Office of the Command Judge Advocate, United States Army Reserve Personnel Center, St. Louis, Missouri.

[31] *Id.* at 354.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

New NEPA Guide for Acquisition Programs

The Office of the Assistant Secretary of the Army for Research, Development, and Acquisition has issued a new guidance document for integrating National Environmental Policy Act (NEPA) analysis into weapons system acquisition activities. The Planning Group for Environmental Requirements, NEPA, and the Weapon System Acquisition Process Initiative released a document in June 1996 entitled *Managing the Environmental Risk: Applying the Environmental Analysis Process of the National Environmental Policy Act to Weapon System Acquisition Programs*.

The document is intended as a guide to fulfill the environmental analysis requirements of *Department of Defense* (DOD) *Directive 5000.1* and *DOD Regulation 5000.2-R*.[1] The acquisition community will use the new directives to integrate NEPA analysis into weapon system program missions, organizational structure, and activities.

The guidance recommends use of environmental analysis to manage environmental risk in the acquisition program. The guidance states that the NEPA should be used within the integrated product team (IPT) framework to ensure a coordinated, multidisciplinary approach. The guidance further recommends integration of the NEPA into each phase of the acquisition program to increase awareness of environmental concerns throughout the decision process. Major Polchek.

[1] DEP'T OF DEFENSE, DIR. 5000.1, DEFENSE ACQUISITION (21 Feb. 1996); DEP'T OF DEFENSE, REG. 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS, (21 Feb. 1996).

Discriminatory Fees Under the Clean Air Act (CAA)

The United States Army will pay the State of Washington's Inspection and Maintenance (I/M) fees for its fleet even though state and local governments are exempt from paying this fee. Under Washington's State Implementation Plan (SIP), fleet operators can inspect their vehicles under the state's I/M program, but must purchase forms for certificates of compliance from Washington's Department of Ecology. The regulations exempt state and local government fleets from paying this fee, which goes to support the I/M program. Washington refused to grant the same exemption to federal agencies.

Federal agencies objected to this provision of Washington's SIP when it was proposed, asserting that it illegally discriminated against the United States. The United States Environmental Protection Agency (USEPA) rejected these comments, citing *United States v. South Coast Air Quality Management District*.[2] The *South Coast* court held that a program that only exempted state and local government agencies from paying air district fees was constitutional because the waiver of sovereign immunity in the CAA specified that federal agencies are to meet all requirements to the same extent and in the same manner as any nongovernmental entity. The United States Department of Justice supports the USEPA's position. Lieutenant Colonel Olmscheid.

Did you know . . . ? At least a quarter of all prescriptions written annually in the United States contain chemicals discovered in plants or animals.

1997 Authorization Act and BRAC

The National Defense Authorization Act for Fiscal Year 1997 (FY 97) has significant new provisions that may impact installations affected by base realignment and closure (BRAC) actions.[3]

Uncontaminated Property

In 1992, Congress passed the Community Environmental Response Facilitation Act (CERFA).[4] The CERFA amended section 120(h)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to provide for designation of certain property as uncontaminated.[5] The uncontaminated property designation is significant because it allows for quicker transfer of property. The CERFA amendment defined uncontaminated property as real property upon which no hazardous substance or petroleum products "were stored for one year or more, known to have been released, or disposed of."[6] As a result, more property can be designated as "clean" pursuant to CERCLA section 120(h)(4).

Although the 1997 Authorization Act amends the uncontaminated property definition in section 120(h)(4), the language "stored for one year of more" was not deleted from CERCLA section 120(h)(1).[7] Section 120(h)(1) requires the giving of notice in any deed if a hazardous substance or petroleum product was stored for one year or more on the property. The consequence of this provision is that, despite the amendment to section 120(h)(4), installations still must have some mechanism to identify property that stored these substances for more than a year so that the appropriate notice can be given in the transfer document. As most installations use the CERFA report process to identify where storage for more than a year has occurred, the change to section 120(h)(4) is likely to have little effect where the CERFA report is concerned. Installations are advised to continue using the CERFA report to identify storage for one year or more so that the appropriate notice can be given upon transfer.

Transfer Authority

Section 334 of the 1997 Authorization Act also amends CERCLA section 120(h)(3) to provide new authority for transfer of contaminated federal property prior to remedial action. Prior to this amendment, the CERCLA required that the remedy be in place and working before a transfer could take place. Section 334 provides that contaminated property eligible for transfer under this new authority must be suitable for the intended use by the transferee and the use must be consistent with protection of human health and the environment. The transfer is further subject to concurrence by the USEPA or state authorities or both.

This new authority has great potential for allowing early transfer of property where the local reuse authorities at BRAC sites are anxious to have the property. Given the problems with properly structuring the transfer, however, the DOD will provide spe-

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[2] 784 F. Supp. 732 (C.D. Cal. 1990).

[3] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422 (1996).

[4] Pub. L. No. 102-425, 106 Stat. 2174 (1992).

[5] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9620(h)(4) (1992).

[6] Section 331 of the 1997 Authorization Act amends CERCLA section 120(h)(4) to change this definition by deleting the reference to storage for one year or more.

[7] CERCLA, 42 U.S.C. § 9620(h)(1) (1992).

cific guidance on implementing this new authority. Until this guidance is final, section 334 may be used only on a case-by-case basis with approval of the Deputy Under Secretary of Defense for Environmental Security (DUSD(ES)). Major Polchek.

> Did you know. . . ? The coastal areas contain 90% of the ocean's plant life.

Migratory Bird Treaty Act

There has been a recent flurry of litigation against the United States Department of Agriculture's Forest Service (USFS) involving allegations that the USFS is violating the Migratory Bird Treaty Act (MBTA) by conducting timber harvests during nesting season in a manner that results in the death or "take" of migratory birds.[8] Courts reviewing these cases have reached conflicting conclusions: some of these decisions have been favorable to the USFS, while others have resulted in injunctions barring proposed timber harvests.

Section 703, in conjunction with sections 704-712 of the MBTA, makes it unlawful for any person, association, partnership, or corporation "by any means or manner, to pursue, hunt, take, capture, kill" any migratory bird without first receiving a permit to do so. The MTBA's implementing regulations do not specifically define the term "person" to include federal agencies. The regulations define "take" to include any of the following actions: "to pursue, hunt, shoot, wound, trap, capture, or collect."[9]

The United States Fish and Wildlife Service (USFWS) is responsible for issuing "take" permits and for enforcing the MBTA and its implementing regulations. While the MBTA does not provide for "incidental take" of migratory birds, the MBTA does authorize the USFWS to issue "special purpose" permits.[10] The "special purpose" permit is required before any person can lawfully take or otherwise possess migratory birds, their parts, nests, or eggs for any purpose not otherwise covered by the general permit regulations.[11] The USFWS does not have an official policy governing issuance of such permits to federal agencies. Issuance of "special purpose" permits to federal agencies, therefore, varies by USFWS Region, with some regions choosing not to issue "special purpose" permits to federal agencies.

While the USFWS does not have a policy of enforcing the MBTA against federal agencies conducting timber management activities,[12] public interest groups are now attempting to obtain enforcement through the federal judiciary and the threat of injunction. The validity of citizen suit enforcement against the federal government and the applicability of the MBTA's prohibitions to federal timber management activities remains unsettled given the conflicting court opinions mentioned above. However, it is possible that United States Army timber harvest activities, and similar ground-disturbing activities, could be disrupted as a result of the focus and attention presently devoted to MBTA issues.

As a result, Environmental Law Specialists (ELSs) should ensure that, with respect to development of Integrated Natural Resource Management Plans and planning for timber related management activities, installation natural resources staffs give due consideration to the impacts of activities, particularly proposed timber harvest activities, on migratory birds, especially for projects scheduled during nesting seasons. Additionally, ELSs should require project officers to consider the impacts of proposed timber management activities, and similar ground-disturbing activities, on migratory birds in the environmental impact evaluation process supporting a project, including relevant NEPA documentation. As part of project review, project officers should provide the USFWS an opportunity to review and comment on any impact analyses dealing with migratory birds. Coordination efforts with USFWS, including opportunities for review and provision of comments should be documented and included in the administrative record supporting the project. Additional action may become necessary in the future as a result of court decisions or action by the USFWS. Mr. Farley.

> Did you know. . . ? 99.5% of the earth's fresh water is located in the polar icecaps and glaciers.

