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Recent Developments Relating to the Posse Comitatus Act[1]

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Calling the flow of illicit drugs into the United States a "grave threat to all Americans,"[2] Congress enacted legislation within the past year intended to facilitate effective cooperation between the military services and non-Department of Defense (DOD) law enforcement agencies in combating drug smuggling into this country from abroad.[3] This legislation, section 905 of the Department of Defense Authorization Act of 1982, expresses a congressional conviction that the military services should be made available to assist civilian law enforcement authorities in their efforts to halt the influx of illegal drugs and marihuana across United States borders.

Section 905 of the Act added Chapter 18 to Title 10 of the United States Code. Entitled "Military Cooperation with Civilian Law Enforcement Officials," the chapter's eight sections represent an

[1]For background on the subject of military aid to law enforcement see Furman, *Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev. 85 (1960); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83 (1975).

[2]H.R. Rep. No. 97-71, Part II, 97th Cong., 1st Sess., *reprinted in* 1981 U.S. Code Cong. & Ad. News 1781, 1785 [hereinafter cited as House Report.]

[3]*Id.*

attempt to enhance military and civilian cooperation by codifying existing law permitting the military departments to provide civilian law enforcement officials with equipment, training, information, and access to military facilities, and by allowing military personnel to actually operate equipment made available to non-DOD law enforcement officials.[4] To the extent that military personnel may now, in certain circumstances, *operate* such military equipment, Congress has created a new statutory exception to the Posse Comitatus Act.

The Posse Comitatus Act

The Posse Comitatus Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both.[5]

Although the Act does not expressly refer to the Navy, the Secretary of the Navy has ordered that members of the Navy and Marine Corps will not enforce or execute federal, state, or local laws except under certain limited circumstances.[6] The Coast Guard is not covered by the Act. Inasmuch as the Posse Comitatus Act is a general prohibition against the direct and active inducement of personnel of the military departments in the execution of federal, state, and local law, civilian law enforcement officials engaged in investigating and suppressing illegal drug trafficking have encountered significant legal limitations on the nature and extent of assistance available from military authorities. Congress hoped to facilitate military and civilian cooperation in this area by enacting this new legislation.

Chapter 18, Title 10, United States Code

Sections 371 through 378 of the recently enacted Chapter 18 of Title 10 of the United States Code address such issues as the transfer to civilian law enforcement authorities of information possessed by the military, the civilian use of military equipment and facilities, the assignment of military personnel for training, advising, and operating equipment in connection with non-DOD law

[4] *See* 10 U.S.C.A. §§ 371-75 (West Supp. 1981).

[5] 18 U.S.C. § 1385 (1976).

[6] SECNAV INSTR. 5820.7 (15 May 1974) provides that members of the naval service shall not, in their official capacity, enforce or execute local, state, or federal civil laws except when expressly authorized by the Constitution or Act of Congress, when authorized under the civil disturbances instruction of the Secretary of the Navy, or when specific approval of the Secretary of the Navy is granted.

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enforcement activities, and reimbursement by civilian law enforcement authorities for military assistance.

In order to implement the new law,[7] the Secretary of Defense issued DOD Directive 5525.5 on 22 March 1982. The directive requires the heads of the military departments to review existing programs dealing with aid to civilian law enforcement agencies and to issue implementing regulations.[8] This article will examine this new legislation and the DOD Directive and highlight how these provisions will facilitate military assistance to civilian law enforcement officials and what potential problems exist in the application of the new statutes. The article will conclude with a look at recent judicial developments in the Posse Comitatus area.

The Amendments

Three sections—sections 371, 372, and 373—essentially codify existing practice concerning the types of military assistance which the armed services may furnish civilian law enforcement officials. For instance, information gathered by a military service in the normal course of its operations or in pursuit of a military purpose has routinely been provided to civilian law enforcement authorities; this practice has been legislatively endorsed by section 371.[9] In an apparent effort to give greater effect to section 371, however, the Secretary of Defense in DOD Directive 5525.5 has authorized the military services to consider the needs of civilian law enforcement agencies in planning and executing military training and operations.[10] Although more compatible mission planning is clearly encouraged, the military services may still not plan and execute operations *primarily* for the purpose of gathering information for non-DOD law enforcement agencies.[11]

The use of tangible military property by civilian officials is covered by the second section. Section 372 provides that the military departments may make available to civilian law enforcement officials "any equipment, base facility, or research facility" for law enforcement purposes.[12] Prior to its enactment, there was concern that section 372 would have a chaotic effect on the operation of existing property disposal statutes unless the statute made clear that its operation was to be compatible with existing law. Hence, by the inclusion of the phrase "in accordance with other applicable law" in section 372, Congress indicated that it did not envision that the military services would become large volume, regular suppliers of modern materiel to civilian law enforcement agencies.[13] On the contrary, it was anticipated that civilian agencies would ordinarily get older equipment.[14] Access to sophisticated equipment is expected to be on a short term and infrequent basis.[15] Although the use of military installations or facilities by civil authorities may be proper under this section, the provision does not change the prohibition

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[7]U.S.C.A. §§ 375, 376, 377 (West Supp. 1981) directed the Secretary of Defense to issue implementing regulations.

[8]Department of Defense Directive No. 5525.5, DOD Cooperation with Civilian Law Enforcement Officials, Sec. E.2. (22 Mar. 1982) [hereinafter cited as DOD Dir. 5525.5].

[9]10 U.S.C.A. § 371 (West Supp. 1981) provides:

> The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.

The phrase "in accordance with other applicable law" was added to section 371 to insure adherence to the Privacy Act. *See* House Report, *supra* note 2, at 1981 U.S. Code Cong. & Ad. News 1790-1791.

[10]DOD Dir. 5525.5, Encl. (2), para. A.5.

[11]*Id.*

[12]10 U.S.C.A. § 372 (West Supp. 1981) provides:

> The Secretary of Defense may, in accordance with other applicable law, make available any equipment, base facility, or research facility of the Army, Navy, Air Force, or Marine Corps to any Federal, State, or local civilian law enforcement official for law enforcement purposes.

[13]House Report, *supra* note 2, at 1981 U.S. Code Cong. & Ad. News 1791-1792.

[14]House Report, *supra* note 2, at 1981 U.S. Code Cong. & Ad. News 1792.

[15]*Id.*

against unnecessary military involvement in civilian law enforcement.[16]

The third section concerns training and advising civilian law enforcement personnel. Although military assistance may be given under section 373, training is linked to the military equipment provided under section 372.[17] This congressional limitation is restated differently but explicitly in DOD Directive 5525.5. Accordingly, military personnel may not provide large-scale or elaborate training programs, nor will they be involved on a regular and direct basis in providing advice in connection with civilian law enforcement operations.[18] These three sections do not materially change the law, but rather reflect in a practical sense the assistance the military has lawfully provided civilian law enforcement authorities in the past.

In contrast to the above sections, section 374 clearly changed the law by authorizing the assignment of military personnel to operate equipment which has been made available to certain federal law enforcement agencies. Specifically, the Secretary of Defense may assign military personnel to operate and maintain equipment made available under section 372 where the assignment of such military personnel is requested by the head of an agency with jurisdiction to enforce federal drug, immigration, or customs laws.[19] The legislative history of section 374 envisions that the agency heads requesting such assistance would be cabinet-

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[16] *Id.* The Opinion of The Judge Advocate General of the Navy 1973/8051, 1 Oct. 1973, which disapproved the request of the Governor of Hawaii to use the Naval Corrections Center at Pearl Harbor on a regular basis to house state-convicted persons was cited in the legislative history of 10 U.S.C.A. § 374 (West Supp. 1974) as an example of the type of unnecessary involvement in civilian affairs which remained prohibited under the new legislation.

[17] 10 U.S.C.A. § 373 (West Supp. 1981) provides:

> The Secretary of Defense may assign members of the Army, Navy, Air Force, and Marine Corps to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment made available under section 372 of this title and to provide expert advice relevant to the purposes of this chapter.

[18] DOD Dir. 5525.5, Encl. (4), secs. A.4., A.5.

[19] 10 U.S.C.A. § 374 (West Supp. 1981) provides:

> (a) Subject to subsection (b), the Secretary of Defense, upon request from the head of an agency with jurisdiction to enforce—
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> (1) the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);
>
> (2) any of sections 274 through 278 of the Immigration and Nationality Act (8 U.S.C. 1324-1328); or
>
> (3) a law relating to the arrival or departure of merchandise (as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401)) into or out of the customs territory of the United States (19 U.S.C. 1202)) or any other territory or possession of the United States, may assign personnel of the Department of Defense to operate and maintain or assist in operating and maintaining equipment made available under section 372 of this title with respect to any criminal violation of such provision of law.
>
> (b) Except as provided in subsection (c), equipment made available under section 372 of this title may be operated by or with the assistance of personnel assigned under subsection (a) only to the extent the equipment is used for monitoring and communicating the movement of air and sea traffic.
>
> (c)(1) In an emergency circumstance, equipment operated by or with the assistance of personnel assigned under subsection (a) may be used outside the land area of the United States (or any territory or possession of the United States) as a base of operations by Federal law enforcement officials to facilitate the enforcement of a law listed in subsection (a) and to transport such law enforcement officials in connection with such operations, if—
>
> (A) equipment operated by or with the assistance of personnel assigned under subsection (a) is not used to interdict or to interrupt the passage of vessels or aircraft; and
>
> (B) the Secretary of Defense and the Attorney General jointly determine that an emergency circumstance exists.
>
> (2) For purposes of this subsection, an emergency circumstance may be determined to exist only when—
>
> (A) the size or scope of the suspected criminal activity in a given situation poses a serious threat to the interests of the United States; and
>
> (B) enforcement of a law listed in subsection (a) would be seriously impaired if the assistance described in this subsection were not provided.

level officials.[20] Thus, section 374 operates to carve out a new statutory exception to the Posse Comitatus Act.

Under the new law, the assistance normally rendered to the federal law enforcement agencies would consist of providing military equipment operated by military personnel for monitoring the movement of air and sea traffic. In emergency circumstances, however, military personnel could operate equipment made available to those particular federal law enforcement agencies as a base from which they could conduct law enforcement operations provided that the equipment is used "outside the land area of the United States,"[21] its territories, or possessions. By definition, an emergency circumstance exists when the size or scope of the particular suspected criminal activity is a serious threat to interests of the United States, and the enforcement of a federal drug, immigration, or customs law would be seriously impaired if assistance involving the use of military personnel to operate the equipment were withheld. The Secretary of Defense and the Attorney General jointly must determine when an emergency circumstance exists. In short, section 374 limits military aid to federal authorities to monitoring air and sea traffic unless there is an emergency.

There are certain limitations on the emergency use of military equipment operated by military personnel in support of non-DOD federal law enforcement officials. The equipment cannot lawfully be used to interdict or interrupt the passage of vessels or aircraft. Another limitation permits the use of equipment operated by military personnel to be used as a base of operations by non-DOD federal law enforcement authorities provided that the use occurs outside the land area of the United States, its possessions, and territories. One example of equipment that is likely to be a valuable asset to civilian law enforcement officials in such a case is a naval vessel. An apparent problem concerning the use of a naval vessel is that section 374 forbids the use of loaned military equipment to interdict or interrupt the passage of vessels or aircraft. Sections 375 and 378 surmount this apparent obstacle by providing that the Secretary of Defense can authorize the use of a Navy ship carrying civilian law enforcement officials to interdict a suspected drug smuggler on the high seas. Section 375 tasks the Secretary of Defense with issuing regulations designed to insure that members of the armed forces assigned to assist civilian law enforcement authorities will not directly participate in the interdiction of a vessel, unless participation in such activity is *otherwise authorized by law*.[22] Section 378, entitled "Nonpreemption of other law,"[23] preserves the authority of the executive branch to use military personnel or equipment for civilian law enforcement purposes to the extent that authority existed prior to the enactment of the new legislation. In the past, the Secretary of the Navy, an official within the executive branch, could lawfully authorize the use of naval personnel and equipment in civilian law enforcement activities because the Navy and Marine Corps were not expressly bound as a matter of law by the prohibitions of the Posse Comitatus Act.[24] Under the provisions of DOD Directive 5525.5, the Secretary of Defense reserved the authority to permit the use of Navy and Marine Corps personnel in the interdiction of a civilian vessel.[25] Accordingly, the strictures against using equipment operated by military personnel to stop or interrupt the passage of a vessel or aircraft, as contained in section 374, would appear to pertain only to members of the

[20] 127 Cong. Rec. H 7992 (daily ed. Nov. 3, 1981).

[21] 10 U.S.C.A. § 374(c) (West Supp. 1981).

[22] 10 U.S.C.A. § 375 (West Supp. 1981) (emphasis added). This section provides:

> The Secretary of Defense shall issue such regulations as may be necessary to insure that the provision of any assistance (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

[23] *Id.* at § 378 (West Supp. 1981) provides:

> Nothing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law prior to the enactment of this chapter.

[24] SECNAV INSTR. 5820.7 (15 May 1974).

[25] DOD Dir. 5525.5, Encl. (4), sec. C.2.

Army and Air Force. Thus, the limitations on the emergency use of military equipment to aid federal law enforcement agencies do not exist for the Navy or the Marine Corps with the proper secretarial approval.

As mentioned earlier, section 375 charged the Secretary of Defense with the responsibility of implementing the restrictions of Chapter 18. Specifically, military personnel are prohibited from participating in law enforcement activities of such a nature as would subject civilians to the direct application of military authority or power. DOD Directive 5525.5 implements this statutory restriction and describes the kinds of assistance the military services can furnish to civilian law enforcement officials. Also provided is a useful collection of statutory exceptions to the Posse Comitatus Act.

Section 376 prohibits the military departments from providing any form of assistance to civilian law enforcement agencies where doing so would adversely affect military preparedness.[26] In this connection the Secretary of Defense has charged the service heads with issuing "guidelines for evaluating requests for assistance in terms of impact on national security and military preparedness."[27] With respect to military equipment, the Secretary of Defense has established particular approval authorities, depending upon the type of materiel or duration of the loan.[28] In addition to expressly designating certain approval authorities, the Secretary of Defense has also empowered military department heads to delegate approval authority for certain kinds of equipment to subordinate unit commanders.[29] Inasmuch as such subordinate unit commanders may not be in a position to meaningfully assess the impact of an equipment loan on national security or military preparedness, the subordinate commander will only, as a practical matter, gauge the impact of the equipment loan on the readiness of his or her own unit.[30] In any case, military assistance to civilian authorities must not adversely impact upon unit readiness.

