

# THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-427

December 2008

## Articles

**Foreword: Administrative Law Is Not for Sissies!**  
*Lieutenant Colonel Suzanne Mitchem*

**Child Custody and Deployments: The States Step in to Fill the SCRA Gap**  
*Lieutenant Colonel Jeffrey P. Sexton & Jonathan Brent*

**New Developments in Child Support: Enforcement of Foreign Orders Under the 2001 Amendments to the Uniform Interstate Family Support Act**  
*Major John S. Frost*

**Survivor Benefits Update**  
*Major Dana J. Chase*

**State Survivor Benefits: An Overview**  
*Major Dana J. Chase & Major Daniel J. Sennott*

**Families First and the Personnel Claims Act**  
*Major Daniel J. Sennott*

**Street FOIA 101: Nuts, Bolts, and Loose Change**  
*Lieutenant Colonel Craig E. Merutka*

**Whistleblower Protection for Military Members**  
*Major William E. Brown*

**For All "Intensive" Purposes: A Primer on Malapropisms, Eggcorns, and Other Rogue Elements of the English Language**  
*Major Ann B. Ching*

**TJAGLCS Practice Note**  
*Faculty, The Judge Advocate General's Legal Center & School*

*Tax Law Note*

**Update for 2008 Federal Income Tax Returns**  
*Major Dana J. Chase*

**Book Review**  
**CLE News**  
**Current Materials of Interest**  
*The Army Lawyer Index for 2008*

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*The Army Lawyer* (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for \$45.00 each (\$63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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*The Army Lawyer* articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at <http://www.jagcnet.army.mil/ArmyLawyer>.

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Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

Articles

**Foreword: Administrative Law Is Not for Sissies!**  
*Lieutenant Colonel Suzanne Mitchem* ..... 1

**Child Custody and Deployments: The States Step in to Fill the SCRA Gap**  
*Lieutenant Colonel Jeffrey P. Sexton & Jonathan Brent* ..... 9

**New Developments in Child Support: Enforcement of Foreign Orders Under the 2001 Amendments to the Uniform Interstate Family Support Act**  
*Major John S. Frost*..... 15

**Survivor Benefits Update**  
*Major Dana J. Chase*..... 20

**State Survivor Benefits: An Overview**  
*Major Dana J. Chase & Major Daniel J. Sennott* ..... 25

**Families First and the Personnel Claims Act**  
*Major Daniel J. Sennott*..... 44

**Street FOIA 101: Nuts, Bolts, and Loose Change**  
*Lieutenant Colonel Craig E. Merutka* ..... 49

**Whistleblower Protection for Military Members**  
*Major William E. Brown* ..... 58

**For All “Intensive” Purposes: A Primer on Malapropisms, Eggcorns, and Other Rogue Elements of the English Language**  
*Major Ann B. Ching*..... 66

**TJAGLCS Practice Note**

*Faculty, The Judge Advocate General’s Legal Center & School*

*Tax Law Note*

**Update for 2008 Federal Income Tax Returns**  
*Major Dana J. Chase*..... 73

**Book Review**

*Green Warriors: Army Environmental Considerations for Contingency Operations from Planning Through Post-Conflict*  
Reviewed by *Major James A. Barkei* ..... 86

**CLE News** ..... 93

**Current Materials of Interest** ..... 105

**The Army Lawyer Index for 2008** ..... 110

**Individual Paid Subscriptions to *The Army Lawyer*** ..... Inside Back Cover



## Foreword: Administrative Law Is Not for Sissies!<sup>1</sup>

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Charlottesville, Virginia

Administrative and civil law can be one of the most challenging and diverse areas for the Judge Advocate (JA) practitioner. For the first time in many years, this edition of *The Army Lawyer (TAL)* exclusively focuses on the legal topics from The Judge Advocate General's Legal Center and School's Administrative and Civil Law Department. While administrative law is the interpretation of the rules, regulations, and statutes that administer how government agencies operate, the function of civil law is "to provide a legal remedy to solve problems. Sometimes civil law is based on a state or federal statute; at other times civil law is based on a ruling by the court."<sup>3</sup>

The Administrative and Civil Law Department is responsible for a broad range of legal topics from environmental law, employment law, federal litigation, income tax and estate planning, family and consumer law, immigration, and servicemembers rights, to military investigations, standards of conduct, government information practices, professional responsibility, and military personnel law. This *TAL* edition will provide our readers with relevant perspectives in our areas of practice covering last year's numerous developments in the areas of legal assistance and claims, civil law, and general administrative law.

Legal assistance practitioners should be aware of the significant developments in our Wounded Warrior Program, in consumer and family law, and in estate planning and income tax. In the May 2007 *TJAG Sends*, Lieutenant General Black challenged us all to support and provide guidance to wounded warriors and their Families.<sup>4</sup> He stated, "No Soldier is more deserving of our best efforts than a Soldier wounded in combat."<sup>5</sup> Consistent with this challenge, our Corps created a new Senior Executive Service-level Director, Soldier and Family Legal Services position with a charter to focus in on the needs of Soldiers and their Families.<sup>6</sup> In this vein, the Army has hired nineteen new civilian attorneys and nineteen new civilian paralegals to serve at those installations that house Warrior Transition Units.<sup>7</sup> The civilian attorneys, known as Medical Evaluation Board (MEB) Outreach Counsel, are being trained to provide legal assistance to all clients, but also to provide specialized assistance to Soldiers going through the Physical Disability Evaluation System (PDES) at its earliest stages.<sup>8</sup> They join forces with Soldiers Counsel, specialized legal assistance attorneys who represent Soldiers going through the Physical Evaluation Board (PEB) stage of the PDES.<sup>9</sup>

Since 2007, Congress, the Department of Defense (DoD), and the Department of the Army (DA) have overhauled the PDES on several levels.<sup>10</sup> The health care law discipline remains ever-changing, and both the DoD and the Department of Veterans Affairs (DVA) continue to work to provide just outcomes for servicemembers and veterans alike. The DoD pilot program seeks to integrate the confusing and oftentimes disparate disability ratings conducted separately by the DoD and the DVA, to the end of providing consistency and understanding for Wounded Warriors who have been found unfit for continued

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<sup>1</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, DUKE L.J. 511, 511 (1989).

<sup>2</sup> All members of the Administrative and Civil Law faculty have provided input for this foreword. For questions in a particular subject matter, a list of professors and the areas of specialty is included.

<sup>3</sup> Civics Library of The Missouri Bar, *What is Civil Law?*, <http://members.mobar.org/civics/WhatisCivilLaw.htm> (last visited Nov. 25, 2008).

<sup>4</sup> *Reaching Out to Wounded Soldiers*, 37-14 TJAG SENDS (May 2007).

<sup>5</sup> *Id.*

<sup>6</sup> *Director, Soldier & Family Legal Services*, TJAG SPECIAL ANNOUNCEMENT 37-16 (2 Oct. 2008).

<sup>7</sup> Interview with Lieutenant Colonel Martha Foss, Office of the Judge Advocate General Legal Assistance Policy Branch, Rosslyn, Va. (Sept. 16, 2008).

<sup>8</sup> *Id.*

<sup>9</sup> These changes came about when the substandard living conditions for Wounded Warriors at Walter Reed Army Medical Center gained notoriety in the spring of 2007. See Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007, at A01 available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/17/AR2007021701172.html>.

<sup>10</sup> From providing a relook at veterans who were separated with disability ratings below the 30% required for disability retirement, to increased emphasis on legal representation at all stages of the PDES, to heightened training requirements for PEB liaison officers, to the initiation of a pilot program in 2007 that has recently been expanded to even more installations. See Patient Administration Branch, The Cornerstone of Concerned Health Care, <http://ameddcs.army.mil/APDES/purpose.aspx> (last visited Dec. 8, 2008).

service. Working closely with the Office of the Judge Advocate General Legal Assistance Policy Branch and the Army's Office of Soldiers Counsel, this department has integrated and emphasized training and education in this area, which is of particular importance during the ongoing Global War on Terrorism.