New Cooperative Agreement Authority to Manage Cultural Resources

The National Defense Authorization Act for Fiscal Year 1997 gives military land managers another tool to manage cultural resources on their installation.[13] The provision adds section 2684 to Chapter 159 of Title 10 of the Untied States Code to give the Secretary of Defense and the Secretaries of the military departments new authority to enter cooperative agreements. The cooperative agreements may be made with a "State, local government or other entity for the preservation, maintenance, and improvement of cultural resources on military installations

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[8] Migratory Bird Treaty Act, 16 U.S.C. § 703 (1989).

[9] Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants, 50 C.F.R. §10.12 (1995).

[10] Migratory Bird Treaty Act, 16 U.S.C. § 712(2) (1978); Migratory Bird Permits, 50 C.F.R. § 21.27 (1995).

[11] Migratory Bird Permits, 50 C.F.R. § 21.27 (1995).

[12] This general policy statement does not mean that the USFWS will not seek to enforce the criminal provision of the MBTA against federal employees acting outside the scope of their duties. Migratory Bird Treaty Act, 16 U.S.C. § 707 (1986).

[13] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 2862, 110 Stat. 2422 (1996).

and for the conduct of research regarding the cultural resources."[14] All contemplated cooperative agreements benefiting Army installations under this new provision will be reviewed by the Environmental Law Division prior to being forwarded to the Secretary of the Army for signature. Major Ayres.

Increasingly Aggressive Enforcement Climate Expected

Army installations have been demonstrating markedly improved environmental compliance since the passage of the Federal Facility Compliance Act (FFCA).[15] In Fiscal Year 1993 (FY 93), fifty-eight fines were assessed against United States Army installations, fifty-one were assessed in Fiscal Year 1994 (FY 94), twenty-one in Fiscal Year 1995 (FY 95), and only eleven in Fiscal Year 1996 (FY 96). Likewise, settlements are proceeding well, with forty-two case settlements in FY 96, the most in any fiscal year. However, this is not the time to relax our excellent efforts.

The USEPA FY 95 Enforcement and Compliance Assurance Accomplishments Report demonstrates that improved compliance trends exist, albeit to a lesser degree, industry-wide. While these trends suggest both an effective USEPA enforcement program and earnest efforts within the regulated community to improve compliance, USEPA and the United States Department of Justice (DOJ) apparently view the decreased enforcement statistics as threatening to their enforcement offices. The Agencies have thus taken various measures to foster an increasingly intense enforcement environment.

A publication recently reported that "[t]his situation [of decreasing enforcement statistics] is reportedly causing some concern at DOJ, where some feel that the decreased environmental caseload may provide ammunition for congressional or administration budget cutters . . . ," and described DOJ's efforts to "protect against this possibility."[16] These concerns are echoed in the USEPA's Office of Enforcement and Compliance Assurance (OECA), where OECA Chief Steve Herman and Deputy Assistant Administrator Sylvia Lowrance called a 27 September 1996 meeting with the Regional enforcement coordinators. At that meeting, Lowrance reportedly stressed that it is "critical that the Agency produce 'healthy and robust' results in FY 97."[17] Herman and Lowrance openly stated at the meeting that "Regional offices will be held accountable for their performance in FY 97," suggesting a heavy emphasis on results. These sentiments can be viewed as a resurgence of USEPA "bean-counting" despite Administrator Carol Browner's stated visions of quality over quantity regarding USEPA's general enforcement policy.[18]

On 19 September 1996, the Administration proposed Senate Bill 2096, legislation that would intensify criminal enforcement measures in several ways. The legislation would (1) allow federal prosecution of environmental crimes even when the crime is stopped before the pollution occurs; (2) extend the maximum prison sentence for death or serious injury under most environmental statutes to twenty years; (3) extend the current five-year statute of limitations for prosecution of environmental crimes for up to three additional years if the polluter concealed the crime; (4) amend federal restitution statutes authorizing federal courts to order convicted environmental criminals to pay the costs of the enforcement and the cleanup, and reimburse "victims," who include all members of a community; (5) add an "attempt" provision similar to those found in Federal drug laws, whereby undercover agents would be permitted to substitute benign substances for dangerous ones that would make some actions crimes; and (6) establish within the USEPA a separate program for training state, local, and tribal law enforcement agents in conducting environmental crime investigations.[19]

A recent USEPA Environmental Appeals Board (EAB) decision suggests that from a judicial standpoint, the USEPA will follow this trend of increased scrutiny with a strict reading of the various administrative penalty policies. The EAB ruled that an administrative law judge (ALJ) erred in reducing an administrative penalty because the ALJ failed to properly apply the Resource Conservation and Recovery Act (RCRA) Civil Penalty Policy, and inappropriately lowered the assessed penalty based on good-faith efforts to comply.[20] The USEPA's June 1992 $500,000 penalty, based upon two violations of Alabama and federal hazardous waste management requirements, was lowered to $59,700 by ALJ Spencer Nissen after he found the violations not to be serious and that Everwood had made good faith efforts to comply. The EAB, however, ruled that Nissen properly analyzed the threat of harm to human health and the environment but failed to consider the harm of the violations on the

[14] *Id.*

[15] Federal Facility Compliance Act, 42 U.S.C. § 6901 n.1 (1992).

[16] 17 INSIDE EPA 37, at 6 (Sept. 13, 1996).

[17] 17 INSIDE EPA 40, at 6 (Oct. 4, 1996).

[18] *See* 3 ENVTL. LAW DIV. BULLETIN 11, at 4 (Aug. 1996).

[19] 11 TOXICS LAW REPORTER 18, at 533-34 (Oct. 2, 1996).

[20] *In re* Everwood Treatment Co., EPA EAB, RCRA (3008) Appeal No. 95-1, Sept. 27, 1996, *reported in* 27 ENV'T REPORTER 1231 (Oct. 4, 1996).

RCRA program in assessing the fine. The EAB thus found that the potential for harm of the violations when considering the amount of the fine was "major." This finding not only increased the gravity-based portion of the fine between ten and twenty thousand dollars, but entered a mandatory multi-day enhancement of between $1000 and $5000 per violation per day (Everwood was in violation for 179 days). This resulted in a base penalty determination by the EAB of $219,000. The EAB next analyzed whether Nissen appropriately gave Everwood a downward adjustment for good faith efforts to comply which included cleaning the spill site that led to the hazardous waste storage area. Not only did the EAB find that Everwood had not acted in good faith, but determined that the company's violations were willful, meriting a twenty-five percent *upward* penalty adjustment. The EAB's final penalty assessment was $273,750, more than four times the ALJ's original finding. Captain Anders.

Lead in Miniblinds

On 25 June 1996, the United States Consumer Products Safety Commission (CPSC) released a consumer advisory for some window miniblinds manufactured in China, Taiwan, Mexico, and Indonesia. Miniblinds imported from these countries that are plastic and do not have a high-gloss finish may contain lead that can be hazardous to young children. The CPSC has advised removing such miniblinds from housing in which young children live.

The United States Army Center for Health Promotion and Preventive Medicine (USACHPPM) has developed a Fact Sheet that provides guidance on steps that an installation should take to address this concern. The guidance recommends that lead-containing miniblinds be removed from installation facilities in which young children or pregnant women reside or are otherwise exposed to this hazard. The Fact Sheet is available by contacting the Industrial Hygiene Field Services Program at (commercial) (410) 671-3118, (DSN) 584-3118, or (800) 222-9698. Installation environmental law specialists should also contact their installation's Directorate of Public Works for further information. Ms. Fedel.

Litigation Division Note

"I DECLARE . . ." (How to Write a Good Declaration)

> I come from a State that raises corn and cotton and cockleburs and Democrats, and frothy eloquence neither convinces nor satisfies me. I am from Missouri. You have got to show me.[21]

One of the most effective and efficient ways to present evidence to a court or other tribunal is through the use of an unsworn declaration under the penalty of perjury (declaration). A declaration is a statutorily authorized[22] substitute for an affidavit. Declarations can be used for a wide variety of purposes, such as establishing the absence of jurisdictional facts in a motion to dismiss,[23] supporting a motion for summary judgment, and in certain circumstances presenting evidence on the merits in a contested hearing or trial.[24] This article provides guidance on drafting an effective declaration and includes a brief, elementary sample at the end.