Section 377 permits the conditioning of military assistance upon reimbursement by civilian law enforcement officials for the cost of such aid.[31] This provision expresses the intent of Congress that "[t]he availability of military assistance is not intended . . . to be an indirect method of increasing the budget authority of the civilian law enforcement agency."[32] The Secretary of Defense has required heads of DOD components to review programs in which reimbursement is not required by law and where a waiver would not adversely affect military preparedness.[33] It would be inaccurate to assume, however, that this should be construed as expressing a liberal policy favoring waivers of repayment of costs. On the contrary, it would appear that the DOD view is that waiver of

[26] 10 U.S.C.A. § 376 (West Supp. 1981) provides:

> Assistance (including the provision of any equipment or facility or the assignment of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such assistance will adversely affect the military preparedness of the United States. The Secretary of Defense shall issue such regulations as may be necessary to insure that the provision of any such assistance does not adversely affect the military preparedness of the United States.

[27] DOD Dir. 5525.5 (22 March 1982), sec. E.2.c.

[28] *Id.* at Encl. (3), sec. D.

[29] *Id.* at Encl. (3), sec. D.3.e.

[30] *Id.* at Encl. (3), sec. C provides in part that "[t]he implementing documents issued by the heads of DOD Components shall ensure that approval for the disposition of equipment is vested in officials who can assess the impact of such disposition on national security and military preparedness."

[31] 10 U.S.C.A. § 377 (West Supp. 1981) provides:

> The Secretary of Defense shall issue regulations providing that reimbursement may be a condition of assistance to a civilian law enforcement official under this chapter.

[32] House Report, *supra* note 2, at 1981 U.S. Code Cong. & Ad. News 1794.

[33] DOD Dir. 5525.5, sec. E.2.b. directs heads of DOD components to "[r]eview training and operational programs to determine how assistance can be provided to civilian law enforcement officials, consistent with the policy in section D., above, with a view towards identification of programs in which reimbursement can be waived under enclosure 5 of this Directive." The policy in *id.* at sec. D states: "It is the policy of the Department of Defense to cooperate with civilian law enforcement officials to the maximum extent practicable." *Id.* at Encl. (5) establishes guidance and policy with respect to funding.

reimbursement should be the exception and not the rule.[34]

As noted above, section 378, the last section in Chapter 18, does not affect prior practice with respect to the authority of the executive branch to use military personnel or equipment for civilian law enforcement activities. The importance of this section lies in its preserving the option of using Navy and Marine Corps personnel in those instances in which the Posse Comitatus Act prohibits the use of members of the Army or Air Force. Indeed, were that not the case, Navy ships crewed by naval personnel would be unable to transport Coast Guard boarding parties in boarding operations against vessels smuggling drugs and marihuana into the United States.

In sum, the newly enacted legislation has served two purposes. It has given statutory blessing to a number of pre-existing practices which had been employed by the military in rendering assistance to non-DOD law enforcement agencies. Additionally, it has significantly expanded the permissible use of military resources in the war against illegal narcotics entering the United States. With these provisions, Congress has taken a large step toward enhancing military-civilian cooperation in an area of an important national objective.

Recent Case Law

Two recent cases interpreting the Posse Comitatus Act have impacted significantly on the subject of military aid to law enforcement. On 4 May 1982, the Oklahoma Court of Criminal Appeals, in *Taylor v. State*,[35] suppressed evidence in a drug prosecution on the basis that the arrest of the defendant had violated the Posse Comitatus Act. In that case, a military police officer was working undercover for a civilian police department. The servicemember participated in an undercover drug purchase, drew his gun during the arrest of the defendant, participated in a search of the defendant's house after the arrest, and personally delivered the drugs seized to the civilian authorities. The court found the military police officer's intervention excessive and that it "intolerably surpassed"[36] the sort of military involvement in civilian law enforcement activities which the court had in the past found not to warrant the application of an exclusionary rule.[37] This case conflicts with other decisions holding that the government's violation of the Posse Comitatus Act does not trigger the exclusionary rule.[38]

In *Lamont v. Haig*,[39] a number of residents of Wounded Knee, South Dakota brought suit in federal court to recover damages for allegedly having been kept from their homes or forcibly confined due to federal law enforcement activities directed and supervised by the defendants during the Indian occupation of Wounded Knee in 1973. The plaintiffs claimed that the use of military personnel in support of civilian law enforcement officials violated the Posse Comitatus Act and therefore entitled them to damages.[40] Describing the Posse Comitatus Act as a "bare criminal statute," the court found nothing in the legislative history of the Act evidencing a congressional intent to create a private course of action.[41] Additionally,

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[34]In a Memorandum for Secretaries of the Military Departments, 25 May 1981, DOD Support to Civilian Law Enforcement Agencies, the Principal Deputy Assistant Secretary of Defense (for Manpower, Reserve Affairs & Logistics) stated: "It remains the opinion of the OSD General Counsel that reimbursement is required as a matter of law except in circumstances which provide to DOD a benefit which is substantially equivalent to that which would be obtained from a military operation."

[35]Taylor v. State, 645 P.2d 522 (Okla. Crim. App. 1982).

[36]*Id.* at 525.

[37]In Lee v. State, 513 P.2d 125 (Okla. Crim. App. 1973); Hilde-Brandt v. State, 507 P.2d 1323 (Okla. Crim. App. 1973); and Hubert v. State, 504 P.2d 1245 (Okla. Crim. App. 1972), the court had the opportunity on three occasions to apply an exclusionary rule in cases of apparent violations of the Posse Comitatus Act. In each case, however, the court found that the purportedly illegal activity of military personnel was of a nature which would have been lawful if performed by a private citizen. Consequently, the witnesses were permitted to testify and the convictions were affirmed.

[38]Other courts which have had occasion to deal with violations of the Posse Comitatus Act have declined to apply an exclusionary rule. *See, e.g.*, State v. Trueblood, 265 S.E.2d 662 (N.C. 1980); State v. Nelson, 260 S.E.2d 629 (N.C. 1979); State v. Danko, 548 P.2d 819 (Kan. 1976). *But see* People v. Burden, 94 Mich. App. 209, 288 N.W.2d 392 (1979).

[39]Lamont v. Haig, 539 F. Supp. 552 (D.S.D. 1982).

[40]*Id.* at 558.

[41]*Id.*

the court found no judicial authority which recognized such a cause of action.[42] Concluding that a violation of the Posse Comitatus Act would not give rise to a civil cause of action, the court dismissed the complaint to the extent that it purported to state a cause of action under the Act.[43] The court found, however, that the complaint stated a constitutional cause of action insofar as it alleged that the plaintiff's First, Fourth, and Fifth Amendment rights had been violated.[44] The case thus stands for the limited proposition that one who is deprived of his constitutional rights by the conduct of an official whose activities may simultaneously violate the Posse Comitatus Act has a colorable cause of action based on the official's conduct as it deprives the plaintiff of his constitutional rights. The violation of the Posse Comitatus Act, of itself, creates no cause of action.

Summary

The enactment of Chapter 18 of Title 10, United States Code has clarified congressional intent with respect to the kind of military assistance which may lawfully be provided to non-DOD law enforcement agencies. It is clear that the military departments may aid such civilian law enforcement officials by providing them information, advice, and training and by making equipment and installation facilities available to them. In addition, Congress expanded the number of statutory exceptions to the Posse Comitatus Act by authorizing the assignment of military personnel, under certain conditions, to operate equipment placed at the disposal of federal non-DOD law enforcement officials. Although provisions of Chapter 18 continue the prohibition of the Posse Comitatus Act against the direct and active participation of Army and Air Force personnel in a non-DOD law enforcement role, such employment of members of the Navy and Marine Corps remains lawful with the authorization of the Secretary of Defense, or Navy, as appropriate. Finally, nothing in newly enacted Chapter 18 of Title 10 permits the military departments to provide assistance to law enforcement outside of DOD where to do so would impair military readiness or endanger national security.

The activity in the courts has reaffirmed that the application of an exclusionary rule in criminal prosecutions remains a potential consequence of violations of the Posse Comitatus Act. On the civil side, the courts have left undisturbed the holding that the Posse Comitatus Act is strictly a criminal statute and that a violation of the Act does not of itself give rise to a civil cause of action.

[42] *Id.* at 558-59.

[43] *Id.* at 559.

[44] *Id.* at 560.

Recognizing Personal Services Contracts

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With the Commercial Activities Program and the resultant increased emphasis on procuring products and services from the private sector,[1] the government attorney must be familiar with service contracting issues. One such recurring issue involves the prohibition, absent express statutory authority, against personal services contracting in circumvention of civil service laws and Department of Defense personnel ceilings.[2] Although

[1] It is the policy of the government to rely on private enterprise, where available, for the provision of the products and services which the government needs in order to act on the public's behalf. *See* Office of Management and Budget Circular No. A-76, 44 Fed. Reg. 20,556 (1979) (amended 45 Fed. Reg. 69,322 (1980)).

[2] Defense Acquisition Reg. § 22-102.1(a) (1 July 1976) [hereinafter cited as DAR] sets forth the Department of Defense policy against personal services contracting in circumvention of civil service laws and regulations, the Classification Act, and Department of Defense personnel ceilings without express statutory authority. For examples of such express authority, *see* 10 U.S.C. § 4022 (1976) (contract surgeons); 10 U.S.C. § 4540 (1976) (architects and engineers); 10 U.S.C. § 828 (1976) (civilian court reporters for courts-martial).

tasked with the responsibility of ensuring compliance with the restrictions on the use of personal services contracts,[3] the contracting officer is directed to seek legal advice in doubtful cases and in all cases in which statutory authority is to be used to justify a personal services contract.[4]

The first step in complying with this prohibition is being able to recognize a personal services requirement at the pre-solicitation stage. Having identified a potential personal services problem, it is often possible to restructure the solicitation so that the contract will call for services of a nonpersonal nature.

The Defense Acquisition Regulation (DAR) describes personal services contracting as "the procuring of services by contract in such a manner that the contractor or his employees are in effect employees of the Government."[5] To further assist in the identification of personal services, DAR 22-102.2 provides a list of factors which might be present in a personal services contract. The criteria in DAR 22-102.2 are divided into four categories: (i) the nature of the work, (ii) contractual provisions concerning the contractor's employees, (iii) other provisions of the contract, and (iv) administration of the contract. The following discussion integrates the DAR criteria with Comptroller General decisions illustrative of selected factors. These factors are not all of equal importance, and each characterization of services as personal or nonpersonal requires a balancing of applicable factors in accordance with their relative weights.[6]

The Nature of the Work

The first category of criteria to consider in identifying a personal services contract involves the nature of the work,[7] i.e., whether the service is such that it could and should be performed by government personnel. In 1944, the Office of Price Administration (OPA) asked the Comptroller General to determine whether lumber grading services could be appropriately contracted out or if government employees should perform the task. The Comptroller General concluded that, although the responsibility for detecting violations of ceiling prices on lumber was statutorily imposed on the OPA, it was appropriate for the OPA to contract with an industry organization for lumber grading services performed in connection with discharge of that responsibility.[8] One persuasive fact was that, after substantial efforts, the OPA had been unable to employ any qualified lumber graders as civil servants.[9] Further, a showing was made that the nature of the services required skilled personnel to operate special equipment and utilize laboratory facilities.[10]

Another important factor in identifying personal services is the extent to which the services represent the "the discharge of a Governmental function which calls for the exercise of personal judgment and discretion on behalf of the Government."[11] In the case above, the OPA was tasked with establishing and enforcing ceiling prices on various grades of lumber. Although lumber grading services would certainly be an integral part of the execution of that responsibility, it is unlikely that such services could be characterized as a governmental function. The actual setting of maximum lumber prices would, however, seem to require the exercise of discretion appropriate only for government personnel. DAR 22-102.2(i)(B) provides that the "governmental function" factor, if sufficiently present, may alone be determinative in rendering services personal in nature.

One other consideration involving the nature of the work is the projected duration of the requirement. Services needed on a continuing basis, as opposed to a short-term or intermittent basis, are indicative of personal services.[12]

Contractual Provisions Concerning the Contractor's Employees

Once the nature of the work has been analyzed for personal services characteristics, it is appro-

[3] DAR § 22-102.1(a).

[4] *Id.*

[5] *Id.*

[6] *Id.* at § 22-102.2.

[7] *Id.* at § 22-102.2(i).

[8] 24 Comp. Gen. 272 (1944).

[9] *Id.* at 273. *See* DAR § 22-102.2(i)(A).

[10] *Id.*

[11] *Id.* at § 22-102.2(i)(B).

[12] *Id.* at § 22-102.2(i)(C).

priate to examine the contractual provisions concerning the contractor's employees.[13] The primary emphasis of this second category of criteria and the related cases is the degree of supervision and control that the government has over the contractor or his employees.[14]

The first factor listed in this contractual provisions category is "to what extent the Government specifies the qualifications of, or reserves the right to approve, individual contractor employees."[15] In *Science Applications, Inc.* (SAI),[16] the Request for Proposals (RFP) contained a clause providing that offeror's proposals would be evaluated on the basis of identified personnel and their qualifications, and their commitment or availability for work on the contract.[17] SAI argued that the evaluation on this basis was restrictive and would result in a prohibited personal services contract.[18] The Comptroller General disagreed and indicated that the RFP was for highly technical services, thereby making evaluation of the skills and background of an offeror's workforce necessary.[19] The opinion cited *Hew Es Co, Inc.*,[20] in which the Comptroller General found that a requirement to submit detailed employee resumes and utilize those individuals on the contract, with substitutions only by permission of the agency, did not render the contract one for personal services.[21] The rationale in *Hew Es*, was that the government had not retained the right to assign specific tasks to particular employees.[22] So in the case of both *Hew Es* and *Science Applications*, the lack of government control over the actual performance of work outweighed the government's intervention in the selection of contractor employees.