Traditional areas of substantive legal assistance continue to evolve as well. In the area of family law, increased deployments have brought special challenges to servicemember-parents with custody of minor children. Across the country, parents have found that their ability to stave off challenges to custodial arrangements by an invocation of a Servicemembers Civil Relief Act (SCRA) stay have fallen on the deaf ears of family court judges.<sup>11</sup> Those judges, weighing their mandate to make custody decisions pursuant to a child's "best interests" against a servicemembers federal SCRA protection, have largely held that the SCRA is incompatible in this regard.<sup>12</sup> Congress contemplated amending the SCRA in each of the past two years; however, family law is constitutionally the province of the states. States have taken it on themselves to fill this gap, but they have done it in myriad ways. This *TAL* edition includes an article written by the department's vice-chair and one of last year's summer interns, which outlines and provides a reference for these state measures.<sup>13</sup>

The area of child support continues to evolve as well, especially with regard to international child support issues. The Uniform Interstate Family Support Act (UIFSA) is at the core of the establishment, modification, and enforcement of not only child support across state lines, but with its 2001 amended version, is also affecting issues across international borders.<sup>14</sup> This *TAL* edition also includes an article that outlines these new developments in UIFSA case law.<sup>15</sup>

Cases from around the country continue to address the divisibility of military retired pay under the Uniformed Services Former Spouses Protection Act.<sup>16</sup> States are starting to reconcile federal legislation affecting the receipt of both disability pay and military retired pay,<sup>17</sup> as well as how they handle separation agreements that address the divisibility of non-vested retirement benefits.<sup>18</sup>

In consumer law, with the recent economic downturn, creditors and third party debt collectors have become more aggressive in pursuing consumers. Nearly 71,000 people filed complaints with the Federal Trade Commission last year and more than 14,000 complained to the Better Business Bureau.<sup>19</sup> This is roughly double the numbers from 2003.<sup>20</sup> Thousands more people lodged grievances with state and city officials.<sup>21</sup> The questionable and often times illegal practices used by these collectors give rise to the need for greater emphasis on consumer advocacy by JAs. Continued development of subject matter expertise on the Fair Debt Collection Practices Act,<sup>22</sup> the Fair Credit Reporting Act,<sup>23</sup> and the Truth in Lending Act<sup>24</sup> will enable our Corps to better serve its client base.

Finally, legal assistance practitioners should be alert for pending legislation on credit card reform. While the \$700 billion Treasury bailout and presidential election have dominated the news, the U.S. House passed a major bill dealing with credit card reform legislation. The Credit Cardholders' Bill of Rights Act of 2008 passed the House on 23 September 2008 by a vote of 312-112 (nine members not voting).<sup>25</sup> The bill, which still needs to pass the Senate before heading to the White

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<sup>11</sup> *In re* Grantham, 2005 Iowa Sup. Lexis 75 (Iowa 2005); *Lenser v. McGowan*, 2004 Ark. Lexis 490 (Ark. 2004).

<sup>12</sup> *In re* Grantham, 2005 Iowa Sup. Lexis 75; *Lenser* 2004 Ark. Lexis 490.

<sup>13</sup> Lieutenant Colonel Jeffrey P. Sexton & Jonathan Brent, *Child Custody and Deployments: The States Step In to Fill the SCRA Gap*, *infra* at 9.

<sup>14</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT (amended 2001), 9 U.L.A. 255 (Supp. 2001); *see* R.12.8.4.

<sup>15</sup> *See* Major John S. Frost, *New Developments in Child Support: Enforcement Orders Under the 2001 Amendments to the Uniform Interstate Family Support Act*, *infra* at 15.

<sup>16</sup> 10 U.S.C. § 1408 (2000).

<sup>17</sup> *See, e.g., In re* Marriage of Michael, 2008 Wash. App. Lexis 1644 (Wash. 2008).

<sup>18</sup> *See, e.g., Hodge v. Hodge*, 2008 Okla. Civ. App. 96 (Okla. 2008).

<sup>19</sup> Assoc. Press, *Complaints Surge as Bill Collectors Get Tough*, CNN.com, Oct. 30, 2008, available at <http://www.cnn.com/2008/US/10/30/debt.collectors.ap>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 15 U.S.C. § 1692 (2000) (as amended by Pub. L. No. 109-351, §§ 801, 802, 120 Stat. 1966 (2006)).

<sup>23</sup> Fair Credit Reporting Act, 15 U.S.C. § 1681u (2000).

<sup>24</sup> Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968).

<sup>25</sup> Credit Cardholders' Bill of Rights Act of 2008, H.R. 5244, 110 Cong.

House, would have a major impact on everything from how credit card issuers apply cardholder payments, to outstanding debt, to limits on interest rate increases.<sup>26</sup>

There are also changes in estate planning and tax. Congress passed legislation that will affect individual income tax returns for the 2008 tax filing season. Among those changes are extensions of expired deductions and credits, new deductions, resurrection of provisions related to Hurricane Katrina, increase in phase-out thresholds, and provisions specifically for servicemembers. These changes are discussed in the tax law note in this issue.<sup>27</sup>

Estate planning for servicemembers has been affected by the National Defense Authorization Act for Fiscal Year 2009 (NDAA 2009)<sup>28</sup> as well as in previous NDAA's 2007 and 2008<sup>29</sup> and new legislation such as the Heroes Earnings Assistance and Relief Tax Act of 2008<sup>30</sup> and the Veterans Benefits Improvement Act of 2008.<sup>31</sup> This legislation affects the various components of survivor benefits such as Dependency and Indemnity Compensation,<sup>32</sup> Survivor Benefit Plan annuity,<sup>33</sup> Death Gratuity,<sup>34</sup> and the Servicemembers Group Life Insurance program.<sup>35</sup> The survivor benefits update in this issue highlights these changes.<sup>36</sup>

Finally, beginning 1 January 2009, the estate tax exemptions amount and unified credit will increase as well as an increase in the gift tax exclusion amount. Currently, the estate tax exemption amount is \$2 million with a unified credit of \$780,800.<sup>37</sup> On 1 January 2009, that estate tax exemption amount will increase to \$3.5 million with a unified credit of \$1,455,800.<sup>38</sup> Also on 1 January 2009, the gift tax exclusion will increase to \$13,000 from the current \$12,000.<sup>39</sup> However, the unified credit for gifts will remain \$1,000,000 with a unified credit of \$345,800.<sup>40</sup> Advise clients accordingly and discuss with them the possible sunset of the Economic Growth and Tax Relief Reconciliation Act of 2001 in 2011 in which the estate tax exemption amount is reduced to \$1 million and the unified credit is once again unified at \$345,800.<sup>41</sup>

Servicemembers and Families should also see improvement in the handling of personal property claims resulting from household (HHG) shipments. This edition includes an article which explains the new Families First Program introduced by DoD this year.<sup>42</sup> Families First is intended to "revolutionize" how service members file claims and the process for handling the same.<sup>43</sup>

Moving away from legal assistance and claims practice, other traditional areas of military civil law practice also witnessed significant developments. Employment law and environmental law practitioners are constantly affected by regulatory and statutory changes in these areas. Likewise, federal civil litigation practitioners in all areas of practice have been reviewing cases in several disciplines.

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<sup>26</sup> *Id.*

<sup>27</sup> See Major Dana J. Chase, TJAGLCS Practice Note, Tax Law Note, *Update for 2008 Federal Income Tax Returns*, *infra* at 73.

<sup>28</sup> Pub. L. No. 110-417, 122 Stat. 4356 (2008).

<sup>29</sup> Pub. L. No. 109-364, 120 Stat. 2083; Pub. L. No. 110-181, 122 Stat. 3.

<sup>30</sup> Pub. L. No. 110-245, 122 Stat. 1624.

<sup>31</sup> Pub. L. No. 110-389, 122 Stat. 4145.

<sup>32</sup> 38 U.S.C.S. §§ 1301-1323 (LexisNexis 2008).

<sup>33</sup> 10 U.S.C.S. §§ 1447-1460B (LexisNexis 2008) [hereinafter EGTRRA].

<sup>34</sup> *Id.* § 1478.

<sup>35</sup> 38 U.S.C.S. §§ 1965-1980.

<sup>36</sup> See Major Dana J. Chase, *Survivor Benefits Update*, *infra* at 20; see also Major Dana J. Chase & Major Daniel J. Sennott, *State Survivor Benefits: An Overview*, *infra* at 25.

<sup>37</sup> The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16, 115 Stat. 38.

<sup>38</sup> *Id.*; see also INTERNAL REVENUE SERVICE PUB. 950, INTRODUCTION TO ESTATE AND GIFT TAXES (2008).

<sup>39</sup> I.R.C. § 2503(b)(1); Rev. Proc. 2008-66.

<sup>40</sup> EGTRRA, *supra* note 33.

<sup>41</sup> *Id.*

<sup>42</sup> Major Daniel J. Sennott, *Families First and the Personnel Claims Act*, *infra* at 44.