Although not required as a formal matter, a declaration should begin with the caption of the proceeding in which it is submitted. This enables the immediate identification of the declaration with its associated proceeding and facilitates the filing of the declaration with a clerk of court if desired.

Following the caption, the body of the declaration should begin with a brief paragraph establishing the qualifications of the declarant to supply the testimony he or she is about to give in the following paragraphs.

The following paragraphs should deliver the desired substantive testimony just as a lawyer would like it presented in court under direct examination.

The conclusion of the declaration must contain the statutorily required elements: a statement under the penalty of perjury that the preceding testimony is true and correct, a signature, and a date.[25]

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[21] Congressman Willard Vandiver, Address at a naval banquet in Philadelphia (1899), *quoted in* John Bartlett, THE SHORTER BARTLETT'S FAMILIAR QUOTATIONS 409 (Permabooks edition 1953).

[22] 28 U.S.C. § 1746 (1994) authorizes the use of declarations and prescribes their form. Declarations are preferable to affidavits because they do not have to be notarized. This facilitates preparation of both the initial declaration and any desired changes.

[23] Reference to jurisdictional facts outside the pleadings is permitted to resolve a motion to dismiss for lack of jurisdiction. *See, e.g.*, Indium Corp. of American v. Semi-Alloys, Inc., 781 F.2d 879, 884 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820 (1986); Adams v. United States, 20 Cl. Ct. 132, 133 n.1 (1990).

[24] Some tribunals allow, either by specific order in a given proceeding or by standing order or local rule, for the submission of direct testimony through declarations, usually with the proviso that the declarant be available for cross examination on the content of the declaration. *See, e.g., In re* Adair, 965 F.2d 777 (9th Cir. 1992); Jones v. Frank, 142 F.R.D. 1, 2-3 (D. D.C. 1992); *In re* Domestic Airline Antitrust Litigation, 137 F.R.D. 677, 682 (N.D. Ga. 1991).

[25] 28 U.S.C. § 1746 (1994).

While the above outline establishes the necessary content of a declaration, it does not assure that the declaration will accomplish its desired purpose of persuading the fact finder. One simple guideline generally suffices on that point: always remember that a declaration is *testimony* and shape it just as you would like to have direct testimony presented in a case you would be trying.

As a necessary condition, the declaration must be *admissible.*[26] In addition to establishing the competence of the declarant to testify, the declaration should provide necessary evidentiary foundations for the matters asserted. Hearsay should be avoided if at all possible, and, if not possible, the predicates for an exception to the hearsay rule should be provided.

The declaration should be organized into brief, numbered paragraphs (for ease of citation), according to the topic being addressed. The sentences should be short, declaratory statements, free of jargon, acronyms (where possible), and other bureaucratic impediments to persuasion. Oppressive detail should be omitted, as should conclusory assertions. Sufficient background information should be included to make it clear that the declarant knows what he or she is talking about and to enable the reader to form some independent idea of the ultimate conclusion to be proven. There should be no legal argumentation or citation of authority, although reference to the authorities, regulations, and other materials relied upon by the declarant in making his or her judgments is most definitely appropriate. The declaration should have the same degree of polish as well prepared direct testimony in court, but like such testimony, it is best if the declaration retain some vestige of the declarant's personal mode of expression.[27] This becomes considerably more important if the declarant is to be cross examined on the declaration.

The declaration should build to the conclusion you seek to establish. If the declaration is directed at one or two points, the final paragraph of the substantive portion of the declaration should be a succinct summary of the preceding paragraphs and the conclusion to be drawn therefrom. If the declaration is addressed to a large number of points, it is often better to include summaries and conclusions throughout the declaration as the various topics are completed.

These guidelines should be adequate to develop a legally sufficient, factually persuasive declaration in essentially every case in which use of a declaration is appropriate. Where time allows, coordination of the form and content of the declaration with the trial attorney using it is always useful, just as preparation of a witness for direct testimony might be done. It is often useful for the declarant's counsel and the Litigation Division attorney to exchange draft copies of their respective written products to assure that they mesh with each other; thus, the Litigation Division attorney might send command counsel copies of a motion for summary judgment as it evolves, and the local counsel might send the Litigation Division attorney corresponding drafts of the supporting declarations. This iterative process enables the Litigation Division Attorney to acquire a better factual understanding of the case, and enables the client to better understand the thrust of the arguments being made on his or her behalf.

The following example is one of several declarations used to argue (successfully) to a bankruptcy court that the automatic stay[28] should be lifted to enable the Army to terminate for default several contracts it had with the bankrupt contractor. Mr. Avery.

[26] For example, Federal Rule of Civil Procedure 56(e) expressly requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

[27] Assuming that the declarant does not speak "High Bureaucratese" or some other completely unintelligible dialect.

[28] 11 U.S.C. § 362 (1996) imposes an automatic stay against any action which might adversely affect the affairs of an entity which has filed for bankruptcy.

SAMPLE DECLARATION

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH CAROLINA

IN RE:	)	
	)	
BIG CONSTRUCTION CO., INC.,	)	Chapter 11
	)	Case No. 12—3456
	)	
Debtor.	)	

DECLARATION OF THOMAS N. JONES

I, Thomas N. Jones, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am the Fort Jackson Engineering Project Manager for the mechanical room, and heating, ventilating and air conditioning (HVAC) upgrade projects for buildings 5482 and 5422 (Contract DABT47—91—C—1234), and buildings 3392 and 6300 (Contract DABT47—91—C-5678). The Contracts for these projects were awarded to Big Construction Co., Inc.

2. In accordance with the Inspection of Construction clause (FAR 52.246—12), the government had independent tests and evaluations conducted of the Contractor's welding procedures and fifty of the actual welds. Contracts have been awarded, with estimated costs of $3800 for the procedures, and $8000 for the welds. Evaluations of the procedures indicated that the Contractor had not followed the proper procedures. Testing of the welds in buildings 5422 and 5482 revealed that forty-nine of the fifty tested did not meet the specifications of the contract. After the Contractor, Big Construction Co., Inc., was unable to correct the defects, the government entered into reprocurement contracts in the amount of $40,500 for the correction of the defective welding. As a result of these corrections, I estimate reinsulation of the affected areas will cost approximately $10,000.

3. One of the pumps installed under contract DABT47—91—C—1234 has failed and cannot be accepted by the government. The estimated cost to replace this pump is $5000.

4. The work remaining for the "Controls" work element will cost at least $10,000. This includes the work to reconnect controls and safety device installation.

5. As of 31 March 1993, the estimated cost to complete the remaining contract requirements for building 3392 (Mann Recreation Center) was $27,200, as set forth in Exhibit A.

6. Buildings 5422 and 5482 are large Basic Infantry Training buildings which contain administrative, training and housing space for 1100 basic training soldiers and over fifty permanent party personnel. The defective welds, other related deficiencies, and failure to complete the contract work in buildings 5422 and 5482 have created an unreasonable safety risk. The contract specified that the interruption of critical utilities during the performance of the work could not exceed six weeks. This interruption was to occur during a six-week period when the building would be mostly unoccupied between training cycles. All of the work was not completed during those periods and they have been reoccupied. As a result of the Contractor's failure, Fort Jackson has been compelled to reoccupy the buildings with defective welds and missing or unconnected safety devices. The flow of basic trainees into Fort Jackson cannot be stopped and there is not another facility that can house 2200 trainees. Interactive control and monitoring capabilities have not been established for critical systems in the mechanical rooms. High temperature water is supplied to three major devices (steam generator, building heating water converter, and domestic hot water tank), in each mechanical room. The relief of excessive pressure from each of these devices is essential to preclude a catastrophic failure of their pressure vessels. The destructive force of such a failure is so great that usually at least three means of avoiding a failure are instituted. As of this date, some of the devices installed in buildings 5422 and 5482 have only one means to avoid a failure. There are no safety controls to turn off the equipment should overpressure or temperature result from faulty controls. Overpressure and/or temperature alarms have not been available to indicate trouble. Fort Jackson has an Energy Management Center to which many of the installation's buildings' HVAC systems are connected. This control center continually monitors the operations of the systems for maximum energy efficiency and safety. None of the specified remote monitoring and control features required in the contract have been installed or connected to the central control unit. The Contractor has not provided a complete set of drawings for the control system as required. In building 5422, the controller and high temperature valve on the hot water storage tank are not functioning properly, leaking valves pose a high risk of injury, and malfunctioning steam generator equipment causes loss of steam and an interruption in mess hall operations.