In *Cerberonics, Inc.*,[23] an RFP for management engineering and technical support services in support of a number of major weapon systems acquisitions contained a "Substitution of Personnel" clause which restricted the contractor's right to substitute personnel working on the contract without prior government approval.[24] The Comptroller General found that, although this clause might infringe somewhat on traditional contractor prerogatives, in this case the elements of government supervision of contractor employees were not present to the extent necessary to create the employer-employee relationship indicative of a personal services contract.[25] In addition to the factors in DAR 22-102.2, the Comptroller General cited *Kelly Services, Inc.*,[26] in support of the finding of no employer-employee relationship. In that case, the Federal Energy Administration issued a purchase order to Kelly Services, Inc., for professional secretarial services for a ten day period at the Alaska Field Office. In reaching the conclusion that the relationship created was tantamount to employer-employee, the Comptroller General looked to six elements which the Civil Service Commission had set forth as indicative of such a proscribed relationship. Those elements, as cited in *Kelly Services, Inc.*, are as follows:

1. Performance on site.

2. Principal tools and equipment furnished by the government.

3. Services are applied directly to integral efforts of agencies or an organizational subpart in furtherance of assigned function or mission.

4. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

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[13] *Id.* at § 22-102.2(ii).

[14] *Id.*

[15] DAR § 22-102.2(ii)(A).

[16] Comp. Gen. Dec. B-197099 (20 May 1980), 80-1 Comp. Gen. Procurement Dec. para. 348 [hereinafter cited as CPD].

[17] *Id.* at 12.

[18] *Id.* at 11.

[19] *Id.* at 13.

[20] Comp. Gen. Dec. B-183040 (18 Apr. 1975), 75-1 CPD para. 239.

[21] 80-1 CPD para. 348, at 12-13.

[22] 75-1 CPD para. 239, at 2-3. See DAR §§ 22-102.2(ii)(B), (D).

[23] Comp. Gen. Dec. B-192161 (21 Nov. 1978), 78-2 CPD para. 354.

[24] *Id.* at 1-2.

[25] *Id.* at 6.

[26] Comp. Gen. Dec. B-186700 (19 Jan. 1977), 77-1 CPD para. 356.

5. The need for the type of service provided can reasonably be expected to last beyond one year.

6. The inherent nature of the service, or the manner in which it is provided, requires directly or indirectly government direction or supervision of contractor employees in order:

a. To adequately protect the government's interest, or

b. To retain control of the function involved, or

c. To retain full personal responsibility for the function supported in a duly authorized federal official or employee.[27]

The critical factor in *Kelly*, was the right to supervise or the actual supervision of a contractor employee.[28]

Numerous Comptroller General decisions focus on this supervision factor found in DAR 22-102.2(ii)(C). There is a series of cases in which contractors alleged that an experimental Navy contract format for mess attendant services created personal services contracts.[29] In each case, the Comptroller General looked to the degree of detailed government direction or supervision of contractor employees and found no employer-employee relationship.[30]

In *Consultant Services—T.C. Associates*,[31] the Comptroller General again reviewed the six elements of the Civil Service Commission test for improper supervision,[32] and cited *Lodge 1858, AFGE v. Webb*,[33] as illustrative of the application of those factors as raising a rebuttable presumption of supervision.[34] The Comptroller General in *Consultant Services*, interpreted the U.S. Court of Appeals for the District of Columbia Circuit as looking for evidence of actual "relatively continuous close supervision" in establishing an employment relationship.[35] The Comptroller General, however, amplified the courts' standard by interposing that it is "a relative standard that takes into account the extent to which the duties of a particular position are susceptible of supervision . . . . If the Government takes over that degree of supervision that the contractor would otherwise perform . . . , the relationship . . . is tantamount to that of employer and employee."[36]

DAR 22-102.2(ii)(D) addresses "to what extent the Government retains the right to supervise or control the method in which the contractor performs the service, the number of people he will employ, the specific duties of individual employees, and similar details." In *Chemical Technology, Inc.*,[37] provisions of a Navy solicitation required the contractor to have present at all times sufficient contractor personnel to render all services required by the contract.[38] The solicitation further provided that military personnel could be assigned to perform the services at contractor's expense in the event of contractor failure to furnish the requisite number of employees.[39] The contractor argued that these provisions created a degree of government management and direction that would result in a personal services contract.[40] The Comptroller General found that the con-

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[27] *Id.* at 3-4 (citing Federal Personnel Management Letter 300-8 (12 Dec. 1978); Federal Personnel Management Letter 300-12 (30 Aug. 1978)).

[28] 77-1 CPD para. 356, at 4.

[29] Logistical Support, Inc., Comp. Gen. Dec. B-200030 (5 May 1981), 81-1 CPD para. 342; Logistical Support, Inc., Comp. Gen. Dec. B-199933 (10 Feb. 1981), 81-1 CPD para. 87; Logistical Support, Inc., Comp. Gen. Dec. B-197488 (24 Nov. 1980), 80-2 CPD para. 391; Palmetto Enterprises, Comp. Gen. Dec. B-190060 (10 Feb. 1978), 78-1 CPD para. 116; Industrial Maintenance Serv., Inc., Comp. Gen. Dec. B-189303, B-189425 (15 Dec. 1977), 77-2 CPD para. 466.

[30] 81-1 CPD para. 342, at 3; 81-1 CPD para. 87, at 3; 80-2 CPD para. 391, at 9; 77-2 CPD para. 466, at 6-7.

[31] Comp. Gen. Dec. B-193035 (12 Apr. 1979), 79-1 CPD para. 260.

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

[33] 580 F.2d 496 (D.C. Cir. 1978).

[34] 79-1 CPD para. 260, at 7.

[35] *Id.*

[36] *Id.* at 8.

[37] Comp. Gen. Dec. B-190074 (25 Apr. 1978), 78-1 CPD para. 317.

[38] *Id.* at 3.

[39] *Id.* at 3-4.

[40] *Id.* at 4.

tractor was responsible for furnishing and supervising adequate personnel to perform the work and the reservation by the government of remedial enforcement powers did not create an illegal employer-employee relationship.[41]

In another case, three firms protested the provisions of a solicitation requiring minimum manning levels and shift times[47] and alleged that this would result in an illegal personal services contract.[48] The Comptroller General quoted a portion of DAR 22-102.2(ii)(D) authorizing a specified minimum number of employees where necessary to assure performance and stated without further inquiry that "the contracting officer reasonably determined that only non-personal services were called for in performance of this contract."[44]

Other factors included in the DAR 22-102.2(ii) category of contractual provisions are the extent to which the government will review the work of individual contractor employees as opposed to reviewing the final product,[45] and whether the government has the right to have contractor personnel removed from the job for performance reasons.[46]

Other Provisions of the Contract

The third category of criteria for recognizing personal services addresses provisions of the contract other than those concerning the contractor's employees.[47] For example, DAR 22-102.2(iii)(A) focuses on whether the service contracted for can be defined as an end product. This factor was persuasive in *United States Advisory Commission on Public Diplomacy*,[48] in which the Commission had contracted with a private law firm to research its legal authority and independence. The Comptroller General determined that the legal service contracted for was an end product and that the manner of achieving that product had been left to the discretion of the contractor law firm.[49] Further, the nature of the services was such that only minimal supervision could have been exercised over the performance of the work.[50]

The second and third factors in this category address whether the contract is for a specific definable task or for work determined on a day-to-day basis,[51] and whether contract payment is made for time worked or results accomplished.[52] The final factor addressed in this section is the degree to which the government furnishes such items as office space, equipment, and supplies to the contractor.[53] Although this factor is often present in cases of alleged personal services, the determinative issue is more likely to be one of supervision and control of the contractor employees.[54]

Administration of the Contract

The final category of DAR criteria for recognizing personal services involves administration of the contract.[55] The first factor is whether contractor employees and government employees are used interchangeably to perform the same functions.[56] Although this issue was not discussed in *Kelly Services*,[54] a contract for temporary secretarial services is a good example of the presence of this criterion. A second factor is the degree to which contractor employees are integrated into the government's organization.[58]

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[41] *Id.* at 6.

[42] Industrial Maintenance Serv., Inc., Comp. Gen. Dec. B-189303, B-189425 (15 Dec. 1977), 77-2 CPD para. 466, at 2.

[43] *Id.* at 6.

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

[45] DAR § 22-102.2(ii)(E).

[46] *Id.* at § 22-102.2(ii)(F).

[47] *Id.* at § 22-102.2(iii).

[48] Comp. Gen. Dec. B-202159 (6 Nov. 1981), 81-2 CPD para. 404.

[49] *Id.* at 6.

[50] *Id.*

[51] DAR § 22-102.2(iii)(B).

[52] *Id.* at § 22-102.2(ii)(C).

[53] *Id.* at § 22-102.2(iii)(D).

[54] *See* AFGE Local No. 3347, AFL-CIO, Comp. Gen. Dec. B-183487 (25 Apr. 1977), 77-1 CPD para. 326, at 6.

[55] DAR § 22-102.2(iv).

[56] *Id.* at § 22-102.2(iv)(A).

[57] *See* text accompanying notes 26-28, *supra*.

[58] DAR § 22-102.2(iv)(B).

The final consideration enumerated in DAR 22-102.2 is the extent to which any of the category (ii) and (iii) factors are actually present during contract administration, regardless of whether they are actually written into the contract itself.[59] This issue was raised in *AFGE Local No. 3347, AFL-CIO*.[60] The union had challenged the RFP for an Environmental Protection Agency (EPA) warehouse receiving function on the grounds that it called for an illegal personal services contract.[61] The Comptroller General denied the protest, responding that, as written, the proposal did not violate any laws.[62] However, the decision noted that administration of the contract might effectuate violations and that the subject would be of continuing interest to the Comptroller General.[63] In 1977, the union further alleged that the contract, as administered, created a employer-employee relationship.[64] Specifically, the union enumerated that contractor personnel were using government equipment, working side-by-side with EPA employees, and receiving government supervision.[65] A Government Accounting Office audit team examined the contract performance on-site to determine the validity of the allegations.[66]. The Comptroller General concluded, based on the observations of the audit team, that the elements of an employer-employee relationship did not exist under the contract as administered.[67]

In another protest, an incumbent contractor alleged that an Invitation for Bids (IFB) for mess attendant services did not accurately reflect the personal services that would in fact be required of contractor personnel.[68] The incumbent stated that contractor employees would be required to perform additional work under the supervision of government personnel.[69] The Comptroller General, looking only to the IFB, saw that employees were to be under the supervision of the contractor and denied the protest, stating that matters of contract administration are for resolution under the disputes clause.[70]

Conclusion

In summary, it should be emphasized that the factors outlined above are guidelines only. Each case requires a careful balancing of the factors involved, giving due consideration to their relative importance.[71] Since not all of the factors are of equal importance, there is helpful parenthetical guidance in the DAR following many of the individual criteria. Further guidance to the practitioner is offered in DAR 22-102.3 in the form of examples of personal and nonpersonal services. The role of the contracting attorney in the personal services area is technically that of advisor to the contracting officer.[72] However, the attorney who is familiar with the boundaries of permissible service contracting can often assist requiring activities by providing positive guidance on how to structure services contracts in a nonpersonal manner.

When reviewing a contract which appears to call for personal services for which there is no express statutory authority, the attorney should consider that the work statement might be salvaged by tailoring the specifications to be nonpersonal when measured by the DAR criteria. For example, it is apparent from the cases cited above that elements of government supervision are strongly indicative of personal services. The contracting attorney reviewing the file might coordinate with the requiring activity to determine whether it is really necessary, for example, for the contractor to

[59] *Id.* at § 22-102.2(iv)(C).

[60] Comp. Gen. Dec. B-183487 (3 July 1975), 75-2 CPD para. 12.

[61] *Id.* at 1-2.

[62] *Id.* at 2.

[63] *Id.* at 3.

[64] AFGE Local 3347, AFL-CIO, Comp. Gen. Dec. B-183487 (25 Apr. 1977), 77-1 CPD para. 326, at 2.

[65] *Id.* at 3.

[66] *Id.* at 5.

[67] *Id.* at 6.

[68] Lewis Management and Serv. Co., Comp. Gen. Dec. B-192078 (18 Oct. 1978), 78-2 CPD para. 286.

[69] *Id.* at 2.

[70] *Id.* at 3-4.

[71] DAR § 22.102.2.

[72] *Id.* at § 22.102.1(A).

perform the work at the government work site, during government work hours, and using government materials and equipment. Eliminating such indicia of government supervision might remove the contract from the personal services category if there are no other strong indicators present. In this regard, the less control government personnel have over the manner or method by which the contractor accomplishes the task, the better. For this reason, it is helpful in drafting nonpersonal service contracts to call for an end product whenever possible.

Occasionally, the contracting attorney will be presented a requirement with obvious personal services implications which are not susceptible to being written out of the contract. An example would be a work statement involving the performance of an inherently governmental function that cannot be delegated to a contractor.[7a] In such a case, the attorney should recognize the requirement as impermissible personal services contracting under the current statutory scheme, and the contracting officer should be so advised.

[7a] *Id.* at § 22.102.1(B).

Torncello & Soledad Enterprises, Inc. v. United States A Return to the Common Law

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Government contract law has existed more or less independently from the common law of contracts. It is an area permeated to the core by statutes and regulations. The practioner in this area only infrequently borrows from his law school knowledge of contracts. In *Ronald A. Torncello & Soledad Enterprises, Inc. v. United States*[1], the Court of Claims has given a new vitality to the common law concept of consideration as applied to government contracts. In so doing it will undoubtedly be a source of considerable confusion.

Torncello

Torncello involves the right of the United States to terminate contracts for the convenience of the government (T/C). It has long been considered the right of the government to T/C contracts when the contracting officer has deemed termination to be in the best interest of the government.[2] To some extent, this right inheres in the government's sovereign power to terminate an obligation when its continued existence is no longer in the public interest. Upon a T/C, the contractor is normally entitled to be reimbursed for the cost of his performance until the time of termination plus a reasonable profit. However contractors are not entitled to the common law remedy of anticipatory profits or consequential damages.[3]

The facts of *Torncello* may briefly be stated. The Navy issued an invitation for bids for grounds maintenance and refuse removal services for six Navy housing projects. The solicitation listed twelve items of work to be awarded to the bidder whose overall price for the twelve items was low; *Torncello* was awarded the contract as the low bidder.[4]

Central to the problem is item eight of the disputed contract. Item eight states that "the work shall include the control of agricultural pests, including rodents, weed control and plant diseases which attack shrubbery, trees and turf grasses."[5] The contract contained the standard T/C clause:

> The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the

[1] No. 486-80C (Ct. Cl. 16 June 1982).

[2] *See* United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1876).