<sup>43</sup> *Id.*

On 26 September 2008, the DoD and the Office of Personnel Management jointly issued Final Enabling regulations for the National Security Personnel System (NSPS).<sup>44</sup> The NSPS was originally authorized by the NDAA 2004<sup>45</sup> and amended by NDAA 2008.<sup>46</sup> Congress made significant changes to the underlying NSPS statute, voiding Subpart G—Adverse Actions; Subpart H—Appeals; and Subpart I—Labor-Management Relations.<sup>47</sup> The final regulations became effective sixty days after publication, consistent with the provisions of the Congressional Review Act.<sup>48</sup>

The core features of NSPS remain essentially intact, including the pay banding and classification structure, compensation flexibilities, and the pay for performance system.<sup>49</sup> The NSPS retains the core values of the civil service, including merit system principles and veterans' preference, and allows employees to be paid and rewarded based on performance results and local market considerations.<sup>50</sup> Therefore, the DoD will continue operating under the government-wide authorities governing adverse actions, appeals, and labor-management relations.

Environmental law practitioners should be aware that with the NDAA 2009 came authority for the Army to participate in conservation banking programs.<sup>51</sup> Likewise, environmental law practitioners should keep a watchful eye on the Environmental Protection Agency's (EPA) impending decision on the regulation of perchlorate.<sup>52</sup> The EPA initially decided not to regulate perchlorate in drinking water at a national level, but has extended its public comment period in response to numerous requests.<sup>53</sup> A decision by the EPA to regulate perchlorate would likely affect U.S. Army installations because of the Army's use of the substance as an oxidizer in rockets, missiles, and pyrotechnics dating back to the 1940s.<sup>54</sup>

While administrative law practitioners should be mindful of environmental protection, in the area of government information, practitioners should keep in mind that the Freedom of Information Act (FOIA) centers on the release of government information. On 31 December 2007, President Bush signed the OPEN Government Act of 2007.<sup>55</sup> This amendment to the FOIA implements several important changes. In addition to modifying annual reporting requirements, defining "news media representative" for purposes of fee waivers, and clarifying when the Agency's time to respond to a request begins, the OPEN Government Act implements significant changes regarding the awarding of attorney's fees. Attorney fees are now awarded if a FOIA plaintiff's lawsuit was the "catalyst" for an agency's subsequent release of information.<sup>56</sup> This legislatively repealed *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*.<sup>57</sup> Probably more significant, however, is the requirement to pay an award of attorney fees (the only relief, other than the court-ordered release of records, under the FOIA) from an agency's operating budget rather than the U.S. Judgment Fund.<sup>58</sup> Whether this award will be paid by DoD, the DA, or by the installation from where the records came, has not yet been determined.<sup>59</sup>

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<sup>44</sup> National Security Personnel System; Final Rule, 5 C.F.R. § 9901 (2008).

<sup>45</sup> National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

<sup>46</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 326, 122 Stat. 3, 63.

<sup>47</sup> National Security Personnel System; Final Rule, 5 C.F.R. § 9901 (2008).

<sup>48</sup> Congressional Review Act of 1996, Pub. L. No. 104-121, § 801, 110 Stat. 857-74.

<sup>49</sup> National Security Personnel System; Final Rule, 5 C.F.R. § 9901 (2008).

<sup>50</sup> *Id.*

<sup>51</sup> Conservation banking is a "biological bank account" that involves the permanent protection of "privately or publicly owned lands that are managed for endangered, threatened, and other at-risk species." See U.S. Fish & Wildlife Serv., Conservation Banking, *available at*, [http://www.fws.gov/endangered/fact\\_sheets/banking\\_7\\_05.pdf](http://www.fws.gov/endangered/fact_sheets/banking_7_05.pdf). "Instead of money, the bank owner has habitat or species credits to sell." *Id.* The U.S. Fish and Wildlife Service manages the conservation banking process and "approves habitat or species credits based on the natural resource values on the bank lands. In exchange for permanently protecting the bank lands and managing them for listed and other at-risk species, conservation bank owners may sell credits to developers or others who need to compensate for the environmental impacts of their projects." *Id.*

<sup>52</sup> U.S. Environmental Command, Newsroom, <http://aec.army.mil/usaec/newsroom/index.html> (last visited Dec. 2, 2008).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 5 U.S.C. § 552 (2000) (as amended by Pub. L. No. 110-175, 121 Stat. 2564 (2007)).

<sup>56</sup> *Id.*

<sup>57</sup> See 532 U.S. 598 (2001) (stating that no attorney fees unless court orders agency to change its position or approves a consent decree).

<sup>58</sup> 5 U.S.C. § 552 (as amended by Pub. L. No. 110-175, 121 Stat. 2564 (2007)).

<sup>59</sup> See Lieutenant Colonel Craig E. Merutka, *Street FOIA 101: Nuts, Bolts, and Loose Change*, *infra* at 49.



In other areas of federal civil litigation, there are multiple decisions that impact the military and could affect military decision-making in both the short and long term. In May 2008, the Ninth Circuit Court of Appeals ruled in *Witt v. Department of the Air Force*<sup>60</sup> that, in light of *Lawrence v. Texas*,<sup>61</sup> the Air Force must satisfy intermediate level scrutiny under substantive due process when making decisions under the “Don’t Ask, Don’t Tell” homosexual policy.<sup>62</sup> The Ninth Circuit held that *Lawrence* raised the standard of review in such cases from rational basis and that the Government must overcome this heightened scrutiny on a case-by-case basis by showing impact on morale, unit cohesion, or the order and discipline of the unit resulting from the specific homosexual acts of the person discharged.<sup>63</sup> It remanded the case back to the district court for additional fact-finding.<sup>64</sup>

The military’s homosexual conduct policy is not the only issue under attack in federal court. Also at risk is the military’s discretion in conscientious objector (CO) cases. In January 2008, the U.S. Court of Appeals for the First Circuit affirmed a district court’s ruling that the Army’s decision to deny the CO application for Captain (CPT) Mary Hanna was arbitrary and capricious.<sup>65</sup> On 23 December 2005, CPT Hanna filed an application for discharge as a CO.<sup>66</sup> Despite favorable recommendations that the application be approved by most of CPT Hanna’s chain of command and most of those who interviewed her pursuant to applicable regulations, the DA CO Review Board (DACORB) denied CPT Hanna’s application.<sup>67</sup> The district court held, and the First Circuit affirmed, that there was no basis in fact for the DACORB denial and reversed the decision.<sup>68</sup> While these cases are always emotionally-charged and intensely personal in nature, the First Circuit’s holding will undoubtedly open the door to more challenges to negative decisions by the DACORB.

There are many other areas where military decisions or actions are being challenged in federal courts, including cases involving contractors in Iraq, challenges about religious freedom, medical maltreatment claims, and myriad discrimination allegations. This *TAL* edition includes an article specifically addressing the Military Whistleblower Protection Act and its effect on military members.<sup>69</sup>

As with legal assistance and civil law, the general administrative law areas of practice such as military investigations, standards of conduct, military personnel law, and, morale, welfare, and recreation have also witnessed change over the last year.

In April 2008, the DoD adopted the Army’s multiple investigation approach to friendly fire mishaps in Change 1 to DoD Instruction 6055.07, *Accident Investigation, Reporting, and Record Keeping*.<sup>70</sup> The change requires all Services to conduct both a legal and a safety investigation into all incidents of friendly fire.<sup>71</sup> Both investigations have been required under Army regulations (AR) for quite some time. The instruction now states that “[t]he Combatant Commander, or his or her designee,” must convene the legal investigation,<sup>72</sup> and the “Service whose forces suffer the preponderance of loss or injury will conduct [the] safety investigation.”<sup>73</sup>

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<sup>60</sup> 527 F.3d 806 (9th Cir. 2008). In *Witt*, a female Air Force reserve component nurse was honorably discharged from the military after evidence of her sexual relationship with a civilian woman came to light. *Id.*

<sup>61</sup> 539 U.S. 558 (2003).

<sup>62</sup> 10 U.S.C. § 654 (2000). “Don’t ask, Don’t tell” was instituted during the first Clinton Administration for the Department of Defense.

<sup>63</sup> *Witt*, 527 F.3d at 817–21.

<sup>64</sup> *Id.* at 822.

<sup>65</sup> *Hanna v. Sec’y of the Army*, 513 F.3d 4 (1st Cir. 2008). Captain Hanna joined the Army in 1997 as a member of the Army Health Professions Scholarship Program (HPSP) and thereafter attended medical school. *Id.* at 5. In exchange for financial assistance with medical school, CPT Hanna promised to serve on active duty in the Army for four years and to remain in the Army Reserve for an additional four years. *Id.* After CPT Hanna finished medical school, the Army deferred her active duty obligation for four years while she completed a residency in anesthesiology. *Id.* On 20 October 2005, the Army sent CPT Hanna a letter directing her to report for active duty in August 2006. *Id.* Hanna was later scheduled to report to William Beaumont Army Medical Center in El Paso, Texas. *Id.*

<sup>66</sup> *Id.* at 6.