7. Expeditious action is necessary to resolve the Contractor's defaults to permit necessary reprocurement actions to meet our obligations for the safety of our soldiers and civilian personnel and ensure that requirements for basic training can be fully achieved as timely and economically as possible.

I declare under penalty of perjury that the above is true and correct.

Dated_____

_____

Thomas N. Jones

Claims Report

United States Army Claims Service

Tort Claims Note

Exclusion of Government Drivers from Private Insurance Coverage

As claims judge advocates, we are concerned with issues of liability and indemnification when administrative claims are filed with the United States Army under the Federal Tort Claims Act (FTCA). The following discussion addresses the issues of liability and indemnification in situations where a government employee operating a privately owned vehicle (POV) within the scope of employment and covered by private automobile liability insurance is involved in a motor vehicle accident causing personal injury, wrongful death, or property damage.

On any given day all across the country, hundreds of soldiers and Department of Army employees will operate POVs within the scope of their federal employment. Some may be involved in motor vehicle accidents that will generate claims or suits against the United States, against the drivers, and against the insurers of the POVs. Under the FTCA,[1] the United States will be liable for the following:

> Loss of personal property or personal injury or death caused by the negligent act or omission of any employee of the [federal] agency while acting within the scope of his office or employment, under circumstances where the United States if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[2]

The Drivers Act[3] amended the FTCA to require substitution of the United States as a party in any civil action against a government driver for a traffic accident occurring while the employee was operating a vehicle in the scope of employment.[4] Thus, the FTCA became the exclusive federal remedy for personal injury, death, or property damage arising out of a traffic accident caused by a government employee acting within the scope of employment.

The insurance industry began to view this "exclusive federal remedy" concept in a global fashion, construing the FTCA to be the exclusive (against anybody) remedy for personal injury, death, or property damage arising out of a traffic accident caused by a federal employee acting within their scope of employment. In a number of early cases, the federal courts held against the insurers who sought to disclaim liability, sought indemnity from the United States, or resisted indemnification actions by the United States.[5] The courts consistently found that the United States was included under the terms "insured" or "covered person" as used and written in the standard omnibus liability clauses of private insurance policies.

Harleysville Ins. Co. v. United States[6] arose out of a traffic accident involving a postal employee making mail deliveries in his POV. The insurer sought to argue that it was insulated from liability because the United States had removed the suit, initially filed against the driver, from state court and substituted itself as defendant.[7] The court for the Eastern District of Pennsylvania held for the United States, finding that the United States was an additional insured because the term "insured person" in the policy encompassed "any other person or organization but only with respect to his or her liability because of acts or omissions of an insured."[8]

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[1] 28 U.S.C. §§ 2671-80 (1994).

[2] *Id.* § 2672.

[3] *Id.* § 2679(b).

[4] The Federal Employees Liability and Tort Reform Compensation Act (FELTRCA), 28 U.S.C. § 2679(b)(d) (1994), enacted in 1988, essentially extended the Driver's Act to all federal employees providing that, upon certification by the United States Attorney General, a defendant federal employee acting within scope of his employment at the time of the incident out of which the claim arose, should be substituted by the United States as the party defendant.

[5] United States v. Myers, 363 F.2d 615, 617 (5th Cir. 1966); Government Employees Ins. Co. v. United States, 349 F.2d 83, 84 (10th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1994); Harleysville Ins. Co. v. United States, 363 F. Supp. 176, 177 (E.D. Pa. 1973); Patterson v. United States, 233 F. Supp. 447 (E.D. Tenn. 1964).

[6] 363 F. Supp. 176 (E.D. Pa. 1973).

[7] *Id.* at 177.

[8] *Id.*

In *Government Employees Ins. Co. (GEICO) v. United States*,[9] the United States Court of Appeals for the Tenth Circuit reached a similar conclusion, finding that the United States was an additional insured under a mail carrier's policy that provided that the term "insured" included "any person or organization legally responsible for the use thereof by an insured."[10] The court rejected the insurer's argument that the United States was not a person or organization within the meaning of the standard policy phrase. In rejecting GEICO's argument that the purpose of the indemnity clause of the insurance policy was not to protect the United States, the court found that the purpose of the FTCA was to render the United States liable in tort as a private person and as such the United States was entitled to be insured as a private person under the provisions of the private insurance policy.

The Court of Appeals for the Fifth Circuit arrived at a similar conclusion in *United States v. Myers*,[11] where it found no evidence of congressional intent through passage of the Driver's Act to preclude the United States from recovering as an additional insured under an employee's liability coverage. Thus, the federal courts were consistently finding that the United States qualified as an additional insured under the standard "any person or organization legally responsible for the use" policy language.

In response to these rulings, insurance companies began to modify the standard phraseology and include specific provisions aimed at excluding the United States as an additional insured under their policies. These efforts and attempted exclusions have met with mixed judicial review depending on the applicable state law.

Several examples of attempted exclusions of the United States as an additional insured have failed under state law. In these cases, states have statutorily limited the permissible exclusions from insurance coverage or specifically provided that the United States is not a permissible exclusion. In *United States v. Government Employees Ins. Co.*,[12] the court had the opportunity to interpret an attempted exclusion in light of New York State insurance regulations which allowed insurers to exclude from coverage any liability assumed by the insured under contract or for which the injured could be liable under a worker's compensation, unemployment compensation, or disability benefit law. In rejecting the exclusion, the court refused to equate the waiver of sovereign immunity under the FTCA with the creation of employee benefits under a worker's compensation or disability benefits scheme.[13]

In *United States v. Government Employees Ins. Co.*,[14] a policy endorsement excluding the United States from coverage as an additional insured was found impermissible under Virginia statute. The court interpreted the Virginia omnibus statute[15] as prohibiting any exclusions from policy coverage except those specifically provided by statute.[16]

In *Ogima v. Rodriguez*,[17] a case arising out of an accident involving a Postal Service mail carrier, the United States District Court for the Middle District of Louisiana found the exclusionary clause "any damages for which the United States might be liable" to be "vague, ambiguous, and too comprehensive in scope."[18] The court refused to enforce the exclusion because it failed to specifically identify the insureds who were being denied coverage and the circumstances and nature of the excluded liability. The *Ogima* court cited three liability coverage exclusion clauses that it termed clear, concise, and specific exclusions.[19] However, in a case arising out of an automobile accident involving a Marine Corps recruiter, a Florida state court held that an exclusion from liability coverage as to "any obligation

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[9] 349 F.2d 83 (10th Cir. 1965).

[10] *Id.* at 84.

[11] United States v. Myers, 363 F.2d 615 (5th Cir. 1966).

[12] 612 F.2d 705 (2d Cir. 1980).

[13] *Id.* at 707.

[14] 409 F. Supp. 986, 992 (E.D. Va. 1976).

[15] VA. CODE ANN. § 38.1-38.1(a2) (Michie 1994) (providing that any endorsement, provision, or rider attached to or included in any such policy of insurance which purports or seeks in any way to limit or reduce in any respect the coverage afforded by the provisions required therein by this section shall be wholly void).

[16] 409 F. Supp. at 991. This ruling is no longer valid in light of subsequent statutory revision. VA. CODE ANN. § 38.2-2204(D) (Michie 1994) now provides in part: "except an insurer may exclude such coverage as is afforded by this section, where such coverage would inure to the benefit of the United States Government or any agency or subdivision thereof under the provisions of the Federal Tort Claims Act, the Federal Drivers Act . . . ."

[17] 799 F. Supp. 626 (M.D. La. 1992).

[18] *Id.* at 631.

[19] Each of the three clauses that the *Ogima* court characterized as clear, concise, and specific exclusions referred to "the provisions of § 2679 of Title 28, United States Code" or "the provisions of the Federal Tort Claims Act" or both.

for which the United States may be liable under the Federal Tort Claims Act" was invalid and contrary to public policy.[20]

The United States District Court for the Middle District of Georgia had the opportunity to apply the *Ogima* test for ambiguity in *Comes v. United States*.[21] *Comes* arose out of a suit by the United States for indemnification under a liability insurance policy issued to a mail carrier who struck a tricyclist while delivering mail in her POV. The *Comes* court interpreted the exclusionary clause "for any damage for which the United States might be liable for the insured's use of any vehicle" and found that it was "ambiguous and vague and should be construed against the insurer under Georgia law."[22] The *Comes* court construed the ambiguous clause against the insurer and found that the United States was an additional insured under the standard omnibus liability clause.