[3] Defense Acquisition Reg. § 8-303 (1 July 1976) [hereinafter cited as DAR].

[4] No. 486-80C, slip op. at 2-3.

[5] *Id.* at 2.

government. If this contract is for supplies and is so terminated, the contractor shall be compensated in accordance with ASPR Section VIII, in effect on this contract's date. To the extent that this contract is for services and is so terminated, the government shall be liable only for payment in accordance with the payment provisions of this contract for services rendered prior to the effective date of termination[6].

Plaintiff's bid on item eight was considered high by the Navy but justified by Torncello on the basis of the extensive nature of the work which might be required. On item eight, Torncello was underbid by a competitor, Public Works.[7]

During the course of the contract period Torncello recceived no work requests for pest control. Upon making inquiry, Torncello learned that this work had been diverted by the Navy to Public Works. The Navy explained that the only services actually required under this item were for gopher control and that Public Works had offered to accomplish this for only seven percent of Torncello's item eight bid. Torncello thereupon offered to modify the contract and perform work for gopher control only at the same rate as Public Works. Nonetheless the Navy continued to divert the work to Public Works.[8]

The successors in interest to Torncello argued unsuccessfully to the Armed Services Board of Contract Appeals (ASBCA) that Navy breached it's contract with Torncello. Plaintiff contented that the contract obligated the government to give all its requirements for pest control to Torncello. Torncello claimed that it was willing and able to perform whatever pest control work the government may have required for the projects. Plaintiff's theory was the government could not abrogate an existing contract because it had subsequently found another party willing to perform the service for a lower price.[9]

[6]*Id.* at 5.

[7]*Id.* at 3.

[8]*Id.*

[9]*Id.* at 4.

The ASBCA held that the government had the right to T/C the Torncello contract. That the government did not denominate its action as a T/C was not fatal; the doctrine of constructive termination for convenience provides that the government's actions may be supported at a later date by any reason which could have been advanced at the time of termination.[10] The operation of this doctrine serves to limit the government's liability for damages. As noted above, the basic measure of a contractor's recovery in a T/C is payment for services performed prior to the date of termination. Because the contract was constructively T/C as of the time the Navy diverted work to Public Works, Torncello performed no pest control services and was therefore not entitled to any compensation from the government.[11]

The Court of Claims Decision

It was in this posture that *Torncello* reached the Court of Claims. Simply stated, the Court of Claims held that neither the underlying rationale of the T/C nor the legal requirement of consideration were vindicated by the result from the ASBCA. The court remanded to the board for a hearing on the quantum of damages to be awarded plaintiff.[12]

The decision is lengthy and is worth analyzing in detail. In the court's view, the propriety of applying the constructive termination doctrine depended upon the ability of the government to terminate a contract prior to breaching it. Thus, the central issue was whether the Navy could validly T/C prior to diverting work to Public Works.[13] An affirmative answer would relieve the Navy from any liability for breach of contract.

In addressing this issue, the court examined the historical development of the T/C. The T/C initially represented a legislative response to wartime conditions. The power to T/C was considered necessary to permit the government to terminate con-

[10]Appeal of Soledad Enter., Inc., ASBCA Nos. 20376, 20423-26 (29 Apr. 1977), 77-2 BCA para. 12,552 (citing College Point Boat Corp. v. United States, 267 U.S. 12 (1925).

[11]No. 486-80C, slip op. at 5.

[12]*Id.* at 28.

[13]*Id.* at 11-12.

tracts for munitions when new technology diminished their potential usefuless. The T/C has also been employed to relieve the government of the burden of wartime contracts after the cessation of hostilities.[14]

Since World War II, the T/C has been in continuous use. The application of this unique creature of government procurement has been sustained in a host of situations. In each case, the basic inquiry is whether invoking the clause is in the best interest of the government.[15] Currently, the T/C clause is a mandatory provision in virtually all government contracts.[16]

This historical perspective led the court to examine its own decisions pertaining to the T/C. The court concluded the T/C has been sustained only when an intervening change occurred in the circumstances of the bargain or the expectations of the parties.[17] The single exception to this rule was to be found in *Colonial Metals v. United States*.[18]

Colonial Metals involved the award of a contract for the supply of copper ingot, a product for which market quotations were easily available. Shortly after award, the contracting officer learned that a better price for the commodity could be obtained from another supplier. The contracting officer thereupon terminated the existing contract and reprocured from the other supplier at a lower price. The Court of Claims sustained the T/C as based on the best interest of the government.[19]

Colonial Metals bears considerable resemblance to the facts of *Torncello*. The *Torncello* court, however, viewed the *Colonial Metals* decision as a radical departure from previous holdings of that court. In *Torncello*, the court opined that so broad a construction of the right to T/C as found in *Colonial Metals* would render illusory any contractual obligation of the government. Such a result would conflict with the common law rule that a contract must be binding on all parties to be enforceable.[20]

The common law rule is that a contract reserving to a party an unqualified right to withdraw is *nudum pactum*. As stated by Williston, "An agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract."[21] The requirement of consideration has also been held applicable to government contracts. In *Willard, Sutherland & Co. v. United States*,[22] the contractor promised to supply the government with its needs for coal. However, the government promised to buy neither its requirements for coal nor any minimum quantity. The Supreme Court observed that since the contract obligated the government to do nothing, such an arrangement could not create an enforceable contract.[23] In *Perry v. United States*,[24] the Supreme Court stated that the government, as a party to a contract, "has rights and incurs responsibilities similar to those of individuals who are parties to such instruments."[25]

While the requirement of consideration has always concerned the courts in the field of government contract law, it was not until *Torncello* that the power reserved to the government by contract to T/C has been so carefully scrutinized for the presence of some sort of consideration. The court attempted to avoid this breach of historical precedent by asserting that previous cases, with the ex-

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[14]*Id.* at 12-16.

[15]*See* John Reiner & Co. v. United States, 163 Ct. Cl. 381, 325 F.2d 438 (1963).

[16]*See* DAR § 7-103.21.

[17]No. 486-80C, slip op. at 17.

[18]204 Ct. Cl. 320, 494 F.2d 1355 (1974).

[19]*Id.* at 331, 494 F.2d at 1361.

[20]No. 486-80C slip op. at 19-20. The court noted that the commentary on the Colonial Metals decision was uniformly unfavorable. *Id.* (citing Newman, *The Beginning of the End—The Encroachment of Federal Contract Termination Practices*, 33 Bus. Law. 2143 (1978); Perlman & Goodrich, *Termination for Convenience Settlements—The Government's Limited Payment for Cancellation of Contracts*, 10 Pub. Cont. L.J. 1 (1978); Note, *Tying Together Termination for Convenience in Government Contracts*, 77 Pepperdine L. Rev. 711 (1980)).

[21]1 S. Williston, A Treatise on the Law of Contracts § 105 (3rd ed. 1957).

[22]262 U.S. 489 (1923).

[23]*Id.* at 493-94.

[24]294 U.S. 330 (1935).

[25]*Id.* at 352. *Compare* The Federalist No. 81 (A. Hamilton): "The contracts between a nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will."

ception of *Colonial Metals*, have permitted a T/C *only* when necessitated by a change in the circumstances of the bargain or the expectations of the parties.[26] Several cases from the Court of Claims were cited in support of this proposition.[27] A close examination of these cases, however, reveals that the *Torncello* court's reliance is misplaced.

In several of the cases cited by the court, the T/C occurred as a result of a General Accounting Office (GAO) recommendation to terminate based upon government impropriety in the solicitation process.[28] In another case, the T/C was necessary due to defective government specifications.[29] In none of the cases cited by the court was a change in the circumstances of the bargain stated as a basis for the T/C. In the cases based on GAO recommendations, no changes occurred which were intrinsic to the contract; the change in circumstances was rather in the subsequent action of the GAO recommending cancellation of the awards.

The GAO itself has only infrequently commented on whether a T/C is justified based upon subsequently finding another offeror able to perform at a lower price. In an unpublished opinion, however, the GAO allowed a contracting officer the discretion to T/C when he found a lower price the contracting for which he deemed to be in the best interest of the government.[30] The Court of Claims had also adopted this expansive view, stating that "under [the T/C], the government has the right to terminate 'at will', . . . and in the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive."[31]

The crux of the *Torncello* court's objection was the boundless nature of the contracting officer's discretion to T/C. The standard of "in the best interest of the government" was not considered sufficiently demarcative. The *Torncello* court ostensibly believed that the right to terminate at will evidenced a lack of consideration.[32]

The government had argued to the Court of Claims that the duty to act in good faith and not abuse discretion constituted sufficient legal detriment to the government to create an enforceable contract.[33] Repeating the principle that public officers are *presumed* to act in good faith, the court found no additional burden to have been thereby placed upon the government. As to the assertion the contracting officer is duty bound not to abuse his discretion, the court stated: "Discretion, and it's abuses, are concepts that depend for their very meanings on the existence of other limits. As concepts that only exist *within* limits, they cannot *be* the limits, as the argument of the government suggests."[34]

That these limits may not be as boundless as the court suggested was demonstrated in *Art Metal—U.S.A. v. Solomon*.[35] *Art Metal* was the largest supplier to the government of office furniture. Stung by publicity, in the *Washington Post* criticizing Art Metal's dealings with the General Services Administration (GSA), GSA ended it's contract with Art Metal under the T/C clause.[36] The district court ruled such a termination, when based upon unsubstantiated allegations, constituted an abuse of discretion.[37].

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[26]No. 486-80C, slip op. at 16-17.

[27] *Id.* (citing G.C. Casebolt Co. v. United States, 190 Ct. Cl. 783, 421 F.2d 710 (1970); Nolan Bros. v. United States, 186 Ct. Cl. 602, 405 F.2d 1250 (1969); Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968); Coastal Cargo Co. v. United States, 173 Ct. Cl. 259, 351 F.2d 1004 (1965); Warren Bros. Roads Co. v. United States, 173 Ct. Cl. 714, 355 F.2d 612 (1965); Nesbitt v. United States, 170 Ct. Cl. 666, 345 F.2d 583 (1965); Brown & Son Elec. Co. v. United States, 163 Ct. Cl. 465, 325 F.2d 446 (1963); John Reiner & Co. v. United States, 163 Ct. Cl. 381, 325 F.2d 438 (1963)).

[28]*See* G.C. Casebolt Co. v. United States, 190 Ct. Cl. 783, 421 F.2d 710 (1970); Coastal Cargo Co. v. United States, 173 Ct. Cl. 259, 351 F.2d 1004 (1965); Warren Bros. Roads Co. v. United States, 173 Ct. Cl. 714, 355 F.2d 612 (1965); Brown & Son Elec. Co. v. United States, 163 Ct. Cl. 465, 325 F.2d 446 (1963); John Reiner & Co. v. United States, 163 Ct. Cl. 381, 325 F.2d 438 (1963).

[29]*See* Nolan Bros. v. United States, 186 Ct. Cl. 602, 405 F.2d 1250 (1969).

[30]Turco Prods., Comp. Gen. Dec. B-152486 (6 Dec. 1963).

[31]163 Ct. Cl. at 390, 325 F.2d at 442 (citations omitted).

[32]No. 486-80C, slip op. at 24.

[33]*Id.* at 25.

[34]*Id.* at 26.

[35]473 F. Supp. 1 (D.D.C. 1978).

[36]*Id.* at 3.

[37]*Id.*

The duty to act in good faith is also an affirmative obligation which should not be ignored as a source of legal detriment. In requirements and output contracts, it is possible a party may refrain from having any requirements and suffer no legal detriment. In these situations, however, the consideration problem is resolved by interposing the duty to act in good faith. As stated in the Uniform Commercial Code, "A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith."[38]

The *Torncello* court's rather strict application of the consideration requirement apparently brings government acquisition law more in tandem with the common law of contracts. Interestingly, the common law courts are searching for a new understanding of the consideration requirement. The modern view is that contracts reserving to one party the right to withdraw, upon giving notice thereof, do not constitute illusory obligations. As stated by one text writer:

> If A and B enter into a bilateral agreement whereby A agrees to provide services for a year at a certain wage and B retains the power to terminate the agreement upon giving thirty days' notice, there is no doubt that the agreement constitutes a contract. B has agreed to pay wages for one year or for thirty days. Both of these alternatives are detrimental to B.[39]

This perspective reflects an evolving tendency in the courts to enforce contracts as agreed upon by the parties. Illustrative of this principle is the well-reasoned case of *Sylvan Crest Sand & Gravel Co. v. United States.*[40] *Sylvan Crest* involved a government contract to deliver trap rock to a project as required. The contract contained a clause permitting cancellation by the government "at any time."[41] In interpreting the contract, the court presumed that both parties to the contract would act in good faith. The court therefore read the cancellation provision to require procurement division to give reasonable notice of cancellation.[42] With respect to the consideration requirement, the court said:

> As we have construed the agreement the United States promised by implication to take and pay for the trap rock or give notice of cancellation within a reasonable time. The alternative of giving notice was not difficult of performance, but it was a sufficient consideration to support the agreement.[43]

In *Torncello*, the court specifically reserved the issue whether giving notice prior to termination would have changed the result.[44] It will be recalled that *Torncello* involved application of the *constructive* termination doctrine.[45] This issue is one of the important points unresolved by *Torncello*.

The validity of the constructive termination doctrine rests upon the principle that "actions by a contracting party may be supported at a later date by any reason that could have been advanced at the time of the actions, even though the party was not then aware of it."[46] By adopting this approach, the ASBCA managed to avoid making the government pay anticipatory profits. Interestingly, the *Torncello* court did not challenge the application of the constructive termination doctrine to the facts before it. Rather the court used the doctrine as the starting point of its analysis. Previous cases from the Court of Claims, however, have evidenced a judicial unwillingness to sustain the T/C unless notice thereof had been given in accordance with the applicable regulation.[47] These cases support the view that the fatal defect in *Torncello* was the failure to give notice of termination pursuant to the T/C clause. This position will be helpful to the government in future cases in attempting to limit *Torncello's* application.

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[38] U.C.C. § 2-306 (1962).

[39] J. Calamari & J. Perillo, Contracts § 4-17, at 161 (1970).

[40] 150 F.2d 642 (2d Cir. 1945).

[41] *Id.* at 643.

[42] *Id.* at 645.

[43] *Id.*

[44] No. 486-80C, slip op. at 23-24 & 24 n.10.

[45] *See* text accompanying notes 10-11 *supra*.