<sup>67</sup> *Id.* at 7–11.

<sup>68</sup> *Id.* at 17.

<sup>69</sup> Major William E. Brown, *Whistleblower Protection for Military Members*, *infra* at 58.

<sup>70</sup> U.S. DEP’T OF DEFENSE, INSTR. 6055.7, ACCIDENT INVESTIGATION, REPORTING, AND RECORD KEEPING (3 Oct. 200) (C1, 24 Apr. 2008).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* sec. E.4.3.

<sup>73</sup> *Id.* sec. E.7.1.

As of the writing of this article, the Central Command commander has not yet identified who his designee will be but it is anticipated that it will be the service component commanders. This does not change, therefore, the current policy that only the highest level commanders may convene and approve friendly fire mishap investigations.<sup>74</sup> Judge Advocates should consult Change 1 to DoDI 6055.07 for more information and, in accordance with The Judge Advocate General policy and review the fifteen minute friendly fire mishap presentation located on Judge Advocate General University prior to deploying.<sup>75</sup> This presentation outlines the changes to the instruction and describes the current Army guidance for friendly fire reporting and investigation.

Other significant regulatory changes have also impacted military personnel law in the area of Soldier separations.<sup>76</sup> First, with the release of the revised AR 600-20 in March 2008, when commanders initiate an administrative separation action on any Soldier, for any reason (voluntary or involuntary), the packet must include documentation that positively identifies the Soldier as having been, or not having been, a victim of sexual assault.<sup>77</sup> Commanders must decide if separation of a victim under the circumstances is in the best interest of the Soldier and of the Army.<sup>78</sup> The Army also continues to withhold separation authority from lieutenant colonel-level commanders to the special court-martial convening authority.<sup>79</sup> Originally, announced in 2005, the Army continues this elevation of separation authority in view of the overall positive reduction the change has had on first-term attrition rates.<sup>80</sup> Recent changes have also affected reserve component separations. Now, U.S. Army Reserve Command general officer commanders with full-time JA support, have been delegated separation authority under AR 135-178 for Army Reserve Troop Program Unit enlisted Soldiers.<sup>81</sup>

Monetary cap increases in several areas have also brought noteworthy developments in 2008. The Family Readiness Group informal fund cap increased from \$5000 of annual income to \$10,000.<sup>82</sup> The foreign gift cap also increased from \$305 to \$335 (value of gift in U.S. dollar at the time of presentation).<sup>83</sup> Finally, Wounded Warriors may now accept gifts from prohibited sources of no more than \$335 per source, per occasion (no more than \$1000 per year from that same source).<sup>84</sup> This cap was increased from \$305 per source, per occasion (no more than \$1000 per year from the same source).<sup>85</sup>

This *TAL* edition ends with a relevant primer on problem areas in professional writing written by the Editor of the *Military Law Review*<sup>86</sup> and a book review on environmental planning for contingency operations written by our environmental law subject matter expert.<sup>87</sup> Both the primer and the book review are practice-focused and designed to give additional perspective to practitioners in the field.

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<sup>74</sup> *Id.*

<sup>75</sup> JAG University Homepage, <https://jag.learn.army.mil/webapps/portal/frameset.jsp> (follow "Mandatory Friendly Fire Training" hyperlink; then follow "Mandatory Friendly Fire Training Presentation" hyperlink) (last visited Dec. 8, 2008).

<sup>76</sup> *Id.*

<sup>77</sup> U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 8-5(o)(26) (18 Mar. 2008). Legal advisors should ensure that there is a memorandum, signed by either the Soldier or the commander initiating the separation, stating (a) if the Soldier was or was not a victim of sexual assault for which an unrestricted report was filed within the past twenty-four months; and, (b) if the Soldier was a victim, whether the Soldier does or does not believe that this separation action is a direct or indirect result of the sexual assault itself or of filing the unrestricted report. *Id.* para. 8-5(o)(27).

<sup>78</sup> *Id.*

<sup>79</sup> Message, 251355Z Aug 08, Pentagon Telecommunications Center, subject: Extend the Elevation of the Special Court-Martial Convening Authority (SPCMCA) for First-Term Attrition.

<sup>80</sup> *Id.*

<sup>81</sup> Memorandum from Headquarters, U.S. Army Reserve Command, to Commanders, USAR Major Subordinate Commands, subject: Delegation of Involuntary Separation Authority Under AR 135-178 (14 Oct. 2008).

<sup>82</sup> Memorandum from Sec'y of the Army to HQDA Principal Officials, subject: Army Directive 2008-01, Increase in Family Readiness Group Informal Fund Cap (7 Mar. 2008). This directive will be incorporated into the next revision of AR 608-1. U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE CENTER (19 Sept. 2007).

<sup>83</sup> 5 U.S.C. § 7342 (2000); U.S. DEP'T OF DEFENSE, DIR. 1005.13, GIFTS AND DECORATIONS FROM FOREIGN GOVERNMENTS (19 Feb. 2002) (C1, 6 Dec. 2002); U.S. DEP'T OF DEFENSE, JOINT ETHICS REGULATION 2-300 (23 Mar. 2006) [hereinafter JER].

<sup>84</sup> JER, *supra* note 81, at 3-400; *see also* 41 C.F.R. ch. 102.

<sup>85</sup> JER, *supra* note 81, at 3-400; *see also* 41 C.F.R. ch. 102.

<sup>86</sup> Major Ann B. Ching, *For All "Intensive" Purposes: A Primer on Malapropisms, Eggcorns, and Other Rogue Elements of the English Language*, *infra* at 66.

<sup>87</sup> Major Jim Barkei, *Green Warriors: Army Environmental Considerations for Contingency Operations from Planning Through Post-Conflict*, *infra* at 86.

As we close out a busy 2008, we prepare for an even more interesting and challenging year ahead. As always, we are here as a source for you, the practitioner in the field. As such, the Appendix contains a list of ADA professors by subject areas of expertise. We hope you find these articles and materials helpful in your practice and, as always, welcome your questions and comments.

## Appendix

### ADA Instruction Responsibilities—2008–2009

<b><u>SUBJECT AREA</u></b>	<b><u>INSTRUCTOR</u></b>
Intro to Administrative & Civil Law	LTC Mitchem (Chair)
Reserve Component Issues	LTC Sexton (Vice-Chair)
General Administrative Law	LTC Merutka (Chief)
Law of Military Installations (LOMI)	
Command Authority	LTC Sexton
Fed-State Relations & Legislative Jurisdiction	LTC Sexton
Standards of Conduct (JER)	MAJ Jankunis
MWR Organizations	MAJ Jankunis
Private Organizations	MAJ Jankunis
Environmental Law	MAJ Barkei
Army Substance Abuse	MAJ (P) Frost
Equal Opportunity	MAJ Brown
Investigations (15-6, FLI, LOD, etc)	LTC Merutka
Government Information Practices (FOIA/PA)	LTC Merutka
Sexual Harassment	MAJ Brown
Civil Law	LTC Birdsong (Chief)
Law of Federal Employ (LOFE)	MAJ Brown
Federal Labor Relations (FLR) (Unions)	LTC Birdsong
Defensive Federal Litigation (DFL)	LTC Birdsong
Health Care Law	MAJ (P) Frost
Claims	MAJ Sennott
FTCA	LTC Birdsong
Professional Responsibility	MAJ McKnelly
Military Personnel Law (MPL)	
Enlisted Separations	MAJ Barkei
Officer Separations	MAJ Barkei
Officer Personnel Law	MAJ Barkei
Acquired Immune Deficiency Syndrome	MAJ (P) Frost
Adverse Administrative Actions	LTC Mitchem
Administrative Remedies	MAJ Brown
Client Services (Legal Assistance)	MAJ (P) Frost (Chief)
Programs & Administration	MAJ (P) Frost
OERs/NCO-ERs	LTC Mitchem
Family Law	MAJ (P) Frost
Consumer Law	MAJ McKnelly
Landlord/Tenant	MAJ McKnelly
Interviewing & Counseling	MAJ (P) Frost
Servicemembers Civil Relief Act	LTC Sexton
Federal Income Tax	MAJ (P) Chase
Survivor Benefits	MAJ (P) Chase
Estate Planning	MAJ (P) Chase
Veterans' Reemployment Law	LTC Sexton
LA Deployment/Mob Environ	MAJ (P) Frost/MAJ McKnelly
Immigration Law	LTC Sexton
Professional Writing Program	MAJ Sennott (Chief)
	LTC Merutka (Deputy Chief)
	MAJ Ching/CPT Tulud (Editors)