In another recent case, *Lentz v. United States*,[23] the United States District Court for the Northern District of Iowa found that policy language purporting to exclude coverage for damages "for which the United States might be liable for the insured's use of any vehicle"[24] was "too ambiguous, vague and comprehensive to be given effect."[25]

Other courts have upheld the exclusion of the United States from liability coverage. In 1968, the United States Court of Appeals for the Tenth Circuit upheld an exclusion written into the policy of a soldier sued in a negligence action arising out of an automobile collision occurring while in the process of changing duty stations.[26] The purported exclusion was specific in identifying the type of liability excluded and who was being denied coverage.[27] More recently, the United States District Court for the Central District of Illinois upheld an exclusion of the United States from coverage as an additional insured.[28] The exclusionary language interpreted in *DeBord v. United States*, "do not provide coverage under Section 1 for: any obligation for which the United States may be held liable under the Federal Tort Claims Act,"[29] was found to be unambiguous in identifying the United States as an insured subject to the exclusion.[30]

From a study of these cases, a three-step analysis can be developed to determine when the United States may be covered as an additional insured under the liability insurance policy of a federal employee acting within scope of employment. The first step will involve an examination of the policy to determine if the policy contains a clause or language that attempts to exclude the United States. If it does not, then presumably, the United States is covered as an additional insured under "any other person or organization" type language of the standard omnibus clause of the policy.

If the policy does contain an attempted exclusion of the United States, the second step of the analysis is to review the language of the exclusionary clause for ambiguity. Apply the tests announced in *Ogima* and used in *Comes* and *Lentz*. More specifically, the inquiry should focus on whether the exclusionary clause

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[20] Reeves v. Miller, 418 So. 2d 1050 (Fla. App. 1982).

[21] 918 F. Supp. 382 (M.D. Ga. 1996).

[22] *Id.* at 386.

[23] 921 F. Supp. 628 (N.D. Iowa 1996).

[24] *Id.* at 630.

[25] *Id.* at 631.

[26] Government Employees Ins. Co. v. United States, 400 F.2d 172 (10th Cir. 1968). While it enforced the exclusion, this court did not specifically address the validity of the exclusionary clause. The opinion discussed the requirements for an insurance company to notify an insured that policy coverage had been reduced without ever reaching a definite conclusion because it noted that the United States, a third-party plaintiff, was seeking indemnification from the insurer, a third-party defendant. The court considered the United States as a third party seeking a gratuitous benefit.

[27] The exclusionary clause read in pertinent part:

> It is agreed that the policy does not apply under the Liability Coverages for Bodily Injury or Property Damage to the following as insureds:
>
> 1. The United States of America or any of its Agencies.
>
> 2. Any person, including the named insured, if protection is afforded such person under the provisions of the Federal Tort Claims Act.

Id. at 175 n.11.

[28] DeBord v. United States, 870 F. Supp. 250, 252 (C.D. Ill. 1994).

[29] *Id.*

[30] *Id.* at 253.

and the language are "vague, ambiguous, and too comprehensive;" or alternatively, on whether they specifically identify the insureds who are being denied coverage and the circumstances and the nature of liability intended to be excluded. If the exclusionary clause is vague or ambiguous, the United States may succeed in asserting a right to indemnification as an additional insured. If the exclusionary clause is clear, concise, specific, and defines the exclusionary circumstances, it may be enforceable and the United States could be excluded. Enforceable clauses can specifically exclude all instances when the provisions of the FTCA require the United States Attorney General to defend a person in any civil action brought for bodily injury or property damage.

If the exclusionary clause is clear and specific, the third step of the analysis is to determine if the exclusion is valid under state law. This obviously will differ from state to state. For instance, Virginia statutes would allow a specific exclusion of the United States under the terms of § 38.2-2204(D) of the Virginia Code Annotated. Effective 12 May 1995, Tennessee insurance statutes would allow a clear, concise, and specific exclusion under the provisions of § 7-105 of Title 56 of the Tennessee Code Annotated.[31] A careful and thorough study of state insurance statutes and preservation of this study effort in the Claims Office state law deskbook is required. After reviewing applicable state statutes and case law, claims judge advocates should consult with their United States Army Claims Service (USARCS) Area Action Officer (AAO) on specific cases involving federal employees operating POVs to explore the possibility of indemnification by private insurers and their participation in the settlement of administrative claims.

In the situation where suit is filed against the government driver in state court, installation claims personnel should notify their USARCS AAO and Torts Branch of the United States Army Litigation Division. Coordination will be made with the appropriate United States Attorney's office. Installation claims personnel will be called upon to assist in the collection and preparation of scope of employment and requests for representation materials concurrent with the removal, substitution, and representation process.

When an action in which the United States is substituted as the party defendant under 28 U.S.C. § 2679(d) is dismissed for failure to file an administrative claim under 28 U.S.C. § 2675(a), the administrative claim will be timely filed if presented to the appropriate federal agency within sixty days after dismissal of the civil action.[32] In the administrative process when, after application of the foregoing three-step analysis, it appears that the United States qualifies as an additional insured under the private liability insurance policy, the insurer should be contacted. Coverage up to the policy limits should be sought. In cases of questionable coverage of the United States as an additional insured, contribution from the insurer should be sought.

Where the United States is qualified as an additional insured and suit is ultimately filed against the United States in a federal district court, the United States may seek to interplead the insurer as a third party defendant. These actions will be coordinated and effected through the appropriate United States Attorney's office. Litigation reports prepared by installation claims personnel should identify indemnification issues and address appropriate state statutory provisions and precedents. Major Kee and Lieutenant Colonel Jennings.

Affirmative Claims Notes

Medical Payments Coverage and 10 U.S.C. § 1095

The United States may recover the reasonable costs of health care services provided at or through a military medical treatment facility to an active duty soldier, retiree, or family member.[33] The United States may recover these health care costs from any entity that provides an insurance, medical service or health plan by contract or agreement, or from any other third-party required to pay under any other provision of law.

Two recent events clarify that medical payments coverage (medpay coverage)[34] is recoverable. First, the Fiscal Year 1997 Authorization Act amended 10 U.S.C. § 1095(h)(1) to specifically authorize recovery of Medpay coverage.[35] This statutory clarification follows the Department of Defense's previous in-

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[31] TENN. CODE ANN. § 56-7-121 (Supp. 1996) (effective May 12, 1995) provides that notwithstanding any other provision of law to the contrary, an insurer may exclude coverage pursuant to a contractual agreement, provided that such exclusion complies with this title.

[32] *See* Egan by Egan v. United States, 732 F. Supp. 1248 (E.D.N.Y. 1990). Note that the date underlying the civil action must have been within the statute of limitations.

[33] 10 U.S.C.A. § 1095 (West Supp. 1996) (originally enacted on 7 April 1986 and amended by the Defense Authorization Acts of FY 1987, FY 1989, FY 1991, FY 1992, FY 1994, FY 1995, and FY 1997).

[34] Medpay coverage is first-party insurance that reimburses the insured for medical expenses resulting from an automobile accident (*i.e.*, insurance the injured party has paid for that would reimburse the injured party for incurred medical expenses). Medpay coverage does not require evidence of a negligent act and an analysis and argument based upon liability and tort law are not required. *See* USAA v. Perry, 886 F. Supp. 596, 601 (W.D. Texas 1995), *rev'd*, 92 F.3d 295 (5th Cir. 1996), *petition for panel reh'g and petition for reh'g en banc filed* (No. 95-50512) (5th Cir. Sept. 20, 1996).

[35] The Act also specifically authorized recovery of personal injury protection coverage, which is insurance coverage for basic economic loss (*e.g.*, medical expenses, wage loss, funeral expenses, *et cetera*), which is payable without regard to fault. The Act amended 10 U.S.C. § 1095(h)(1) to define a third party payer as including an entity which provides "personal injury protection or medical payment benefits in cases involving personal injuries resulting from the operation of a motor vehicle." National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 735, 110 Stat. 2422.

terpretation of the statute.[36] Second, the Fifth Circuit held, in *USAA v. Perry*,[37] that medpay coverage is a form of no-fault insurance under 10 U.S.C. § 1095.