[46] No. 486-80C, slip op. at 5.

[47] *See, e.g.*, Goldwasser v. United States, 325 F.2d 722 (Ct. Cl. 1963); Klein v. United States, 285 F.2d 778 (Ct. Cl. 1961).

Current procedures require notice be given pursuant to the T/C clause; however, no specified period of notice is required.[48] In the aftermath of *Torncello*, consideration should be given to detailing a stated period of notice which must be given prior to effectuating the T/C. At minimum, this will bolster the government's position that the T/C right does not negate the consideration requirement.

The Issue of Damages

The *Torncello* court referred the case to the trial division for further proceedings on the issue of damages. The court thereby apparently intended that the plaintiff be awarded anticipatory profits. This result runs contrary to the trend in federal procurement law that a contractor should not recover anticipatory profits against the government. The rationale underlying this policy is that the taxpayers should not be required to pay for more than a contractor's costs plus a reasonable profit. Permitting a contractor to recover the full benefit of his bargain would be too costly to the public treasury.[49]

The Court of Claims has recognized the logic of this policy in *G.L. Christian & Assoc.* v. *United States*.[50]

In *Christian*, the deactivation of Ft. Polk caused the government to T/C a contract for post housing. The contract in *Christian* did not contain the standard T/C clause. The *Christian* court recognized that the T/C provision is a mandatory clause in government contracts pursuant to the Defense Acquisition Regulation (DAR).[51] Citing this DAR requirement as justification, the court held that the T/C clause had been included in the disputed contract by operation of law.[52] Moreover, the decision was made applicable to all government contracts in which the T/C clause is a mandatory provision.[53]

Underlying the decision in *Christian* was a desire to avoid having the government pay anticipatory damages to contractors. As the court said: "The termination clause limits profit to work actually done, and prohibits the recovery of anticipated but unearned profits. That limitation is a deeply ingrained strand of public procurement policy." [54] The *Christian* court obviously placed great reliance on the DAR and afforded this regulatory provision the force of law. Another section of the DAR provides that, upon termination of a fixed price contract, anticipatory profits and consequential damages shall not be allowed.[55] To the extent the *Torncello* opinion requires otherwise, it seemingly detracts from the previous deference given the DAR in *Christian*.

Conclusion

Torncello raises several questions. The court restricted the availability of the T/C clause to situations involving a change in the circumstances of the bargain or in the expectations of the parties. The cases cited by the court in support of this proposition do very little to clarify the intended meaning of this requirement.[56]

Those with an interest in government procurement will eagerly await further judicial construction. Until then, confusion will undoubtedly exist in the field: Is the changed circumstances test the equivalent of the common law doctrine of impossibility of performance or frustration of the venture? Or does this test require something less or different?

Torncello raises implications for other aspects of government procurement. Under the changes clause in government contracts, the contracting officer may unilaterally order a reduction in the quantity or change in the type of work to be accomplished. Sometimes this is also referred to as a partial T/C. Logically, the rationale of *Torncello* could equally be applied to this type of situation.

Another area of interest will be the impact on the firm bid rule. Under this rule, offerors are ob-

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[48] DAR § 7-103-21.

[49] *See* General Builders Supply Co. v. United States, 409 F.2d 246 (Ct. Cl. 1963).

[50] 312 F.2d 418 (Ct. Cl. 1963).

[51] *Id.* at 424 (citing Armed Services Procurement Reg. § 8.703 (1952)).

[52] 312 F.2d at 425.

[53] *Id.* at 427.

[54] *Id.* at 426.

[55] DAR § 8-303(A).

[56] *See* text accompanying notes 28-29 *supra*.

ligated not to withdraw their bids for a specified period of time. This rule has traditionally been construed as an exception to the consideration requirement.[57] What will be the impact of *Torncello* here?

Perhaps most disconcerting is the spectre of increased exposure by the government to breach damages, including anticipatory profits. Due to the inherent difficulties of applying the changed circumstances test, contracting officers may feel unduly constrained when desiring to T/C. Those contracting officers who elect to T/C may expose the government to a larger sphere of liability than heretofore considered likely.

The concurring opinions in *Torncello* would have limited the court's holding to situations in which the contracting officer based the T/C on knowledge obtained prior to award that a lower price could be obtained from a different supplier.[58] Such a result would have merely overruled the decision in *Colonial Metals* without going further. While perhaps not entitled to precedential effect, these opinions may lend support to future efforts to narrow the range of *Torncello*.

Perhaps the best argument from the government point of view is that *Torncello* should be applied only to those situations in which notice of termination was not given. The position that the requirement to give notice constitutes sufficient consideration is supported by precedent.[59] In any case, discovering the real meaning of *Torncello* must await later case law development.

[57]*See, e.g.*, Scott v. United States, 44 Ct. Cl. 524 (1909); W. Keyes, Government Contracts 132 (1979).

[58]*See* 486-80C, slip op. at 28 (Friedman, C.J. concurring); *id.* at 29 (Davis, J., concurring).

[59]*See* text accompanying note 47 *supra*; 486-80C, slip op. at 24 n.10.

Considerations on the Preparation of Wills for Domiciliaries of Puerto Rico

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Editor's Note: This article discusses the validity of wills prepared for Puerto Rican domiciliaries serving in the U.S. Army and stationed outside of Puerto Rico. The article also summarizes the basic substantive requirements for a will under Puerto Rican law. Because of the complex nature of Puerto Rico's property law, legal assistance attorneys are reminded that such wills should be prepared only when the attorney is fully competent to prepare it in accordance with Puerto Rican law.

This article attempts to fill a gap existing in the current edition of the *Legal Assistance Handbook*.[1] It should provide information and guidance to legal assistance officers concerning the preparation of wills for domiciliaries of Puerto Rico.

The present guidance discourages the preparation of wills for domiciliaries of Puerto Rico by legal assistance officers:

> Due to the formalities involved in executing and protocolization of any open or closed will it is recommended that it not be executed by anyone except a Puerto Rican attorney. For those citizens of Puerto Rico who cannot have this done, it is suggested that a holographic will be used. In order for a holographic will to be properly executed, it must be accomplished by a person of full age. It must be written in its entirety by the testator, signed by the testator and the year, month and day in which it is signed must be so stated by the testator. If it contains any erasures, corrections or interlineations, the testator shall so comment beneath his signature. The holographic will is held by the testator or some third party. Upon the death of the testator the will must be promulgated (filed for probate in continental terminology)

[1]U.S. Dep't of Army, Pamphlet No. 27-12, Legal Assistance Handbook (1974).

within five (5) years of the death of the testator. The form of proof for a holographic will is rather formal but is not difficult. Basically, this would mean that you advise your client as to how to draft his will and then have him sit down and write it out completely himself. While this is a rather time-consuming and cumbersome way, it is the safest manner for a citizen of Puerto Rico to execute a will when he is not on the Island.

Foreign wills executed with the formalities required by the country of execution are valid, except those made jointly by two or more persons in the same instrument.[2]

As a result, many legal assistance officers do not prepare wills for servicemembers or dependents who are domiciliaries of Puerto Rico.

The Handbook's precautionary policy is understandable because testamentary matters in Puerto Rico are governed by Spanish Civil Law as codified in the laws of Puerto Rico.[3] Under this intricate romanistic civil law system, the drafting, execution, and protocolization of an open or closed will involves peculiar formal requirements unfamiliar to our North American common law system. In my opinion, the suggestion that legal assistance officers limit themselves to advising on the execution of a holographic will is unnecessary in view of the formal requirements that a "foreign" will must meet when executed by a domiciliary of Puerto Rico outside the jurisdiction.

The Formal Requirements of a "Foreign" Will

Article 666 of the Civil Code of Puerto Rico (the Code) provides that citizens of Puerto Rico may, subject to some statutory exceptions, execute wills outside the jurisdiction of Puerto Rico if they comply and meet the established testamentary forms of the country or state in which they are executed.[4] Although this concept constitutes a deviation from the formal requirements to be followed in the preparation, execution, and protocolization of the more common Puerto Rican wills, it follows the general principle of private international law of *locus regit actum* embodied in article 11, section 11 of the Code. This doctrine states that the formal or legal requirements of wills shall be determined by the laws of the country in which they are executed.[5]

Therefore, the domiciliary of Puerto Rico who drafts and executes a last will and testament outside of Puerto Rico need not worry about the intricate formal requirements of the open, closed, or holographic wills executed in Puerto Rico. Furthermore this principle of *locus regit actum* has been expanded by the Puerto Rico Supreme Court in the case of *Widow of Ruiz v. Registrar.*[6] *Ruiz* held that a will executed by a domiciliary of Puerto Rico outside its jurisdiction will be valid *as to form* if it meets the formal requirements of the country in which it was executed *or* those of Puerto Rico.[7]

Statutory Exceptions To Locus Regit Actum

The most salient exception to the doctrine is contained in that provision of the Code which strictly prohibits joint wills.[8] This prohibition is so rigorous that the Code has been interpreted to declare null and void any foreign will which has been jointly executed by domiciliaries of Puerto Rico *even if* such will is valid under the laws of the state or country where it was executed.[9]

The other Codal prohibition forbids the making and executing of a will by proxy or agent.[10] The Code declares that, since the act of testating is strictly personal, it cannot be delegated, whether in whole or part, to a third party.[11]

The Basic Substantive Requirements

Puerto Rico is a community property jurisdiction not unlike the various community property states in the United States. The act of marriage creates a distinct legal entity, the conjugal part-

[2] *Id.* at para. 14-2d(II).

[3] P.R. Laws Ann. tit. 31 (1967).

[4] P.R. Laws Ann. tit. 31, § 2221 (1967).

[5] *Id.* at § 11.

[6] 93 P.R.R. 893 (1967).

[7] *Id.* at 900.

[8] P.R. Laws Ann. tit. 31, § 2123 (1967).

[9] Armstrong v. Armstrong, 85 P.R.R. 404 (1962).

[10] P.R. Laws Ann. tit. 31, § 2124 (1967).

[11] *Id.*

nership, a *sui generis* institution with its own legal personality.[12] The Code states that "through the Conjugal Partnership, the husband and wife will share *equally*, upon the dissolution of the marriage, the profits or benefits obtained by either one of them during the duration of said marriage."[13] Generally any type of property produced or acquired by any or both of the spouses during the marriage will become the property of the conjugal partnership and is shared *equally* by both spouses. Additionally, the Code states that, subject to statutory exclusions, all existing assets at the termination of the marriage, either by divorce, annullment or death of one of the spouses or both, are presumed to form part of the conjugal partnership unless proof of individual ownership by one of the spouses is presented.[14] Excluded from this sweeping provision are:

A. Those assets that either spouse possessed before entering into the marriage.

B. Those obtained by the individual spouse by virtue of a donation, bequest or inheritance.

C. Those interchanged, bartered or traded with other assets that were already the private property of one of the spouses.

D. Those purchased or otherwise acquired by either party with their own personal money, that is, money obtained by the spouse by one of the aforementioned methods.[15]

Thus, absent one of these exceptions, a married testator cannot dispose of more than half of the estate at the time of death.

Another more formidable limitation imposed on a testator is the concept of the legitimate or forced share. The Code provides that a portion of the testator's assets may not be freely disposed of, but must instead be reserved for certain close relatives, known as *forced heirs*. They include children or, grandchildren *or* parents, or grandparents.[16] Further, the Code states that, if a testator pretermits his or her forced heirs, the will shall be declared null and void and the estate divided in accordance with the law of intestate succession. Specific gifts, bequests, and or devices given to a third party, however, will survive or stand as long as they do not impinge upon the legal portion which the law has reserved for the forced heirs.[17]

Amount of the Forced (Legitimate) Share

Decendants. The Code provides that the legitimate share of all descendants is two-thirds of the testator's estate.[18] Of that portion, however, one-third may be applied to benefit or favor any particular descendant or descendants in any order or generation. In other words, if no descendant has been favored over another, then all descendants will share equally in the two-thirds forced portion. This portion is called the descendant's "global" share. On the other hand, if one descendant is favored over another, then that favored descendant or group of descendants may receive up to an additional one-third of the two-thirds of the "global" share. The other descendants will then only share in one-third of the estate, which is called the "strict" share. The testator may not, under any circumstances, fail to recognize this strict share when planning to benefit other descendants. Furthermore, from this two-thirds forced portion,

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[12] *Id.* at § 3621.

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

[14] *Id.* at § 3647.

[15] *Id.* at § 3631.

[16] *Id.* at § 2361. Forced heirs are a statutory creation of P.R. Laws Ann. tit. 31, § 2362 (1967), which provides that, with regards to their parents and ascendants, off spring and descendants are forced heirs. It should be noted that descendants include any generation. The rule is that sons and daughters exclude grandchildren completely but, in the absence of sons or daughters, grandchildren are forced heirs and so on *ad infinitum*. However, it should be noted that in the case of descendants only, a forced heir's son or daughter will *represent* his father or mother in his grandparents estate if such father or mother has predeceased the testating grandparent. The grandchild will inherit what his father or mother would have inherited if he or she were alive. *Only in the absence of any descendants* shall parents and ascendants be forced heirs with relation to their descendants. As to ascendants (with the exception of the right to represent) the same rules apply, *i.e.* parents will inherit and grandparents are excluded, but in the absence of one, the other generation will inherit. The widowed spouse, with relation to the deceased, shall always be a forced heir whether he or she concurs in the inheritance with descendants or ascendants.

[17] *Id.* at § 2368.

[18] *Id.* at § 2363.

only a descendant may be favored over another forced heir. Thus, grandchildren, but not a parent, may be benefited over the testator's sons or daughters. This is true regardless of whether they are forced heirs or not. This mechanism is designed to permit the testator to reward a "special" or favorite descendant. However, if there is no specific mention or designation of a favored descendant, then all descendants must share equally the two-thirds of the global share.

The remaining one-third of the estate may be freely disposed of by the testator to any person or persons; thus, it is commonly referred to as the "freely disposable third."

Ascendants. The Code provides that ascendants, who inherit only in the absence of descendants, are entitled to one-half of their descendants' estate.[19] The other one-half of the estate may be freely disposed of by the testator. If, however, there is a widowed spouse, then the spouse will only fully inherit one-third of the estate; the spouse inherits one-third and is entitled to a usage right (usufruct) over an additional one-third of the estate.