## **Child Custody and Deployments: The States Step In to Fill the SCRA Gap**

*Lieutenant Colonel Jeffrey P. Sexton, Vice Chair and Professor,  
Administrative & Civil Law Department  
and  
Mr. Jonathan Brent, Student, University of Virginia School of Law\**

A significant issue facing military leaders during any time of conflict is the welfare of the family members of deploying servicemembers. Family distracters prevent servicemembers from concentrating fully on their military duties and can have an adverse impact on unit and individual readiness, safety, and morale. Of major concern to countless servicemembers is the risk of losing permanent custody of their children while mobilized or otherwise deployed outside the state or country. This has been especially true during the current War on Terror, in which the combination of high divorce rates and frequent mobilizations and deployments force servicemembers of all components, whether reserve or active, to deal with custody issues before, during, and after mobilization and deployment.<sup>1</sup>

A typical situation involves a divorced servicemember with joint legal custody of his children, with the primary physical care being with the servicemember. The servicemember then receives orders to deploy (or to activate and mobilize in the case of a member of the Reserve Components). As part of a Family Care Plan,<sup>2</sup> the servicemember arranges for a relative, such as a grandparent, to take care of the children during the deployment. Then, while the servicemember is deployed, the other parent sues for permanent physical custody of the children. Since laws in most states favor natural parents over any other guardian, the non-servicemember parent has a good chance of prevailing, especially if the court denies the servicemember's request to delay the proceedings and moves forward with the case in the servicemember's absence.<sup>3</sup> Furthermore, when the servicemember returns from deployment, he faces an uphill battle to regain custody of the children since most state laws forbid modification of child custody decrees unless there has been a significant change in circumstances.<sup>4</sup> To make matters worse, even if the servicemember obtains a hearing upon return from deployment, there is a risk that the court will view the servicemember's military profession, and the possibility of future deployments, as a detrimental factor when determining what custody solution would be in the "best interest" of the child.<sup>5</sup>

Traditionally, the Servicemembers Civil Relief Act (SCRA) has protected servicemembers from having to deal with important legal and financial issues during periods of military service.<sup>6</sup> However, the SCRA fails to provide specific protection to servicemembers embroiled in child custody disputes. Although Congress recently amended the SCRA in the National Defense Authorization Act for Fiscal Year 2008 (NDAA)<sup>7</sup> to emphasize that the stay provisions of sections 521 and 522 of the SCRA apply to child custody proceedings in addition to other civil proceedings,<sup>8</sup> the amendment does not require

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\* The authors thank Major Christopher Cox and Major William Schaefer, 56th Judge Advocate Officer Graduate Course, for their significant research contributions to this article.

<sup>1</sup> See, e.g., Pauline Arrillaga, *Deployed Troops Battle for Custody of Children*, USA TODAY, May 5, 2007, available at [http://www.usatoday.com/news/nation/2007-05-05-parentswar\\_N.htm](http://www.usatoday.com/news/nation/2007-05-05-parentswar_N.htm).

<sup>2</sup> U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-5 (18 Mar. 2008).

<sup>3</sup> See, e.g., *In re Marriage of Grantham*, 698 N.W. 2d 140 (Iowa 2005); *Diffin v. Towne*, 849 N.Y.S.2d 687 (N.Y. App. Div. 2008).

<sup>4</sup> See, e.g., ORE. REV. STAT. § 107.169(5) (2007) ("Modification of a joint custody order shall require showing of changed circumstances."); WIS. STAT. § 767.451(1)(b)1b (2007) (requiring "substantial change of circumstances" as one element in order to obtain a modification).

<sup>5</sup> The "best interest of the child" is the standard used generally in all the states to "determine which of the parents will be awarded custody." 3-32 FAMILY LAW AND PRACTICE § 32.06 (2008). Depending on the jurisdiction, under the best interest standard, military mobilizations and deployments may weigh against the servicemember parent. See, e.g., Rick Maze, *Bill Would Safeguard Child Custody Rights*, A.F. TIMES, June 2, 2008, available at [http://www.airforcetimes.com/news/2008/05/airforce\\_vabills\\_053008p/](http://www.airforcetimes.com/news/2008/05/airforce_vabills_053008p/) (citing a situation where a servicemember, during her custody proceeding, was told by a judge that the mere possibility of her deployment weighed against the best interests of the child).

<sup>6</sup> Servicemembers Civil Relief Act, 50 U.S.C.S. App. §§ 501-596 (LexisNexis 2008). Examples of benefits and protections provided by the SCRA include reduction of interest on debts to 6% for debts incurred before entry on active duty, stays of civil proceedings, protection against default judgments, tolling of statutes of limitation, termination of residential and automobile lease provisions, and protection from eviction without a court order. See, e.g., *Diffin*, 849 N.Y.S.2d 687.

<sup>7</sup> National Defense Authorization Act for Fiscal Year 2008, H.R. 5986, Pub L. No. 110-181, 110th Cong. (enacted).

<sup>8</sup> The first paragraph of both section 521 and section 522 of the SCRA now states as follows: "Applicability of section. This section applies to any civil action or proceeding, including any child custody proceeding . . ." 50 U.S.C.S. App. §§ 521-522.

the courts to grant stays for the duration of the deployment. Nor does the amendment prohibit courts from making permanent changes to pre-deployment custody arrangements. Further, even with the amendment's new language, some courts may still be inclined to deny or ignore stay requests outright, asserting that the best interests of the child outweigh the authority and interests of the SCRA.<sup>9</sup> The bottom line is that despite the new language in the SCRA stay provisions, servicemembers are still at the mercy of the individual court's approach to the contentious issues surrounding military service and child custody rights.

The good news is that as the War on Terror progresses and mobilizations and deployments continue, the issue of servicemember child custody disputes has gained the attention of state legislatures. This has resulted in more and more states stepping forward with protective legislation. As of this writing, twenty-one states have passed laws that provide some form of protection for servicemembers dealing with challenging custody situations, and eleven states have bills currently pending.<sup>10</sup> As the chart in the Appendix suggests, the states are varied in their approach. Some states address only one particular topic, such as prohibitions on permanent custody orders during deployment,<sup>11</sup> while other states cover the whole spectrum of issues, to include expedited hearings for deploying troops,<sup>12</sup> delegation of guardianship rights during deployment,<sup>13</sup> and even the opportunity for a servicemember to present electronic testimony when not physically present at a custody hearing.<sup>14</sup>

The following section provides a brief overview of current state legislative activity on this important topic.

### State Child Custody Legislation

State attempts to deal with servicemember child custody situations generally address three areas: (1) prohibitions on permanent custody orders during deployment/mobilization; (2) limitations on the use of past and/or future deployments/mobilizations in making custody determinations; and (3) other assorted protections, such as expedited custody hearings, delegated custody rights, and electronic testimony and visitations. An individual state's statute might provide some or all of these protections.

#### *Prohibitions on Permanent Change in Custody Orders During Deployments/Mobilizations*

This is a common protection measure designed to prevent the non-servicemember parent from obtaining permanent custody orders during the servicemember's deployment. For example, numerous state statutes forbid the issuance of permanent custody orders while a parent is deployed or on active duty, stating instead that only temporary custody orders can be implemented.<sup>15</sup> Other statutes provide that any custody order made while a parent is deployed or otherwise on active duty is automatically considered to be a temporary order.<sup>16</sup>

An interesting related issue is the process by which temporary orders are terminated or vacated upon the return of the servicemember. The States vary in their approach. For example, Colorado requires the servicemember to give written notice to the court that he or she has returned, after which the custody order in place before the deployment goes back into effect without the need for court action.<sup>17</sup> Other states require the court to reinstate the original custody order upon the

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<sup>9</sup> Lyndsey Kimber, *Talk is Cheap, Defending Your Rights as a Servicemember Is Not*, 25 MINN. J. 8-10 (2008), available at <http://www.citizensleague.org/publications/journal/MNJJournalFebruary2008.pdf> (pointing out that some courts take the approach that the best interest of the child standard trumps the servicemember's right to a stay in court proceedings).

<sup>10</sup> See the chart at the end of this article for a state-by-state breakdown of applicable legislation in each state.

<sup>11</sup> See, e.g., ARK. CODE ANN. § 9-13-110(d) (2008).

<sup>12</sup> See, e.g., MISS. CODE ANN. § 93-5-34 (2008).