The *Perry* decision reversed an adverse district court summary judgment ruling against the government's claim for payment under Medpay coverage.[38] The reversed district court ruling held that an automobile insurer who provided voluntary first-party coverage (*i.e.*, not-state mandated coverage) for a military member's medical expenses sustained in an auto accident was not a "third party payer" within the meaning of 10 U.S.C. § 1095. However, in rejecting this argument and reversing the district court's summary judgment in favor of USAA, the Fifth Circuit deferred to the Department of Defense's construction of 10 U.S.C. § 1095 as "permissible" and "consistent with the language of the statute, dictionaries, and insurance treatises."[39] The Fifth Circuit further specified that it was "Chevron-bound to conclude that medpay is a form of no-fault insurance within the meaning of § 1095" and, therefore, can be recovered.[40]

The recent amendment to 10 U.S.C. § 1095, along with the Fifth Circuit's decision in *USAA v. Perry*, provides ample legal authority to assert and recover from medpay coverage or personal injury protection funds. In cases where the medical care was provided before 23 September 1996 (the effective date of the 1997 Authorization Act), the cited authority for medpay coverage collection should be the Fifth Circuit's decision in *USAA v. Perry* and the Department of Defense regulations at 32 C.F.R. Part 220. In cases where the medical care was provided after 23 September 1996, the cited authority to collect on medpay coverage should be the amended language of the statute. Captain Beckman.

Lost Wages Under the Federal Medical Care Recovery Act

Effective 23 September 1996, if a soldier is injured under circumstances creating tort liability, the United States has the right to recover the soldier's pay during the time he or she was unable to work. This right to recovery is independent of any rights the injured soldier may have and the United States may directly recover the costs of pay from the tort-feasor who caused the injury, his or her insurer, or both.

The Fiscal Year 1997 Authorization Act[41] amended the Federal Medical Care Recovery Act (FMCRA)[42] to permit the United States to recover the costs of pay provided to members of the armed forces by the United States when they are unable to perform their military duties due to the wrongful conduct of a tortfeasor. Prior to this amendment, the FMCRA gave the United States the right to recover only the costs of hospital, medical, surgical, or dental care and treatment furnished to a beneficiary because of illness or injuries caused by a tortfeasor.

The 1997 Authorization Act also amended the FMCRA to eliminate the windfall to tortfeasors in no-fault jurisdictions. Prior to the enactment of the 1997 Authorization Act, courts interpreted the FMCRA to allow government recovery only where a state permitted fault-based recoveries and had state defined "tort liability" concepts. As many no-fault statutes purport to abolish tort liability principles, the FMCRA was therefore frequently held to be inapplicable in no-fault jurisdictions.[43] The present amendment allows the United States to recover for the costs of pay and medical care in no-fault states, regardless of the state's general denial of fault based recoveries. Claims personnel should note, however, that the FMCRA is still premised upon "tort liability" in both the fault and no-fault state contexts.

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[36] The Department of Defense's interpretation of 10 U.S.C. § 1095(h)(2) as specifically including medical payments coverage and personal injury protection is contained at 32 C.F.R. § 220.12(I) (Sept. 9, 1992).

[37] USAA v. Perry, 92 F.3d 295 (5th Cir. 1996), *petition for panel reh'g and petition for reh'g en banc filed* (No. 95-50512) (5th Cir. Sept. 20, 1996).

[38] USAA v. Perry, 886 F. Supp. 596, 601 (W.D. Texas 1995), *rev'd*, 92 F.3d 295 (5th Cir. 1996), *petition for panel reh'g and petition for reh'g en banc filed*, No. 95-50512 (5th Cir., Sept. 20, 1996).

[39] *Perry*, 92 F.3d at 296-299.

[40] *Id.* "Chevron-bound" refers to the United States Supreme Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which dealt with statutory construction. In *Chevron*, the Supreme Court dictated that if Congress has not plainly spoken to an issue and the particular statute is ambiguous on its face, the reviewing court should determine whether the agency's construction of the statute is based on a permissible construction of the statute. If so, the court should defer to the interpretation of the agency charged with administering the statute. *Id.*

[41] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1075, 110 Stat. 2422.

[42] 42 U.S.C. §§ 2651-53 (1962) *as amended by* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1075, 110 Stat. 2422.

[43] *See, e.g.*, Hohman v. United States, 470 F. Supp. 769 (E.D. Penn. 1979), *affirmed* 628 F.2d 832 (3d Cir. 1980); United States v. Jackson, 572 F. Supp. 181 (W.D. Mich. 1983); *reconsideration denied*, 577 F. Supp. 901 (W.D. Mich. 1984); United States v. Allstate Ins. Co., 573 F. Supp. 142 (W.D. Mich. 1983).

To collect lost wages under the newly amended FMCRA, claims personnel will need to determine how long a soldier was unable to perform military duties[44] because of injury. This can be done by adding a question to the report of injury questionnaire routinely sent to the injured party: "How long were you unable to work at your regularly assigned duties or at any other military duties because of the injury you received in this accident?" Alternatively, the injured party's attorney can be asked the same question. This information can be verified by having the company commander verify the total number of days the soldier was unable to perform military duties.

Claims personnel also will need to know the amount of the injured party's basic pay and any special or incentive pay. A copy of the service member's Leave and Earnings Statement (LES) or a statement from the member would provide the amount of the additional pay. If there is no additional pay, then the LES or reference to a current pay chart will provide the amount of basic pay the service member was receiving at the time of the incapacitation.

Because the amendment is limited to obtaining reimbursement for pay (basic, special, and incentive) of active duty service members only, calculating the amount attributable to the time the service member was unable to perform any military duties is a simple mathematical calculation. For example, if a specialist with four years of service is unable to perform military duties for two weeks, the amount of these lost wages is $601.66 ($1302.60 monthly basic pay divided by the 4.33 weeks in one month then multiplied by two). Claims personnel should calculate the amount of a service member's lost wages when they calculate medical expenses. When they assert the government's claim against the insurance company or tortfeasor, claims personnel should include the total amount of medical care costs as well as the lost wages.

The amended FMCRA allows recovery of lost wages to be returned to the appropriation which supports the operation of the command, activity, or other unit to which the soldier was assigned at the time of his or her injury. The United States Army Claims Service has determined that these funds should be deposited in the installation operation and maintenance accounts which support the local commands, activities, or other units. Contact your servicing Finance and Accounting Office to verify the correct accounting classification (*i.e.*, fund cite) in each case involving pay costs. Captain Beckman.

Personnel Claims Note

Checking Items off the Inventory

Household goods carriers frequently deny liability for missing items contending that the service member checked them off the inventory at delivery. The carriers maintain that the items could not possibly be missing if they were checked off.

The Army has been successful in defeating carrier denials of liability for missing items where the items on the inventory were checked off. The Army has even been successful where initials, not check marks, were used.

The landmark case in this area is *National Forwarding Company*,[45] which involved a missing Schwinn bicycle that the carrier's inventory indicated was checked off and delivered. The nonbinding General Accounting Office (GAO) Settlement Certificate noted that without any explanation for the inventory check mark or why the missing bicycle was not listed on the DD Form 1840 (Joint Statement of Loss or Damage at Deliver), the carrier should not be held liable.

The Army successfully appealed this decision. The Comptroller General noted:

> A member generally has seventy-five days after delivery to report missing items, so that the fact that the bicycle was not reported as missing at delivery is not dispositive of liability for the item. Moreover, there is nothing in the record establishing that it was, in fact, the member (as opposed to the driver, for example) who checked the space next to the bicycle listing . . . . Finally, we note that the MOU provides that proper notice of later-discovered loss or damage within the prescribed period shall be accepted by the carrier as overcoming the presumption of the correctness of the delivery receipt. On this record, then, the carrier shall be held liable for the bicycle.[46]

National Forwarding Company requested reconsideration. The carrier presented with its appeal a signed statement by the driver indicating that the service member checked the bicycle

[44] "Military duties" should be broadly defined to include any task which furthers the unit mission. Therefore, even if an injured soldier was unable to perform his or her normally assigned military duties, but performs some work (*e.g.*, answering phones, filing documents), no lost pay should be calculated.

[45] Comp. Gen., B-238982 (June 22, 1990).

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

off the inventory. The Comptroller General affirmed the prior holding.[47] The Comptroller General discussed the validity of the seventy-five day notice period and also questioned an undated statement provided by the driver three years after the shipment in question.