The widowed spouse. This forced heir has a *sui generi* legal right to inherit known as a limited proprietary interest in the portion of the spouse's estate. The spouse has a "tenancy in common" or a "right of usage" (usufruct) in his or her assigned portion; he or she may enjoy the fruits and benefits of a certain share but may not, under ordinary circumstances, dispose of the share itself. This portion consists of a usufruct of one-third share of the testator's estate.

Additionally, the widowed spouse's rights are: guaranteed, no matter with whom he or she may concur in the estate.[20] The share is similar to a tenancy in common, in its limited amount, with any other heirs who may concur in the estate.[21] The portion of the share is somewhat variable depending upon what other heirs concur in the estate.[22] Finally, the proprietary interest or lien such share creates may be transformed, contractually or by court order, into a specific cash equivalent. This would dissolve the tenancy in common created with the other heirs and terminate the spouses proprietary rights in the estate.[23]

It should be noted that the Code and the jurisprudence which has interpreted it have established certain conditions for the widowed spouse to inherit. The widowed spouse may not be divorced from the testator. Even if divorced, however, such widowed spouse may still inherit if he or she has been declared the nonculpable party in the divorce proceedings. If the widowed spouse is a nonculpable party in the divorce proceeding such widowed spouse must not have remarried.[24] Finally, if the testator was adjudged the culpable party in the divorce, he must not have remarried a third party.[25]

Amount of the Widowed Spouse's Share

The amount of the widowed spouse's share will vary depending upon with whom the widowed spouse concurs in the estate. If the widowed spouse concurs in the inheritance with only one off-spring or descendant, then his or her share will equal one-third of the testator's estate. It will be extracted from the descendants *strict* third of the global two-thirds destined to descendants as their forced share. If the widowed spouse concurs with no other forced heirs, his or her forced share will be one-half of the testator's estate.[26] If the widowed spouse concurs with ascendants, his or her forced share will be one-third of the testator's estate to be extracted from the one-half, freely disposable portion. An additional one-third is furnished in usufruct. Finally, if the widowed spouse concurs with two or more off-spring or descendants, he or she will share equally with them in the two-thirds of the testator's estate. If he or she concurs with off-spring of two or more previous marriages, his or her share will be as above-described, but will be extracted from the remaining one-third of free disposition and not from the two-thirds destined as the descendants' legitimate share.[27]

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[19] *Id.* at §§ 2364, 2365.

[20] *Id.* at § 2411.

[21] *Id.*

[22] *Id.*

[23] *Id.* at § 2415.

[24] Pirelá v. Registrar, 65 P.R.R. 900 (1946).

[25] Marxvach v. Registrar, 57 P.R.R. 131 (1940).

[26] P.R. Laws Ann. tit. 31, § 2411 (1967).

[27] *Id.* § 2413.

Several examples are provided:

Example: A married testator with three children wishes to bequeath most of the $99,000.00 estate to his or her spouse. The global forced share would be $66,000.00 which is divided into quarters and distributed amongst the spouse and three children; each receives $16,500.00. The testator may then leave the remaining free third of the estate exclusively to the spouse. The spouse's total inheritance thus becomes $49,500.00 and the testator's wishes have been fulfilled.

Example: The same testator desires to leave most of the estate to the three children instead. The free third of the estate may be bequeath to the children, increasing the share of each by $11,000.00. Each child then takes $27,500.00 of the estate.

Example: A married testator wishes to bequeath his estate to the spouse and three children to the extent that the law demands, but yet bequeath a certain amount to another person or persons, such as surviving parents. In such case, the testator need only leave the free third of the estate to such person or persons. Two surviving parents could thus inherit $16,500.00 each.

Example: An unmarried testator who predeceases his parents and leaves no descendants had executed a will in which he bequeath "all my freely disposable possessions" to another person, such as a fiancee. In a $100,000.00 estate, the forced heirs would take one-half the estate ($50,000.00) and the freely disposable share, the other half, would go to the appropriate designated party.

Conclusion

There is no reason for legal assistance officers to avoid drafting or executing "foreign" wills for domiciliaries of Puerto Rico. The formal requirements pose no difficulty. The substantive requirements, however, demand a careful study to insure that the little real freedom a testator has to dispose of a small portion of the estate may be intelligently exercised by the testator.[28] It should be apparent, however, that descendants and spouses are well protected under the testamentary laws of Puerto Rico and may be disinherited for only just cause and subject to statutory guidelines in the Puerto Rico Civil Code.

Appendix

Typical Clauses Covering Most Common Situations

A. Married testator with 2 children wishes to bequest the legal share to his forced heirs (children and spouse) and all the remainder of the estate to his parents.

> "I hereby bequeath and bequest to my children _____ and _____ born of my present marriage to _____ their full Global share to which they are by law entitled, and to my present wife _____, give, devise and bequest her fair legal share as the law requires.
> The remaining freely disposable portion of my estate I give, devise and bequest to my true living parents; to wit: _____ and _____ of _____ to share and share alike equally."

B. Married testator with 2 children wishes to bequest the strict legal share to one of them and benefit the other to the fullest extent possible.

> "I hereby bequeath and bequest to my children _____ and _____ born of my present marriage to _____. The following amounts: To my child _____ the strict legal share to which he is entitled by law. To my child _____ all the remainder of my estate, exception made of that portion the law reserves for spouses."

[28] For an excellent source on testimentary matters in Puerto Rico, *see* J. Velez, Derecho De Sucesiones (1974) (in the original Spanish language).

Dangling Participles, Hanging Prepositions, and Other High Crimes Against the English Language

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Introduction

Rarely, if ever, are lawyers called upon to articulate the formal rules of grammar. Yet, we must know them and use them correctly if we are to be effective communicators and advocates. Increasingly, advertising and the media have influenced the way we perceive and think, and hence the way we write. From the classic "Winston tastes good like a cigarette should" (substitute "as" for "like"), to the current bumper sticker "55: It's a law we can live with" (see Hanging Prepositions, below), the English language has been assaulted, twisted, mutilated, and dismembered. A brief foray into a daily newspaper—and not merely the comic strips, which are notoriously brutal slayers of language—will demonstrate my point.

This brief article highlights some of the most common offenses against good grammar and usage and prescribes corrective action. The examples in some cases were gleaned from formal documents such as briefs, memoranda, and yes, even an occasional appellate court opinion.

As with all rules, there are exceptions, and no attempt is made to specify absolutes in every case. For example, certain "comma splices" are acceptable, and I note common exceptions to that rule. The exceptions listed are not exhaustive, but illustrative. Similarly, the suggested corrections of improper English are merely that: suggestions. For a more comprehensive treatment of the rules, see the references at the end of this article.

The following is offered, I confess, in atonement for having committed, at one time or another, every offense described herein.

Dangling Participles and Infinitives

This offense often goes unrecognized because author and reader alike usually know what is intended. For that reason, it is a particularly insidious crime, one worthy of separate punishment for the technical grammatical error and for the often ridiculous images suggested:

—*Walking* into the courtroom, the highly polished woodwork was intimidating.

While one can discern the author's intent in this example, the error is obvious: the subject "woodwork" is incapable of walking (participle) or of much else, for that matter. Some corrections:

—Walking into the courtroom, I was intimidated by the highly polished woodwork.

—As I walked into the courtroom, the highly polished woodwork was intimidating.

Infinitives pose a similar problem:

—*To see* at night, the starlight scope was developed.

As with the example above, the intent may be clear, but the infinitive "to see" dangles. It does not refer to "starlight scope," but rather to an unspecified person. Corrected:

—To assist night vision, the starlight scope was developed.

—The starlight scope was developed to assist us to see at night.

Note that danglers can be identified and corrected simply by asking whether the participle, infinitive, or other modifier is "attached" to the correct part of speech in your sentence. If there is ambiguity, try to rewrite the sentence.

Hanging Prepositions

Similar to dangling modifiers but more easily identified, the hanging preposition has ensconced itself in our culture. Arguably, advertising and much popular entertainment are responsible for generating most abuses in this area. During extenuation and mitigation; therefore, one might plead the matter of a permissive society. An example:

—The victim identified the direction he came *from*.

The preposition is left unattached to any phrase. Corrected, the sentence reads:

—The victim identified the direction from which he came.

The relative pronoun "which" satisfies the need for attachment of the preposition "from." However, many idiomatic expressions such as "stipulated to" and "guard against" are acceptable, and for this reason the rule is not absolute.

There are many instances of unacceptable hanging prepositions in our language, and rampant use of them in all forms of advertising and mass communication has tended to make them legitimate for certain purposes. For example, the catchy "55: a law we can live with" somehow loses its effectiveness if written to conform to technical requirements: "55: a law with which we can live." Perhaps the vast acceptance of sloppy English in our society is to blame, but the ear does not seem to respond favorably to proper English in slogans or television commercials.

Comma Splices

Simply stated, this offense is very basic and allows for easy correction. Thus, while it is in a different league from some of the unnatural acts described earlier, it is also subject to little debate. Ignorance of this one operates as an aggravating factor in sentencing. For example:

—There was no discussion, however, appellant took the money from the informant.

This is the most common form of the comma splice. It joins two independent clauses. "However," like "moreover," is particularly notorious because it can appear legitimately, in the same structure as the sentence above, by joining parts of speech in the same sentence: "The crimes, however, were infamous." The above example may be corrected as follows:

—There was no discussion. However, appellant took the money from the informant.

—There was no discussion; however, appellant took the money from the informant.

—There was no discussion, however. Appellant took the money from the informant.

Note that the last option changes the meaning somewhat, and is a bit awkward outside its context. The second example demonstrates that a comma splice can be remedied in some cases by substituting a semicolon.

Important exceptions to this rule exist. Independent coordinate clauses structured "a, b, and c" can be joined legitimately by commas. Further, a sentence ending in climax, such as "I came, I saw, I conquered." is excepted. Finally, creating antithesis or making comparisons legitimates the comma splice. This formulation may be "it was not this, it was that" or some other variety, such as "it is more than X, it is Y." Some caution should be observed in this area, as one can fall prey to unacceptable comma splices, thereby creating run-on sentences. A run-on sentence can earn you three years of confinement at hard labor and a dishonorable discharge.

Squinting Modifiers

These puzzlers are so named because their placement in a sentence creates ambiguity. The modifier can be attached correctly to either of two verbs, and the reader is left to discern the author's intent. If one meaning is ludicrous, the other wins by default. Often, however, the reader is left guessing. This is less desirable than committing a glaring technical error, for it demonstrates indecision or lack of commitment. While you may be rewarded for your skill in arguing either of two legal positions, you must not confuse that with waffling at the time of decision. Waffling will earn you scorn and an extra six months of confinement. Leave no doubt about your intent:

—The court member who had entered the deliberation room *quickly* sat down.

The adverb "quickly" must be shifted to modify only one verb:

—The court member who had entered the deliberation room sat down quickly.

The same problem may arise in the placement of other parts of speech:

—The witness was prepared and ready to testify *within three hours.*

A clearer formulation, if the phrase modifies "was prepared", is:

—The witness was prepared within three hours and was ready to testify.

If the phrase modifies both verbs, i.e., the witness was prepared and was rendered ready to testify, all within three hours, try:

—Within three hours, the witness was prepared and ready to testify.

In some cases, placement of the modifier is open to many options. No hard rule exists, except that clarity is enhanced by placing the modifier as closely as possible to the part of speech modified.

Split Infinitives

More than hanging prepositions, this offense has become socially acceptable to a large extent, in part the product of a permissive society and the, now waning, "relevant curriculum" in schools. To be sure, there is considerable agreement that this offense is no longer a felony. Like many consensual sexual activities, the law is not invoked in the absence of a complainant. It appears, however, that increasingly authors and readers are achieving perverse mutual pleasure from sharing this once-forbidden fruit. Mind you, the rule still exists. Breaking it wantonly could lead to various social afflictions and charges under Article 134:

—I promise *to* never *say* that word again.

This is a technical violation unless placement of "never" is intended for special emphasis. Otherwise:

—I promise to say that word never again.

Another legitimate reason to split an infinitive arises where failing to do so would create an awkward or imprecise sentence:

—*To* occasionally *allow* the rule to be broken does no real harm.

Note that there is no better way to write this sentence to mean precisely the same thing, and the author thus may plead justification at his court-martial.

The rule is better stated, "Avoid the split infinitive when possible."

A Few Words on Agreement

Occasionally one of the more esoteric areas of grammar, and consequently one which engenders more disagreement than others, is agreement between subject and verb. As simple as the principle may appear, only the seasoned criminal would dare view the matter lightly. There are a few firm rules, and the obvious ones are not included here. What appears below are less familiar rules, some of which are firm, but some of which are undergoing subtle change in our culture.

As the letter "s" represents most often the difference between the singular and plural forms, the clever author accused of offending the Principle of Agreement might consider invoking typographical error as a defense. While this is a lesser offense, it may give rise to other charges, such as "failure to proofread." Moreover, the author-typist privilege ceases to the extent that your typist will be permitted to testify against you to defend his or her good name. Your ignorance of good grammar will thus be revealed to all the world. Moral: Plead guilty, take the deal and run.

Pronouns such as "all", "any", "each", "none", and "some" can be either singular or plural, depending on whether they refer to a "mass noun" or a "count noun."[1] Thus:

—All criminal defendants are presumed innocent.

—All land is sacred and should be treated accordingly.

Beware, however, that the preferred usage for "each" and "none" is singular. While "None of the lawyers are aware of the rule" is gaining acceptability, standard English demands "None of the lawyers *is* aware of the rule." An exception: "None are required by statute" if "none" refers to a plural noun such as "licenses." If the plural is clearly suggested, as in the last example, the plural verb is fitting.

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[1]This is akin to the rule of usage for "fewer" and "less". If you can count it, *e.g.*, hours, use "fewer;" if you cannot, *e.g.*, time, use "less." More precisely, "less" refers to quantity, "fewer" to number. Some concepts are subject to either interpretation: "My mistakes are less than yours" reflects magnitude or quantity, while "fewer" in that context simply reflects number. "One-third less calories" calls for two-thirds more punishment.

Authority is split over treatment of a relative pronoun with two antecedents, one singular and one plural:

—Ira is one of the lawyers who specialize[s] in retirement planning.

As in other cases, the author's intent controls. Either construction is logical, but there is probably a preference in standard English for the singular verb in such a case.

Collective nouns such as group, family, and class pose a special problem because either the singular or plural form of a verb may be used. The author's intent controls:

—The group is gathering at my house today.