<sup>13</sup> See, e.g., S.D. Codified Laws § 33-6-10 (2008).

<sup>14</sup> See, e.g., N.C. GEN. STAT. § 50-13.7A(c)(1) (2008).

<sup>15</sup> See, e.g., FLA. STAT. ANN. STAT. § 61.13002 (2008) (Florida custody statute); MICH. COMP. LAWS SERV. § 722.27 (LexisNexis 2008) (Michigan custody statute).

<sup>16</sup> See, e.g., KY. REV. STAT. ANN. § 403.340(5)(b) (2008); VA. CODE ANN. § 20-125.8(A) (2008).

<sup>17</sup> COLO. REV. STAT. § 14-10-131.3(3)(b) (2008).

servicemember's return.<sup>18</sup> Additional states simply state that, upon the servicemember's return, the temporary order will *automatically* revert back to the order in place at the time of deployment.<sup>19</sup> Another approach that was recently enacted in Pennsylvania and is pending in Minnesota is to require the court to specify in the temporary order that the order will revert to the pre-deployment order upon the return of the servicemember.<sup>20</sup> The State of North Dakota is slightly different, requiring temporary orders to explicitly provide for custody to be returned to the servicemember *unless* the court finds by clear and convincing evidence that this would not be in the best interest of the child.<sup>21</sup> Finally, there are states in which temporary orders that were issued based on military service automatically end ten days after the servicemember returns unless the non-servicemember parent motions for an emergency hearing, citing an immediate danger to the child.<sup>22</sup>

### *Use of Deployments/Mobilizations in Custody Determinations*

Another approach by some states is to limit the significance that deployments/mobilizations play in custody determinations. This type of legislation typically provides that courts are not allowed to take past deployments/mobilizations into account when applying the best interest test.<sup>23</sup> Other states go a step farther by providing that the possibility of additional *future* active duty service cannot be taken into account as well. For example, Wisconsin law provides that in an action to modify a custody order, the court may not consider the fact that a servicemember has been or *may be* called to active duty or the fact that he may be absent from his home due to military service.<sup>24</sup> Still other state statutes provide that mobilization or deployment by itself is not sufficient to justify modification of an order based on a change of circumstances.<sup>25</sup> As a result, a non-servicemember parent would have difficulty modifying an order if the sole reason is based on a mobilization or deployment.

### *Other Protections*

Numerous states give additional child custody protections to mobilized and deployed servicemembers. Some states explicitly allow a servicemember to delegate custody during deployment.<sup>26</sup> Other states authorize expedited custody hearings for servicemembers about to deploy,<sup>27</sup> allow electronic testimony from a servicemember who cannot physically attend a custody hearing,<sup>28</sup> or both.<sup>29</sup> In the event that the non-servicemember parent does obtain custody for the duration of the deployment, two states require the non-servicemember parent to maximize contact between the child and the deployed parent via electronic means and to make the child available for visitation during the deployed parent's leave.<sup>30</sup>

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<sup>18</sup> See FLA. STAT. ANN.STAT. § 61.13002(2); MICH. COMP. LAWS SERV. § 722.27(1)(c).

<sup>19</sup> See KY. REV. STAT. ANN. § 403.340(5)(a)2; TENN. CODE ANN. § 36-6-1(d) (2008).

<sup>20</sup> See S.B. 1107, 2007–2008 Gen. Assem., 2007 Sess. (Pa. 2007); H.R. 2494, 2007–2008 Legis., 85th Sess. (Minn. 2007) (as of this writing, this bill is pending).

<sup>21</sup> N.D. CENT. CODE § 14-09-06.6(9) (2008).

<sup>22</sup> See MISS. CODE ANN. § 93-5-34(3)(a) (2008); N.C. GEN. STAT. § 50-13.7A(c)(1) (2008).

<sup>23</sup> See, e.g., MICH. COMP. LAWS SERV. § 722.27(c).

<sup>24</sup> WIS. STAT. § 767.451(5)(c) (2007).

<sup>25</sup> See, e.g., NEB. REV. STAT. ANN. § 43-2923(3) (2008); ORE. REV. STAT. § 107.169(6)(a) (2007).

<sup>26</sup> See IDAHO CODE ANN. §§ 15-5-104 (2008) (allowing the custodial parent to delegate any powers regarding care and custody except the power to consent to marriage or adoption); ME. REV. STAT. ANN. tit. 18-A, § 5-104 (2008) (delegating any powers regarding care and custody except the power to consent to marriage or adoption); S.D. CODIFIED LAWS § 33-6-10 (2008).

<sup>27</sup> H.B. 2621, 2007/2008 Leg., 2008 Sess. (Kan. 2008) (as of this writing, this bill is pending).

<sup>28</sup> H.R. 808, 2007–2008 Gen. Assem., 117th Sess. (S.C. 2007) (as of this writing, this bill is pending).

<sup>29</sup> MISS. CODE ANN. §§ 93-5-23, 93-11-65 (LexisNexis 2008); N.C. GEN. STAT. § 50-13.7A(e), (f) (2008).

<sup>30</sup> FLA. STAT. ANN.STAT. § 61.13002(1) (2008); VA. CODE ANN. §§ 20-124.10 (2008).

### *Limiting Factors*

Several states place significant limitations on the protections they offer. In seven states, the protections only apply to members of the National Guard and/or members of the Reserve, with some states only protecting *their own* National Guard members.<sup>31</sup> This is a significant limitation given that deployed active component servicemembers experience the same issues and difficulties regarding child custody disputes as do their activated reserve component colleagues. The limitation likely originates from thinking by state legislatures, whether legitimate or not, that active component servicemembers have affirmatively assumed the risks involved in making the military their full-time profession.

Similarly, laws in Arkansas and Tennessee provide that the protections do not apply if the servicemember parent volunteers for permanent military duty as a career choice.<sup>32</sup> Since terms such as “volunteer,” “permanent military duty,” and “career choice” are not clearly defined, it is difficult to anticipate how a court would resolve the evidentiary issues associated with proving that a servicemember volunteered for “permanent military duty as a career choice.” After all, just because an active component servicemember is currently serving beyond an original service obligation, it does not necessarily mean he or she has decided to “make a career” of the military. Further, under traditional state civil protections and similar SCRA protections afforded to servicemembers, it is generally irrelevant whether a servicemember has made a choice to make the military a career.

Finally, with regard to other limiting factors, in a rare approach not taken by other states, Texas has passed a law explicitly stating that deployment *does* constitute a “change in circumstances” for the purposes of modification.<sup>33</sup>

### **Conclusion**

As previously mentioned, the chart in the Appendix provides a state-by-state listing of state laws that address in one way or another the intersection between child custody issues and the performance of military duty. Although the chart is a good starting point for legal assistance practitioners attempting to assist servicemembers facing child custody disputes, practitioners should keep in mind that this is a fluid issue with more states coming on board and new legislation appearing each year. Numerous states currently listed on the chart as “pending” may have passed legislation since the publication of this article, and the language of the legislation may have changed from the bills originally submitted. It is also important to remember that every state is different; there is not a “one size fits all” approach. It is the professional responsibility of every legal assistance attorney to check and double-check the law in a particular jurisdiction to ensure that advice and assistance to their clients is timely and accurate.

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<sup>31</sup> COLO. REV. STAT. § 14-10-131.3 (2)(d) (2008) (member of a reserve component of the United States Armed Forces or a member of the state National Guard); IDAHO CODE ANN. §§ 32-717(6) (2008) (member of military reserve or of Idaho National Guard); ME. REV. STAT. ANN. tit. 18-A, § 5-104(B) (2008) (member of the National Guard or of the reserves of the Armed Forces); N.D. CENT. CODE § 14-09-06.6(9) (2008) (member of the National Guard or a reserve unit of the U.S. Armed Forces); Ohio, H.R. 61, 127th Gen. Assem., Reg. Sess. (Ohio 2007) (member of the Ohio National Guard or any reserve component of the armed forces); ORE. REV. STAT. § 107.169 (2007) (member of the Oregon National Guard); WIS. STAT. § 767.451 (2007) (member of the National Guard or a reserve unit of the U.S. Armed Forces).

<sup>32</sup> ARK. CODE ANN. § 9-13-110(d) (2008); TENN. CODE ANN. § 36-6-1(e) (2008).

<sup>33</sup> TEX. FAM. CODE § 156.105(b) (2007).