In *National Claims Service*,[48] the carrier again contended that it was not liable for missing items because the member checked the items off the inventory at delivery. The carrier also presented an undated statement from National's driver stating that all the cartons except those noted as missing at delivery were checked off by the member. This undated statement was sent to the USARCS more than one year after dispatch of DD Form 1840R.

In the administrative report, the USARCS noted that this was an extremely large shipment. It involved a family of two doctors. The inventory was ten pages long, with 296 items, including 121 packed cartons. The missing items in contention were twelve cartons, five of which were medical books.

The USARCS questioned who actually checked the items off the inventory. With the carrier industry system of "charge-backs," the checks may well be made by someone other than the claimant. Under the charge-back system, the Government Bill of Lading (GBL) carrier is assessed for the loss and then charges a substantial part of the loss against the agent. The agent in turn assesses a significant part of the loss against the driver. With such a system, USARCS contended that there was significant motivation for someone other than the claimant to make the actual check marks.

The Comptroller General agreed with the Army and upheld the offset action. The Comptroller General noted:

> In this case, the service member did examine his entire shipment once the movers left, and he found that a relatively small number of additional items had not been delivered. The Memorandum of Understanding (MOU) gave the service member a right to notify a carrier of additional loss/damage within seventy-five days of delivery in recognition of the fact that it may be difficult to account for everything while the carrier was still at the service member's quarters. . . . The fact that the missing items were checked off on the signed delivery inventory is not conclusive evidence of delivery of these items since it is not clear who checked the inventory sheet.[49]

The Comptroller General has also affirmed an offset action where initials, not check marks, appeared next to the item on the inventory. In *Andrews Van Lines*,[50] the carrier maintained that the member initialed each inventory item as received and confirmed this by his signature on the inventory. The Comptroller General indicated:

> In the present situation the fact that the member may have initialed the inventory for delivery of the cartons and signed for unpacking of the household goods provides no evidence that the missing goods were delivered since the goods were carried into the house and unpacked by the carrier . . . . Moreover, the member's prompt reporting of the missing items overcame the presumption of the correctness of the delivery receipt.[51]

In another case, the carrier noted that, after the negative decisions involving checking items off the inventory, certain carriers requested the service members to initial the inventory next to each item to signify receipt. The carrier argued that because the service member initialed each item on the inventory and did not waive unpacking the carrier should not be held liable for missing items. In *Resource Protection*,[52] the Comptroller General did not accept the carrier's argument that a member's initials relieved the carrier of liability. The Comptroller General noted that "[t]he shipper's presence during the unpacking does not relieve the carrier from liability since it is unreasonable to expect the shipper to note every item of loss or damage during the unpacking. Therefore, we affirm the prior settlement."[53]

Whenever a carrier denies liability because items are checked off the inventory, or the inventory reflects the shipper's initials, be sure to rebut the carrier by referencing the Comptroller General decisions discussed above. Ms. Schultz.

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[47] Comp. Gen., B-238982.2 (June 3, 1991).

[48] Comp. Gen., B-270299 (May 16, 1996).

[49] *Id.* at 2.

[50] Comp. Gen., B-257399 (Dec. 8, 1994).

[51] *Id.* at 3.

[52] Comp. Gen., B-265978 (Apr. 26, 1996).

[53] *Id.* at 1.

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 (JAGSO) units or other troop program units to attend On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend 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 Rivera.

1996-1997 Academic Year On-Site CLE Training

On-Site instruction provides an excellent opportunity to obtain CLE credit as well as updates in various topics of concern to military practitioners. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and United States Army Reserve Command. Legal automation instruction provided by the Legal Automation Army-Wide Systems Office (LAAWS) personnel and enlisted training provided by qualified instructors from Fort Jackson will also be available during the On-Sites. Most On-Site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Remember that *Army Regulation 27-1*, paragraph 10-10, requires United States Army Reserve Judge Advocates assigned to JAGSO units or to judge advocate sections organic to other USAR 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 civilian attorneys also are strongly encouraged to attend and take advantage of this valuable program.

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. You may also contact me on the Internet at *riveraju@otjag.army.mil.* Major Rivera.

GRA On-Line!

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

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

COL Keith Hamack, ... hamackke@otjag.army.mil
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LTC Peter Menk, ... menkpete@otjag.army.mil
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Ms. Sandra Foster, ... fostersa@otjag.army.mil
IMA Assistant

Mrs. Margaret Grogan, ... groganma@otjag.army.mil
Secretary

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

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
4-5 Jan 97	Long Beach, CA 78th MSO Long Beach Renaissance Hotel 111 East Ocean Blvd. Long Beach, CA 90802 (310) 437-5900	AC GO RC GO Contract Law Criminal Law GRA Rep	MG K. Gray COL J. DePue MAJ T. Pendolino MAJ S. Henley COL K. Hamack	LTC Andrew Bettwy 10541 Calle Lee, Ste 101 Los Alamitos, CA 90720 (714) 229-3700
1-2 Feb	Seattle, WA 6th MSO University of Washington School of Law, Condon Hall 1100 NE Campus Parkway Seattle, WA 22903	AC GO RC GO Criminal Law Int'l-Ops Law GRA Rep	MG W. Huffman COL R. O'Meara LTC L. Morris MAJ S. Morris LTC P. Menk	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 Street Columbus, OH 43085 (614) 436-0700	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG K. Gray COL J. DePue MAJ J. Fenton MAJ N. Allen COL T. Tromey	LTC Timothy J. Donnelly 9th MSO 165 N Yearling Road Whitehall, OH 43213 (614) 693-9500
22-23 Feb	Denver, CO 87th MSO Holiday Inn Hotel Denver International Airport Denver, CO 80239 (800) 511-2118	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	COL J. DePue MAJ S. Castlen MAJ W. Barto COL T. Tromey	LTC David L. Shakes 3255 Wade Circle Colorado Springs, CO 80917 (719) 596-3326
22-23 Feb	Indianapolis, IN IN ARNG Indianapolis National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Ad & Civ Law Int'l-Ops Law GRA Rep	BG W. Huffman COL T. Eres MAJ S. Parke MAJ R. Barfield COL K. Hamack	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
1-2 Mar	Charleston, SC 12th LSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG J. Altenburg COL T. Eres MAJ C. Garcia LTC K. Ellcessor COL K. Hamack	COL Robert S. Carr P.O. Box 835 Charleston, SC 29402 (803) 727-4523
8-9 Mar	Washington, DC 10th MSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Int'l-Ops Law Criminal Law GRA Rep	BG J. Cooke COL R. O'Meara MAJ M. Newton MAJ C. Pede Dr. M. Foley	CPT Michelle A Lang 10th MSO 5550 Dower House Road Washington, DC 20315 (301) 394-0558/0562

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

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
15-16 Mar	San Francisco, CA 75th LSO	AC GO RC GO Criminal Law Contract Law GRA Rep	MG M. Nardotti COLs O'Meara, Eres, & DePue MAJ R. Kohlmann LTC J. Krump COL T. Tromey	LTC Allan D. Hardcastle Babin, Seeger & Hardcastle P.O. Box 11626 Santa Rosa, CA 95406 (707) 526-7370
22-23 Mar	Rolling Meadows, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Road Rolling Meadows, IL 60008	AC GO RC GO Ad & Civ Law Int'l-Ops Law GRA Rep	BG J. Cooke COL R. O'Meara MAJ P. Conrad MAJ M. Mills LTC P. Menk	MAJ Ronald C. Riley P.O. Box 1395 Homewood, IL 60430-0395 (312) 443-4550
4-6 Apr	Miami, FL 174th MSO/FL ARNG Maimi Airport Hilton & Towers 5101 Blue Lagoon Drive Maimi, FL 331126 (305) 262-1000	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	BG J. Altenburg COL R. O'Meara LCDR M. Newcombe MAJ T. Pendolino LTC P. Menk	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 & Tng Ctr 360 Eliott Street Newport, RI 02841	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	BG J. Cooke COL J. DePue MAJ M. Mills MAJ K. Sommerkamp LTC P. Menk	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 St Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	AC GO RC GO Criminal Law Contract Law GRA Rep	BG W. Huffman COL T. Eres MAJ D. Wright MAJ W. Meadows Dr. M. Foley	LTC Cary Herin 81st RSC 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9304
17-18 May	Des Moines, IA 19th TAACOM The Embassy Suites 101 E Locust Des Moines, IA 50309 *(515) 244-1700	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	TBD COL R. O'Meara MAJ J. Little LTC J. Krump LTC P. Menk	MAJ Patrick J. Reinert P.O. Box 74950 Cedar Rapids, IA 52407 (319) 363-6333

* Topics and attendees listed are subject to change without notice.