—The group have different plans for the evening.

The latter example refers to individuals in the group and calls for the plural verb. Awkward sentences, however, are best rewritten entirely.

Beware of special words and phrases:

—A series of ads was run in national newspapers. (One series.)

—The World Series are genuinely American cultural events. (Collection of Series calls for plural verb.)

The same rule applies to a collection of words or phrases, such as "thirty years." If the thought is expressed as a unit, use the singular verb.

The word "data," clearly a plural form of the noun, appears to be losing its identity. Thus it is used increasingly as a synonym for "information" and is often treated as a singular noun. Many other words fall into this category. Caution and wisdom dictate that when in doubt, you will offend no one by employing correct English.

Compound and plural subjects that express a unit take the singular verb:

—Our President and Commander-in-Chief arrives tomorrow.

Although singular subjects joined by either/or, neither/nor, or similar "disjunctives" require a singular verb, and plural subjects likewise joined require plural verbs, a special rule exists for treatment of a singular and plural subject similarly joined: The verb attaches to the nearest subject. Thus:

—Neither the attorneys nor the judge is familiar with this case.

The temptation is to make the verb routinely plural, but doing so carries a maximum punishment of death. However, forfeitures are not necessarily imposed.

Agreement between subject and verb is unaffected by intervening phrases:

—One of the court members is related to the judge.

Finally, this note: the subjunctive mood of the verb "to be," when used to express wish, doubt, or condition contrary to fact, is "were." While this is not technically a problem of agreement, it seems to arise most often when a singular subject appears in a sentence expressing a condition. Thus:

—If the judge *were* here, he would agree.

If "was" is used, the past tense is created and the meaning is changed drastically:

—If the judge *was* here [either he was here before, or he was not], he will agree.

Writing "If the judge was here, he *would* agree" yields a very narrow meaning: If he was here on a prior occasion, he would agree [with the proposition in question] *were he consulted.* Care should be exercised with this construction.

Conclusion

As indicated at the beginning of this article and repeated at various times throughout, many of the rules of formal English are changing, and others are more guidelines than rules. As lawyers, we often yearn for stability and predictability, but nevertheless we are trained to work with uncertainty and strive for results favorable to our cause. It should be no surprise, then, that the one rule that never changes is one of caution: If in doubt about usage or form, be conservative.[2] You can offend no one by employing correct English, but you risk effectiveness and a certain amount of credi-

[2]Render due homage to the son of caution, consistency.

bility if you are wanton in using less formal English. Being correct on a point of fact or law is only part of the battle; you must convey your point accurately and effectively. Whether your audience is a client, your boss, or a court, your ability to impress, to persuade, and to win is reflected directly in your speech and writing.

Now then, drafting your petition for clemency should be a rewarding experience, as you no doubt will wish to explain how you were able to commit each of these High Crimes when you wrote that letter to the convening authority last week.*

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*References:

W. Irmscher, The Holt Guide to English (1972); J. Kierzek & W. Gibson, A Handbook of Writing and Revision (1965); W. Strunk & E. White, Elements of Style (3d ed. 1979); J. Walpole, A Writer's Guide (1980); F. Watkins, W. Dillingham, & E. Martin, Practical English Handbook (1978).

See generally R. Flesch & A. Laas, A New Guide to Better Writing (1977); L. Payne, The Lively Art of Writing (1969); J. Simon, Paradigms Lost (1980).

American Bar Association/Young Lawyers Division Annual Convention

Captain Bruce E. Kasold
ABA/YLD Delegate
Tort Branch, Litigation Division, OTJAG

The Young Lawyers Division (YLD) is the largest single organization in the American Bar Association (ABA), comprising more than 51 percent of the total membership of the ABA. The YLD is governed by the Division Assembly, which is largely composed of delegates selected by affiliate organizations such as the young lawyers sections of the various states. In addition, The Judge Advocate General of each military service is entitled to send one military young lawyer as an assembly delegate (with full voting privileges) to each convening of the YLD assembly. During the August meeting of the ABA/YLD in San Francisco, California, I was TJAG's delegate to the YLD assembly.

As in the past, proposed changes to the proposed Model Rules of Professional Conduct consumed a significant portion of the assembly's attention. The assembly passed resolutions recommending the following proposed modified rules to the senior bar:

(1) Proposed Rule 2.2 generally provides that an attorney may represent clients with conflicting interests provided that the attorney explains the implication of common representation and obtains the consent of each client. In addition, the attorney must reasonably believe that the best interests of each client can be protected and that there is little risk of material prejudice to the interests of any client. The proposed change would also require an attorney to withdraw from representing all clients if only one client requested termination of representation or if the interests of all clients could no longer be effectively represented.

(2) Proposed Rule 1.5 would require an attorney's fee to be "reasonable." Disciplinary sanctions under this rule should be easier to take than under the present rule which proscribes "clearly excessive" fees; under the proposed rule "unreasonable" fees would be cause for discipline. In addition, this proposed rule would require all contingent fee agreements to be in writing and specifically detail the percentage of recovery that accrues to the attorney and what expenses are to be deducted. Finally, this proposed rule would permit a division of fees between lawyers in different firms only in proportion to the services they provide or if all lawyers agree in writing with the client that they assume responsibility for the representation of the client.

(3) Proposed Rule 7.3 would prohibit initial contact under circumstances involving coercion or duress, or if the attorney knew or reasonably should have known that the prospective client either did not want to receive communications from the attorney or was not able to exercise reasonable judgment in employing the attorney. There would be no general prohibition limiting initial contact to close friends or relatives as in the current proposed rule.

A proposal to distinguish a lawyer's representation of an organization from the representation of its officers and directors was rejected. This proposal would have required the attorney represent-

ing the organization to report to higher authority any past or future acts of an officer or director which were in violation of a legal obligation to the organization or were likely to result in material injury to the organization.

In other areas of the law the assembly acted as follows:

(1) It passed a resolution opposing any legislation providing tax credits, deductions or other aid to parents of children attending non-public schools, including elementary or secondary schools or colleges.

(2) It deferred on a proposal specifically endorsing the concept that the present insanity defense needed extensive study and revision.

(3) It rejected a proposal requesting appropriate United States officials to convene a multilateral conference for the purpose of drafting a convention providing for total nuclear disarmament.

(4) It rejected supporting a proposed amendment to the Freedom of Information Act which would have clarified what constituted an agency violation of the established time limits for responding to a request. For example, there would be no violation of the time limits if the agency could not practicably comply with them. The proposed legislation would have permitted the agency releasing the documents to keep any fees collected pursuant to the Act.

(5) It rejected taking a position in opposition to a proposed amendment to the Civil Rights Act of 1964 which would prohibit discrimination in any private club which derived a substantial amount of its income from business sources.

(6) It passed a resolution to amend the ABA Standards for the Approval of Law Schools by prohibiting discrimination based on religious beliefs.

(7) It rejected a resolution in support of federal legislation to allow limited deductions for income tax purposes for legal expenses, even if unrelated to the production of income.

Any inquiries concerning the ABA/YLD Annual Convention should be addressed to Captain Bruce E. Kasold, Headquarters, Department of the Army, Office of The Judge Advocate General (DAJA-LTT), Washington, DC 20310. AUTOVON 225-6435, Commercial (202) 695-6435, or FTS 695-6435.

Petitions to the Department of the Army Suitability Evaluation Board

Criminal Law Division, TJAGSA

Army Regulation 27-10 now allows certain servicemembers to petition the Department of the Army Suitability Evaluation Board (DASEB) for transfer of nonjudicial punishment records. Petitions will request movement of these records from the performance portion to the restricted portion of the servicemember's Official Military Personnel File. Petitions must be supported by substantive evidence that the purpose of the nonjudicial punishment has been served and that transfer of the record is in the best interest of the Army.

On 12 November 1982, Department of the Army published guidance for consideration of these petitions by the DASEB. Normally, there will be insufficient evidence to judge a petition unless one year has elapsed and one official evaluation report has been recorded in the official file since the nonjudicial punishment was administered. Additional criteria for judging petitions is contained in the 12 November 1982 message, set out in part below.

The message also indicates that favorable determinations by DASEB will not be a basis for reconsideration of a previous nonselection for promotion. Guidelines contained in this message apply to appeals for transfer of administrative letters of reprimand as well. The pertinent text of the 12 November 1982 message is as follows:

Subject: Appeals for Transfer of Article 15 From Performance Portion to Restricted Portion of OMPF

A. AR 27-10, Military Justice, 1 Sep 82.

B. AR 600-37, Unfavorable Information, 15 Nov 80.

1. Ref B authorized SM appeals for transfer of

Administrative Letters of Reprimand (LOR) from performance portion of OMPF to restricted portion of that file on basis of intended purpose having been served. Effective 1 Nov 82, Ref A authorized commissioned and warrant officers and EM grades E-6 and above to petition DA Suitability Evaluation Board (DASEB) similarly for transfer of records of nonjudicial punishment (Art 15), if such action is also in the best interest of the Army. Transfer will not be approved unless these criteria are clearly established by substantive evidence.

[Paragraph 2 was omitted in message.]

3. Normally, DASEB will find insufficient evidence on which to base a judgment unless at least one year has elapsed and a minimum of one official evaluation report, other than an academic report, has been rendered and recorded in the OMPF since the Art 15/LOR was administered. Petitions/appeals which do not fall within these limits may be returned without action.

4. Other type criteria to be considered by DASEB in judging petitions/appeals:

a. Age and grade of member at time Art 15/LOR administered.

b. Severity and circumstances of offenses/incidents/shortcomings.

c. Quality of performance/commendatory/disciplinary record before and after Art 15/LOR administered.

d. Recommendations of imposing officials, and/or current chain of command.

e. Effect on petitioner's/appellant's career ostensibly attributable to Art 15/LOR being petitioned/appealed.

f. Quality of evidence and argument presented by petitioner/appellant.

5. Favorable determinations by the DASEB will not be a basis for reconsideration of a previous nonselection for promotion, as stated in paragraph 3-43B(5), of Ref A. Additionally, the DASEB does not have authority to act on requests for removal of records of Art 15 submitted on the basis of error or injustice. Such requests, providing other remedies as prescribed in AR 27-10 have been exhausted, may be made to the ABCMR UP AR 15-185.

Bar Membership and Continuing Legal Education Requirements

Twelve states have adopted mandatory requirements under which participation in approved continuing legal education (CLE) programs is a condition precedent to continuing membership in good standing. TJAGSA *resident* CLE courses have been approved by eleven of these jurisdictions. Approved sponsor status has been applied for in Montana where a mandatory requirement will commence on 1 January 1983.

Paragraphs 7-15 and 7-16 of the *JAGC Personnel Policies*, October 1982, provide that it is the responsibility of each judge advocate to remain knowledgeable of continuing membership requirements of state bar associations. These membership requirements and the availability of exemptions or waivers of mandatory CLE for military personnel vary from jurisdiction to jurisdiction and frequently change.

With the exception of Nevada attorneys, TJAGSA does not report attendance of students at CLE courses to the states. CLE reporting is an individual responsibility. TJAGSA will verify all attendance upon request. Nevada attorneys must notify the Deputy Director, Academic Department, at the commencement of the TJAGSA CLE Course for which credit is desired.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the responsible local official and the reporting date:

STATE	LOCAL OFFICIAL	PROGRAM DESCRIPTION
Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269-1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. Active duty military attorneys are exempt, but must declare exemption annually. —Reporting date: 31 December annually.
Colorado	Executive Director Colorado Supreme Court Board of Continuing Legal and Judicial Education 1515 Cleveland Pl., Suite 210 Denver, CO 80202 (303) 893-6842	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years. Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually.
Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342-8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.
Iowa	Executive Secretary Iowa Commission Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281-3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
Minnesota	Executive Secretary Minnesota State Board Continuing Legal 875 Summit Ave St. Paul, MN 55105 (612) 227-5430	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 March every third year.
Montana	Director Montana Board of Continuing Legal Education P.O. Box 4669 Helena, MT 59604 (406) 442-7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.

STATE	LOCAL OFFICIAL	PROGRAM DESCRIPTION
Nevada	Executive Director Board of Continuing Legal Education State Bar of Nevada P.O. Box 12446 Reno, NV 89510 (702) 826-0273	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58502 (701) 255-1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.
South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. Active duty military attorneys are exempt, but must declare exemption annually. —Reporting date: 10 January annually.
Washington	Director of Continuing Legal Education Washington State Bar Association 505 Madison Seattle, WA 98104 (206) 622-6021	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
Wisconsin	Director, Board of Attorneys Professional Competence Room 403 110 E. Main Street Madison, WI 53703 (608) 266-9760	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.
Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82001 (307) 632-9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. Washington On-Site Location Changed

The location of the Reserve Component Technical (On-Site) Training on 5 February 1983 was previously announced as Leisy Hall, Fort Lawton, Washington. It will be held instead at the University of Washington Law School, Seattle, Washington. The date remains unchanged. Action officers, COL Thomas J. Kraft, (206) 624-8822, or LTC Charles Kimbrough, (206) 233-1313, can provide additional information for attendees if needed.

2. Senior Judge Advocate Positions

Assignment of Military Law Center commanders and staff judge advocates of ARCOM or GOCOM headquarters is the responsibility of TJAG. The selection process set forth at paragraph 2-20h, AR 140-10 calls for the ARCOM or GOCOM commander to forward to TJAG the names of at least three nominees for each position. All eligible officers to include officers assigned to the USAR Control Group who are located within the ARCOM or GOCOM area must be considered. There have been instances in which eligible officers within the geographic vicinity of an ARCOM or GOCOM have been overlooked in the selection process. Thus, to insure that all eligible officers are given an opportunity to be considered for these senior judge advocate positions, TJAG has directed the semiannual publication of these positions and the termination date of the incumbent's tenure. Tenure for these positions is limited to three years unless exceptional circumstances justify an extension. Interested eligible officers should so advise the appropriate ARCOM or GOCOM commander no later than six months prior to the expiration of the incumbent's tenure. For those positions marked by an asterisk eligible individuals should contact the respective ARCOM or GOCOM commander immediately.