## Appendix

### State Custody Laws Related to Deployment of SM Parents

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not factor in custody determination	Deployment does not justify modification	Deployed SM can delegate guardianship	Expedited / Electronic Hearing for deployed parent
Alaska	Pending	H.B. 264, 25th Leg., 1st Sess. (Ala. 2007)	X		X			
Ariz. <sup>1,2</sup>	Passed	Ariz. Rev. Stat. § 25-411 (LexisNexis 2008)				X		
Ark. <sup>3</sup>	Passed	Ark. Code Ann. § 9-13-110 (2008)	X					
Cal.	Passed	Cal. Fam. Code § 3047 (Deering 2007)				X		
Colo. <sup>5</sup>	Passed	Colo. Rev. Stat. § 14-10-131.3 (2008)	X	X <sup>9</sup>				
Del.	Pending	H.B. 294, 114th Gen. Assem., 2dSess. (Del. 2008)	X					
Fla. <sup>4</sup>	Passed	Fla. Stat. Ann.Stat. § 61.13002 (2008)	X	X <sup>10</sup>				
Idaho <sup>6</sup>	Passed	Idaho Code Ann. §§ 32-717, 15-5-104 (2008)				X	X	
Ill.	Pending	H.R. 1250, 95th Gen. Assem., (Ill. 2007)					X	
Iowa	Passed	Iowa Code § 598.41C (forthcoming 2009)	X	X <sup>10</sup>	X	X		
Kan.	Pending	H.B. 2621, 2007/2008 Leg., 2008 Sess. (Kan. 2008)	X	X <sup>11</sup>		X		X
Ky.	Passed	Ky. Rev. Stat. Ann. § 403.340 (2008)	X	X <sup>12</sup>				
Me. <sup>5</sup>	Passed	Me. Rev. Stat. Ann. tit. 18-A, § 5-104 (2008)					X	
Md.	Pending	H.B. 346, 2008 Gen. Assem., 425th Sess. (Md. 2008)	X	X <sup>12</sup>				
Mich.	Passed	Mich. Comp. Laws Serv. § 722.27 (LexisNexis 2008)	X	X <sup>10</sup>	X			
Minn.	Pending	H.R. 2494, 2007–2008 Legis., 85th Sess. (Minn. 2007)		X <sup>13</sup>	X			
Miss.	Passed	Miss. Code Ann. § 93-5-34 (2008)		X <sup>11</sup>		X		X
Neb.	Passed	Neb. Rev. Stat. Ann. § 43-2923 (2008)				X		
N.J.	Pending	S. 2910, 212th Legis., 2006–2007 Sess. (N.J. 2007)	X			X		
N.Y.	Pending	A.O. 6027, 2007 Sess. (N.Y. 2007)			X			
N.C.	Passed	N.C. Gen. Stat. § 50-13.7A (2008)		X <sup>11</sup>		X		X
N.D. <sup>5</sup>	Passed	N.D. Cent. Code § 14-09-06.6 (2008)	X	X <sup>14</sup>				
Ohio <sup>6</sup>	Pending	H.B. 61, 127th Gen. Assem., Reg. Sess. (Ohio 2007)	X			X		
Okla.	Passed	Okla. Stat. tit. 43, § 112 (2008)	X					
Or. <sup>7</sup>	Passed	Ore. Rev. Stat. § 107.169 (2007)				X		

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not factor in custody determination	Deployment does not justify modification	Deployed SM can delegate guardianship	Expedited / Electronic Hearing for deployed parent
Pa.	Passed	S.B. 1107, 2007–2008 Gen. Assem., 2007 Sess. (Pa. 2007)	X	X <sup>13</sup>	X	X		
S.C. <sup>4</sup>	Pending	H.R. 808, 2007-2008 Gen. Assem., 117th Sess. (S.C. 2007)	X	X <sup>12</sup>		X		X
S.D.	Passed	S.D. Codified Laws § 33-6-10 (2008)	X				X	
Tenn. <sup>3</sup>	Passed	S.B. 2547 / Tenn. Code Ann. § 36-6-113 (2008)	X	X <sup>12</sup>				
Tex.	Passed	Tex. Fam. Code §§ 156.105, 153.3161 (2007)				Rev. <sup>8</sup>		
Va. <sup>4</sup>	Passed	Va. Code Ann. §§ 20-124.7 - 20-124.10 (2008)	X					
Wash.	Pending	S.B. 6331, 60th Legis., 2008 Reg. Sess. (Wash. 2007)	X	X <sup>12</sup>				
Wis. <sup>5</sup>	Passed	Wis. Stat. § 767.451 (2007)			X			

<sup>1</sup> Judge should defer to family care plan

<sup>2</sup> Pre-deployment custody order must address the issue of post-deployment custody

<sup>3</sup> Court can make a permanent modification if the parent volunteers for active duty as a career choice

<sup>4</sup> Non-SM parent must maximize child's communication with SM parent while SM is deployed

<sup>5</sup> Law only protects members of the armed forces reserves and the National Guard

<sup>6</sup> Law only protects members of the armed forces reserves and that state's National Guard

<sup>7</sup> Law only protects members of that state's National Guard

<sup>8</sup> Texas law specifically mentions that deployment by itself is sufficient to justify a modification

<sup>9</sup> Servicemember gives notice that he has returned, after which previous order goes back into effect

<sup>10</sup> Court shall re-instate the custody decree in place before deployment

<sup>11</sup> Temporary orders end 10 days after the servicemember returns, unless the other parent files a motion

<sup>12</sup> Orders revert automatically upon the return of the servicemember

<sup>13</sup> Court is required to state in the temporary order that the order will revert upon the return of the servicemember

<sup>14</sup> Court is required to state in the temporary order that the order will revert upon the return of the servicemember, unless the court has clear and convincing evidence that this is not in the best interest of the child

## New Developments in Child Support: Enforcement of Foreign Orders Under the 2001 Amendments to the Uniform Interstate Family Support Act

Major John S. Frost\*

Every state adopted the Uniform Interstate Family Support Act (UIFSA)<sup>1</sup> when Congress included a federal fund contingency provision in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.<sup>2</sup> The UIFSA represents a waiver of state sovereignty in family law, an area constitutionally reserved to the states,<sup>3</sup> in the name of settling jurisdiction uniformly across the states. Prior to the UIFSA's enactment, states operated under the Uniform Reciprocal Enforcement of Support Act (URESAs)<sup>4</sup> and its rewritten version, the Revised Uniform Reciprocal Enforcement of Support Act (RURESAs).<sup>5</sup> Despite their names, states adopted these laws non-uniformly, allowing judges and support enforcement agencies to alter jurisdiction to fit their needs. This resulted in competing support orders from different states, confusing modification of orders in multiple states, reluctance by some states to enforce an order issued by another state, and a general disrespect of orders by obligors.<sup>6</sup> The UIFSA sought to repair these deficiencies by getting states to agree to settle jurisdiction in the areas of establishment, modification, and enforcement, before applying their own individual "best interests of the child" formulas to the specifics of support. By agreeing to settle jurisdiction first and in a uniform way, states would ameliorate the problems that resulted from URESAs, because they would eliminate multiple and conflicting orders.

The UIFSA also recognized that states were conducting the day-to-day aspects of child support through administrative agencies within the states. Again seeking to enable support, the UIFSA empowered these Child Support Enforcement Agencies, or Title IV-D agencies, to communicate among themselves across state lines, and to exercise personal jurisdiction over obligors on behalf of obligees in separate states.<sup>7</sup> The UIFSA has resulted in an increase in the number of supported children where interstate support settings are involved across the nation.<sup>8</sup> Military legal assistance attorneys have a heightened interest in awareness of the interstate and international hurdles involving the establishment, modification and enforcement of child support, due to the itinerant nature of military service.<sup>9</sup>

If jurisdictional obstacles pose hardships across state lines, even further challenges come to light when a support order originates in a foreign country and an obligee seeks enforcement in a particular U.S. jurisdiction. The UIFSA recognized this dynamic when it defined a "state" in §101 as follows:

(19) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes:

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<sup>1</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT (amended 2001), 9 U.L.A. 255 (Supp. 2001) [hereinafter UIFSA 2001].

<sup>2</sup> Pub. L. No. 104-193, 110 Stat. 2166 (1996) (codified as amended at 42 U.S.C. § 666(f) (2000)). The UIFSA was first drafted by the National Conference of Commissioners for Uniform State Laws (NCCUSL) in 1992. UNIF. INTERSTATE FAMILY SUPPORT ACT (amended 2001), 9 U.L.A. 77 (1992). It was amended in 1996 and it is the 1996 version that states had to adopt in order to continue to receive federal funds for child support under the Personal Responsibility and Work Opportunity Reconciliation Act. UNIF. INTERSTATE FAMILY SUPPORT ACT 1996, 9 U.L.A. 235 [hereinafter UIFSA 1996]. The states had to adopt the UIFSA by 1 January 1998, and all states complied. 90 A.L.R. 5th 1 (2001). It was amended again in 2001, and it is this latest version that is the focus of this piece. UIFSA 2001, *supra* note 1

<sup>3</sup> See *In re Burrus*, 136 U.S. 586 (1890) where the U.S. Supreme Court famously said "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id.* at 593-94.