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

1997

January 1997

7-10 January:	USAREUR Tax CLE (5F-F28E).
13-17 January:	USAREUR Contract Law CLE (5F-F18E).
19 January-11 April:	142d Basic Course (5-27-C20).
21-24 January:	PACOM Tax CLE (5F-F28P).
22-24 January:	3d RC General Officers Legal Orientation Course (5F-F3).
27-31 January:	26th Operational Law Seminar (5F-F47).

February 1997

3-7 February:	USAREUR Operational Law CLE (5F-F47).
3-7 February:	140th Senior Officers Legal Orientation Course (5F-F1).
10-14 February:	Maxwell AFB Fiscal Law Course (5F-F12A).
10-14 February:	65th Law of War Workshop (5F-F42).
18-21 February:	1st National Security Crimes Course (5F-F30).
24-28 February:	40th Legal Assistance Course (5F-F23).

March 1997

3-14 March:	138th Contract Attorneys Course (5F-F10).
17-21 March:	21st Administrative Law for Military Installations Course (5F-F24).
24-28 March:	1st Advanced Contract Law Course (5F-F103).
31 March-4 April:	141st Senior Officers Legal Orientation Course (5F-F1).

April 1997

7-18 April:	7th Criminal Law Advocacy Course (5F-F34).
14-17 April:	1997 Reserve Component Judge Advocate Workshop (5F-F56).
21-25 April:	27th Operational Law Seminar (5F-F47).
28 April-2 May:	8th Law for Legal NCOs Course (512-71D/20/30).
28 April-2 May:	47th Fiscal Law Course (5F-F12).

May 1997

12-16 May:	48th Fiscal Law Course (5F-F12).
12-30 May:	40th Military Judges Course (5F-F33).

19-23 May:	50th Federal Labor Relations Course (5F-F22).

June 1997

2-6 June:	3d Intelligence Law Workshop (5F-F41).
2-6 June:	142d Senior Officers Legal Orientation Course (5F-F1).
2 June-11 July:	4th JA Warrant Officer Basic Course (7A-550A0).
2-13 June:	2d RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
9-13 June:	27th Staff Judge Advocate Course (5F-F52).
16-27 June:	JAOAC (Phase II) (5F-F55).
16-27 June:	JATT Team Training (5F-F57).
16-27 June:	2d RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
22 June-12 September:	143d Basic Course (5-27).
30 June-2 July:	28th Methods of Instruction Course (5F-F70).

July 1997

1-3 July:	Professional Recruiting Training Seminar
7-11 July:	8th Legal Administrators Course (7A-550A1).
23-25 July:	Career Services Directors Conference
28 July-8 May 1998:	46th Graduate Course (5-27-C22). (5-27-C22).
28 July-8 August:	139th Contract Attorneys Course (5F-F10).
29 July-1 August:	3d Military Justice Managers Course (5F-F31).

August 1997

4-8 August:	1st Chief Legal NCO Course (512-71D-CLNCO).
11-15 August:	8th Senior Legal NCO Management Course (512-71D/40/50).
11-15 August:	15th Federal Litigation Course (5F-F29).
18-22 August:	66th Law of War Workshop (5F-F42).
18-22 August:	143d Senior Officers Legal Orientation Course (5F-F1).
25-29 August:	28th Operational Law Seminar (5F-F47).

September 1997

3-5 September:	USAREUR Legal Assistance CLE (5F-F23E).
8-10 September:	3d Procurement Fraud Course (5F-F101).
8-12 September:	USAREUR Administrative Law CLE (5F-F24E).
15-26 September:	8th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1997

January 1997

3-11, VCLE	Sixteenth Institute of Trial Advocacy, Charlottesville, VA
23, ABA	Legal Assistance for Military Personnel (LAMP), Pearl Harbor, Hawaii

March

20, ABA	Legal Assistance for Military Personnel (LAMP), Fort Carson, CO

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744 (800) 521-8662.

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3203
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW., Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 222-5286

GICLE: The Institute of Continuing Legal Education
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: Practicing 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
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

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 November 1996 issue of *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School publishes deskbooks and materials to support resident course 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 for registration as a user may be requested from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 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).
*AD313675	Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 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 A310157	Federal Tort Claims Act, JA 241-96 (118 pgs).
AD A301061	Environmental Law Deskbook, JA-234-95 (268 pgs).
AD A311351	Defensive Federal Litigation, JA-200-95 (846 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).
AD A311070	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 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
Telephone (314) 263-7305, ext. 268

(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 Personnel and Administrative Center (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 Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), 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, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988).*

(*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 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (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) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (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 12-series forms 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, 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, extension 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 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of *DA Pams* by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

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

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community for Army access to the LAAWS On-Line Information Service, while also providing Department of Defense (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 160.147.194.11 or Domain Names jagc.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: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

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)

Novell 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 = 160.147.194.11

Host Name = jagc.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 file name. 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 a 9600 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 all 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 files 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, April 1996.
ALAW.ZIP	June 1990	*The Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	July 1996	Current list of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school in Word 6.0, June 1996.
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 WordPerfect 5.0 and zipped into executable file.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FOIA2.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, un zip 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	August 1996	Soldiers' & Sailors' Civil Relief Act Guide, January 1996.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, March 1993.

FILE NAME	UPLOADED	DESCRIPTION
JA262.ZIP	January 1996	Legal Assistance Wills Guide, June 1995.
JA263.ZIP	August 1996	Family Law Guide, August 1996.
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	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
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.
JA508-2.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.

FILE NAME	UPLOADED	DESCRIPTION
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.
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.ZIP	January 1996	Operational Law Deskbook 1995.
YIR93-1.ZIP	January 1996	Contract Law Division 1993Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993Year 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 1994Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994Year in Review, Part 3, 1995 Symposium.
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YIR94-5.ZIP	January 1996	Contract Law Division 1994Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994Year 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 3 inch or 3 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 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
or C:\msoffice\winword

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 DEC96.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:

Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept*, 47 FLA. L. REV. 159 (1995).

Jeffrey M. Taylor, *Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defamation into Cyberspace*, 47 FLA. L. REV. 247 (1995).

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 at tjagsa@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, extension 435. Lieutenant Colonel Godwin.

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 Southern European Task Force
ATTN: AESE-JAO
Unit # 31401, Box 7
POC SSG Darrell Wade
DSN 634-7607

* Federal Reporter (1st and 2d Series)

* ALR 3d Series

Office of the Staff Judge Advocate
ATTN: STEWS-JA, Building S-146
White Sands Missile Range, New Mexico
88002-5075
COM (505) 678-1266
DSN 258-1263
FAX (505) 678-1266

* U.S. Supreme Court Digest (Lawyer's Edition), 20 volumes with 1980 pocket parts

* West's Federal Practice Digest 2d, 92 volumes with 1984 pocket parts

* West's Pacific Digest (covering 1 P2d through the May 1993 Supplement), 4 sets, 194 volumes

* West's Texas Digest 2d, 60 volumes with 1986 pocket parts

* West's Texas Digest, 42 volumes with 1983 pocket parts

* U.S. Court of Claims Reports, 210 volumes (1863-1976)

* The Opinions of the U.S. Attorneys General, volumes 1-41

9. Miscellaneous

Soldiers Magazine tells the Army's story to the soldiers, Department of the Army Civilians, retirees, their families, the media, and the American public. *Soldiers* needs the help of commanders, noncommissioned officers, and public affairs officers at all levels to ensure that all soldiers and civilians receive this publication. It is important to note that units must request *Soldiers Magazine* to receive it. It is part of the "Dash 12" publication series. Unit publication representatives can order the magazine at the unit or through the Internet. If you choose to subscribe by the Internet, first go to the *Soldiers* home page at http:www.redstone.army.mil/soldiers/home.html. Once there, find and click on the "About *Soldiers*" hot link. Click the hot link to the U.S. Army Publication and Printing Command. Complete the necessary form and you are now ready to receive *Soldiers Magazine*, the Army's flagship publication. For individual subscriptions, click on the Government Printing Office hot link. The cost for individual subscriptions is $20 per year.

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