First Army

ARCOM	*SJA*	*Vacancy Due*
77	LTC C. E. Padgett	Nov 84
79	COL J. S. Ziccardi	Sep 85
81	COL J. E. Baker	Sep 83
94	COL N. J. Roche	Aug 82* (Action pending)
97	COL W. P. George	Aug 85
99	LTC R. L. Kaufman	Sep 85
120	COL O. E. Powell	Jun 85
121	COL G. R. Reynolds	Dec 82*

Fifth Army

ARCOM	*SJA*	*Vacancy Due*
83	COL T. P. O'Brien	Jul 84
86	LTC T. V. Barnes	Feb 85
88	LTC L. W. Larson	May 85
90	LTC J. M. Compere	Mar 85
102	COL R. E. DeWoskin	Jul 85
122	COL R. H. Tips	Aug 82* (Request for extension pending TJAG approval)
123	COL R. F. Greene	Feb 83*

Sixth Army

ARCOM	*SJA*	*Vacancy Due*
63	COL J. M. Provenzano	Jul 84
89	COL F. E. Gehrt	Mar 83*
96	COL G. G. Weggeland	Aug 85
124	COL R. M. Ishikawa	Jun 84

Military Law Centers

First Army

MLC	*Commander*	*Vacancy Due*
3	COL A. S. Aguiar	Sep 85
4	COL R. B. Grunewald	Feb 85
10	COL E. P. Oppler	Aug 83
11	COL J. H. Herring	May 85
12	COL D. W. Fouts	Aug 85
42	COL D. M. Laufe	Sep 84
153	COL P. A. Feiner—Acting	(Action* pending)
213	COL J. T. Gullage	Jul 83

Fifth Army

MLC	*Commander*	*Vacancy Due*
1	LTC C. J. Sebesta	May 85
2	COL H. B. Hopkins	Feb 83*
7	COL L. E. Strahan	Feb 84
8	COL T. P. Graves	May 85
9	LTC N. B. Wilson	Apr 84*
214	Vacant	(Replacement action pending)

Sixth Army

MLC	*Commander*	*Vacancy Due*
5	COL R. B. Jamar	Mar 85
6	COL W. J. Barker	Jul 84
78	COL J. L. Moriarity	Jul 84
87	COL C. A. Jones	Oct 85
113	COL D. S. Simons	(Appointed 1 Nov 82 pending TJAG approval)

Training Divisions

First Army

Tng Div	*SJA*	*Vacancy Due*
76	COL J. E. Pearl	Dec 83
78	LTC R. R. Baldwin	Oct 85
80	LTC R. H. Cooley	Jul 85
98	LTC J. M. Frantz	Dec 82* (Action pending)
108	LTC H. B. Campbell, Jr.	Dec 81* (Action pending)

Fifth Army

Tng Div	*SJA*	*Vacancy Due*
70	MAJ P. A. Kirchner	Nov 82*
84	COL L. E. Slavik	Sep 83
85	MAJ G. L. Coil	Jun 83
95	MAJ J. S. Arthurs	(Appointed 1 Nov 82 pending TJAG approval)
100	LTC E. A. Jasmin	Feb 83*

Sixth Army

Tng Div	*SJA*	*Vacancy Due*
91	LTC H. M. Rosenthal	Jul 82
104	COL R. B. Rutledge	Apr 84

General Officer Commands (Major)

First Army

GOCOM	*SJA*	*Vacancy Due*
353 CA Cmd	MAJ J. E. O'Donnell	(Appointed 1 Dec 82 pending TJAG approval)
412 Engr Cmd	MAJ W. M. Bost	Jul 85
310 TAACOM	COL J. B. Gantt	(Appointed 23 Nov 82 pending TJAG approval)
143 Trans Bde	LTC R. M. Morris	Jul 85
352 CA Cmd	LTC J. E. Ritchie	Aug 83
290 MP Bde	LTC C. E. Walker	Jun 84

Fifth Army

GOCOM	*SJA*	*Vacancy Due*
103 COSCOM	COL C. W. Larson	(Appointed 1 Oct 82 pending TJAG approval)
377 COSCOM	COL A. B. Pierson, Jr.	Feb 83*
416 Engr Cmd	COL W. R. Farnberg	Jun 83
420 Engr Bde	MAJ C. E. Lance	Jul 84
300 MP Cmd	MAJ J. Wouczyna	Apr 85
425 Trans Bde	MAJ T. J. Hyland	Mar 83*
807 Hosp. Ctr.	LTC J. C. Hawkins	Nov 82*

Sixth Army

GOCOM	*SJA*	*Vacancy Due*
311 COSCOM	COL D. M. Clark	Feb 85
351 CA Cmd	COL R. A. Meyers	Feb 81* (Action pending)

Western Command

GOCOM	*SJA*	*Vacancy Due*
HQ IX Corps	COL M. K. Soong	Oct 83

Please call Reserve Affairs, TJAGSA, 804-293-6121 regarding any errors or omissions noted in the above listing.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. Communication

Chief legal clerks and senior noncommissioned officers in the SJA office have a responsibility to keep subordinate court reporters and legal clerks advised of all relevant training and job or career related information. Maintaining these lines of communication is sometimes difficult because these individuals are usually assigned to and located in the battalion or separate company which they support. SJA personnel may have little or no control over them. Chief legal clerks and NCOs are therefore encouraged to make staff visits and to do whatever possible to assist in effectively and expeditiously disseminating such information to them. Although the majority of subordinate personnel are kept up to speed, there is always room for improvement.

2. Drill Sergeant and Recruiter

There have been several inquiries concerning why and how certain personnel are selected for drill sergeant and recruiting duties.

Drill Sergeant:

Drill sergeants are a select group of noncommissioned officers responsible for developing discipline, motivation, morale, esprit de corps, and

professionalism in new soldiers. Drill sergeants teach the skills necessary for soldiers to become valuable members of today's Army during their formative weeks of training. It is important that the best qualified soldiers be assigned these duties. Selection for duty as drill sergeant is based on individual qualifications and the demonstrated potential for positions of increasing responsibility. Those NCOs selected for drill sergeant duty are highly regarded for promotion, schooling, and assignments. Selection criteria and application procedures are outlined in AR 614-200 and DA Pamphlet 600-8.

Recruiter:

MILPERCEN has a program for selecting quality soldiers for recruiting duty and for maintaining the recruiting force at 100 percent. Recruiters are selected based on administrative reviews of records and on recommendations from field commanders. Selection criteria for recruiting duty are contained in AR 601-1. In the MOSs 71D and 71E, selections for both recruiters and drill sergeants are made by DA staff without regard for the preferences of JAGC enlisted personnel management.

3. Assignments and Reassignment

The majority of legal clerks and court reporters understand the assignment and reassignment process. However, many still question why they should be assigned to a certain installation and cannot be assigned where they really want to be stationed. MILPERCEN has guidelines and policies that must be followed in assigning personnel. The primary consideration is the need of the Army for the grade and military skills of the servicemember. Individual preferences are considered to the extent practicable. The ultimate decision, however, is based on worldwide requirements and the availability of qualified replacements to fill these requirements. There are always exceptions to policy for compassionate reasons. Requests for exceptions must be fully documented and routed through the chain of command for consideration.

4. Legal Clerk Course Schedule For Fiscal Year 83

CLASS #	*START*	*END*	*PROJECTED INPUT*
1	15 Oct	13 Jan	30
2	5 Nov	3 Feb	30
501	12 Nov	9 Feb	30
3	3 Dec	25 Feb	30
4	14 Jan	25 Mar	30
5	4 Feb	15 Apr	30
502	18 Feb	29 Apr	30
503	25 Feb	5 May	29
6	25 Mar	3 Jun	30
7	15 Apr	24 Jun	30
8	6 May	15 Jul	30
9	3 Jun	12 Aug	30
10	12 Aug	21 Oct	30
11	2 Sep	10 Nov	30
			419-TOTAL

5. Legal Clerk Course Split Training Classes for Fiscal Year 83

CLASS 3	*START*	*STOP*	*PROJECTED INPUT*
ST—1	15 Jul	23 Sep	28
ST—2	22 Jul	30 Sep 2	27
			55—TOTAL

6. Court Reporters Course schedules for Fiscal Year 1983

	Projected Input
28 Feb — 8 Apr 1982	10
9 May — 17 Jun 1983	10
29 Aug — 7 Oct 1983	10
7 Nov — 16 Dec 1983	10
	40

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM'S. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

February 7-11: 8th Criminal Trial Advocacy (5F-F32).

February 14-18: 22nd Law of War Workshop (5F-F42).

February 28-March 11: 95th Contract Attorneys (5F-F10).

March 14-18: 12th Legal Assistance (5F-F23).

March 21-25: 23rd Law of War Workshop (5F-F42).

March 28-30: 1st Advanced Law of War Seminar (5F-F45).

April 6-8: JAG USAR Workshop.

April 11-15: 2nd Claims, Litigation, and Remedies (5F-F13).

April 11-15: 70th Senior Officer Legal Orientation (5F-F1).

April 18-20: 5th Contract Attorneys Workshop (5F-F15).

April 25-29: 13th Staff Judge Advocate (5F-F52).

May 2-6: 5th Administrative Law of Military Installations (Phase I) (5F-F24).

May 9-13: 5th Administrative Law for Military Installations (Phase II) (5F-F24).

May 10-13: 16th Fiscal Law (5F-F12).

May 16-June 3: 26th Military Judge (5F-F33).

May 16-27: 96th Contract Attorneys (5F-F10).

May 16-20: 12th Methods of Instruction.

June 6-10: 71st Senior Officer Legal Orientation (5F-F1).

June 13-17: Claims Training Seminar (U.S. Army Claims Service).

June 20-July 1: JAGSO Team Training.

June 20-July 1: BOAC: Phase II.

July 11-15: 5th Military Lawyer's Assistant (512-71D/20/30).

July 13-15: Chief Legal Clerk Workshop.

July 18-22: 9th Criminal Trial Advocacy (5F-F32).

July 18-29: 97th Contract Attorneys (5F-F10).

July 25-September 30: 101st Basic Course (5-27-C20).

August 1-5: 12th Law Office Management (7A-713A).

August 15-May 19, 1984: 32nd Graduate Course (5-27-C22).

August 22-24: 7th Criminal Law New Developments (5F-F35).

September 12-16: 72nd Senior Officer Legal Orientation (5F-F1).

October 11-14: 1983 Worldwide JAG Conference.

October 17-December 16: 102nd Basic Course (5-27-C20).

3. Civilian Sponsored CLE Courses

April

6-9: NCDA, Public Civil Law Problems, Reno, NV

8: WSBA, Partnerships, Portland, WA

8: GICLE, Workers' Compensation, Savannah, GA

8-10: WSBA, Estate Planning, Seattle, WA

9: NKUCCL, Administration & Taxation of Estates, Highland Heights, KY

9: MCLNEL, Estate Planning, Cambridge, MA

11-27: MCLNEL, Criminal Indigent Defender Training Program, Boston, MA

14-5/5: MCLNEL, Real Estate Skills, Boston, MA

14-16: ALIABA, Trial Evidence in Federal & State Courts, San Antonio, TX

State Courts

15: GICLE, Workers' Compensation, Macon, GA.

15: WSBA, Partnerships, Yakima, WA

15-16: KCLE, Commercial Law, Lexington, KY

17-21: NCDA, Trial Advocacy for Prosecutors, Chicago, IL

21-22: ATLA, Hospital Liability, Baltimore, MD

21-23: GICLE, Real Property Law, St. Simons Island, GA

22: SBM, General Practice, Great Falls, MT

22: GICLE, Workers' Compensation, Atlanta, GA

23: MCLNEL, Federal Tax Institute of New England, Boston, MA

23: NKUCCL, Federal Trial Practice Criminal/Civil, Highland Heights, KY

26-30: NCDA, Office Administrator Course, San Antonio, TX

28-30: ATLA, Trial & Appellate Advocacy, Pittsburgh, PA

29: GICLE, Estate Planning and Will Drafting, Albany, GA

29: MCLNEL, Zoning, Subdivision, & Land Use Planning, Boston, MA

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 520 Commonwealth Avenue, Boston, MA 02215

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone: (202) 965-3500.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MICLE: Institute of Continuing Legal Education, University of Michigan Hutchins Hall, Ann Arbor, MI 48109.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NKUCCL: Chase Center for the Study of Public Law, Salmon P. Chase College of Law, Northern Kentucky University, Highland Heights, KY 41076. Phone: (606) 527-5444

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Association, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

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

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and the Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

This directory should be retained. Beginning with this issue, it will be published quarterly.

Current Material of Interest

1. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 135-91	Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures	I01	29 Oct 82
AR 135-100	Appointment of Commissioned and Warrant Officers of the Army	14	15 Nov 82
AR 135-178	Separation of Enlisted Personnel	I04	29 Oct 82
AR 190-24	Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement Services		15 Nov 82
AR 190-53	Interception of Wire and Oral Communications for Law Enforcement Purposes	I02	5 Nov 82
AR 340-15	Preparing Correspondence	1	15 Oct 82
AR 570-1	Manpower Management	1	15 Sep 82
AR 570-4	Manpower Management		15 Sep 82
AR 600-200	Enlisted Personnel Management System	I11	23 Nov 82
AR 601-100	Appointment of Commissioned and Warrant Officers in the Regular Army	I02	10 Nov 82
DA Pam 550-99	Yugoslavia: A Country Study		1982
DA Pam 550-155	East Germany: A Country Study		1982

2. Articles

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Bywater, *Drink, Drugs, and Criminal Intent*, 132 New L.J. 617 (1982).

Dale, *Freedom of Information Act: Lawyers Discover a New Discovery Tool*, Trial, Aug. 1982, at 36.

Fenrick, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 18 Can. Y.B. Int'l Law 229 (1981).

Jones & Singer, *Changes in Procedure, Strategy Due in New Federal Circuit and Revamped Claims Court*, 57 J. Tax'n 139 (1982).

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Reisner, *Layman's Guide to the Use of Blood Grouping Analysis in Paternity Testing*, 20 J. Fam. L. 657 (1982).

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Note, Stone v. Powell *and the Effective Assistance of Counsel*, 80 Mich. L. Rev. 1326 (1982).

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Recent Developments, *EIS Need Not Discuss Infeasible Site Alternatives*, 22 Nat. Resources J. 497 (1982).

Third Circuit Review, *Military Service Immunity—There is No Cause of Action Implied Under the Constitution Against Government Officials for Intentional Constitutional Torts Occurring Incident to Military Service*, 27 Villanova L. Rev. 858 (1981-82).

By Order of the Secretary of the Army:

E.C. MEYER
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Chief of Staff

Official:
ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

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