<sup>4</sup> UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT (URESAs) (amended 1968), 9 U.L.A. 553 (1987). The NCCUSL originally authored URESAs in 1950.

<sup>5</sup> REVISED UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT (RURESAs) (1968), 9 U.L.A. 381 (1987).

<sup>6</sup> See generally LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION ch. 1 (Supp. 2007) (providing a discussion of UIFSA's history and the problems that resulted from states' non-uniform adoption of URESAs and RURESAs).

<sup>7</sup> UIFSA 1996, *supra* note 2, §§ 101(20), 310.

<sup>8</sup> The U.S. Census Bureau reported that "[t]he proportion of custodial parents who received the full amount of owed child support increased from 37 percent in 1993 to 47 percent in 2005." Press Release, U.S. Census Bureau, Fewer Custodial Parents on Public Assistance (Sept. 20, 2007), <http://www.census.gov/Press-Release/www/releases/archives/children/010634.html>; TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CHILD SUPPORT, REPORTS AND TABLES, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2005 (Aug. 2007), <http://www.census.gov/prod/2007pubs/p60-234.pdf>.

<sup>9</sup> See Major Robert D. Broughton, Jr., *Modification of Child Support Orders Under the Uniform Interstate Family Support Act (UIFSA)*, ARMY LAW., Dec. 2004, at 57 (providing an excellent summary of the UIFSA's basic provisions and their application to military legal assistance practice).

(i) an Indian tribe; and

(ii) a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this [Act], the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.<sup>10</sup>

By defining “state” this way, the 1996 UIFSA incorporated foreign support orders into its rules, but only after satisfaction of a due process type of finding of “substantial similarity” by the U.S. jurisdiction.<sup>11</sup> For this reason, obligees seeking enforcement in a U.S. jurisdiction still found it cumbersome to make the required “substantially similar” finding. Many parties found themselves seeking to have states register foreign child support orders the way they would any foreign judgment; they had to rely on a separate statute in a state that took cognizance of a foreign judgment, or they had to rely on the doctrine of comity. The doctrine of comity stands for the proposition that a particular jurisdiction will respect a judgment from another jurisdiction not out of any obligation under law to do so, but out of good will and an interest in having the other jurisdiction reciprocate.<sup>12</sup> Both avenues were litigious, expensive and slow, and obligors were sometimes able to use the United States as a haven from support obligations handed down in other lands.

The NCCUSL promulgated further amendments to the UIFSA in 2001. The federal government has not given the 2001 Amendments the same enthusiastic support that it gave the 1996 UIFSA in that there are no federal funds contingent on their adoption. For this reason, state legislatures have been passing the 2001 UIFSA Amendment provisions as they see fit. Currently, twenty-two U.S. jurisdictions have passed the amendments into law.<sup>13</sup> The amendments contain several provisions that seek to clarify the 1996 UIFSA without substantially changing the law. There are also a few housekeeping alterations.<sup>14</sup>

The New Jersey Appellate Court discussed a provision of the 2001 UIFSA Amendments in the case of *Marshak v. Weser* in 2008.<sup>15</sup> In *Marshak*, the parties were divorced in Pennsylvania and a Pennsylvania court issued a support order.<sup>16</sup> Both parents and the children in question moved to New Jersey.<sup>17</sup> Pennsylvania law does not require an obligor to pay college expenses of a child who has reached majority, but New Jersey law does.<sup>18</sup> The father-obligor brought an action in New Jersey to have one of the children declared emancipated when he turned eighteen, and the mother-obligee argued that because everyone had relocated to New Jersey, a New Jersey court should apply New Jersey’s rules on emancipation to the

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<sup>10</sup> UIFSA 1996, *supra* note 1, § 101(19).

<sup>11</sup> For example UIFSA § 203 read: “Under this [Act], a tribunal of this State may serve as an initiating tribunal to forward proceedings to another State and as a responding tribunal for proceedings initiated in another State.” *Id.* § 203.

<sup>12</sup> The U.S. Supreme Court spoke extensively on the doctrine of comity in the case of *Hilton v. Guyot*, and said:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

159 U.S. 113, 163–64 (1895).

<sup>13</sup> As of December 2008, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Idaho, Illinois, Maine, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming have passed the 2001 Amendments to the UIFSA. Uniform Law Comm’rs, A Few Facts About the . . . Uniform Interstate Family Support Act (2001), [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uifsa.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uifsa.asp) (last visited Dec. 4, 2008). The legislatures of Maryland and New Jersey introduced the Amendments in 2008. *Id.*

<sup>14</sup> In addition to the grander provisions discussed *infra*, the 2001 Amendments contain a provision that allows parties to confer subject matter jurisdiction over modification to the issuing jurisdiction, even when they have all moved out of the order issuing state. See UIFSA, 2001, *supra* note 1, § 205(a)(2). The 2001 Amendments also eliminate a pedantic roadmap for state officials that previously existed at § 301. Finally, the 2001 Amendments define “person” and “record” at § 102, and clarify § 201’s long arm jurisdiction provision by attempting to limit the long-arm rules for personal jurisdiction to establishment of a support order, rather than modification of an existing support order. *Id.* §§ 102, 201.

<sup>15</sup> *Marshak v. Weser*, 915 A.2d 613 (N.J. Super. Ct. App. Div. 2007).

<sup>16</sup> *Id.* at 614.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

Pennsylvania order, not Pennsylvania's.<sup>19</sup> Her argument would have required the father to continue supporting the children after they turned eighteen. The lower court agreed with the mother, reasoning "that [the] Legislature had not adopted a 2001 amendment to UIFSA specifically providing that the duration of child support obligation imposed by the courts of one state may not be extended by the courts of another state."<sup>20</sup> The appellate level court overruled the lower court, determining that the 2001 UIFSA amendment in question did not change the extant version of the UIFSA in New Jersey, but only clarified it.<sup>21</sup> For that reason, the father succeeded in having the child declared emancipated.<sup>22</sup> The New Jersey court could not apply its own rules to the parties, all of whom now resided in New Jersey. Instead, New Jersey's adoption of the UIFSA forced it to continue to defer to Pennsylvania's rules on emancipation because the order in question came from Pennsylvania.<sup>23</sup>

The most substantial changes in the 2001 UIFSA Amendments, however, come with the recognition of foreign support orders. First, an entirely new section of the UIFSA states that the rules having to do with recognition of foreign judgments are cumulative, and that they are not to be used to exclude recognition by any other mechanism a party seeking support might muster, including the old doctrine of comity.<sup>24</sup> Second, the definition of "state" has been broadened to expand reciprocity with foreign countries and even political subdivisions of foreign countries:

(21) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes:

(A) an Indian tribe; and

(B) a foreign country or political subdivision that:

(i) has been declared to be a foreign reciprocating country or political subdivision under federal law;

(ii) has established a reciprocal arrangement for child support with this State as provided in Section 308; or

(iii) has enacted a law or established procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under this [Act].<sup>25</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 614–15.

<sup>21</sup> *Id.* at 616. The provision in question honed in on an area of controversy that has persisted despite the UIFSA's adoption, that is, orders from one state, but recognized in another state, when there is a difference on the duration of support (some states have child support expiring at age eighteen, others at twenty-one and still others with accompanying provisions dealing with college enrollment). The 2001 version of § 611 explicitly says that the issuing state's law applies. The *Marschak* case quoted from the Comment to § 611(d) of the Amendment, saying "[f]rom its original promulgation UIFSA determined that the duration of child-support obligation[s] should be fixed by the controlling order . . . . If the language was insufficiently specific before . . . . 2001, the amendments should make this decision absolutely clear," even though New Jersey had not adopted the Amendments. *Id.* at 616 (quoting UIFSA 2001, *supra* note 1, § 611(d)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 615.

<sup>24</sup> The language of § 104 reads:

(a) Remedies provided by this [Act] are cumulative and do not affect the availability of remedies under other law, including the recognition of a support order of a foreign country or political subdivision on the basis of comity.

(b) This [Act] does not:

(1) provide the exclusive method of establishing or enforcing a support order under the law of this State; or

(2) grant a tribunal of this State jurisdiction to render judgment or issue an order relating to [child custody or visitation] in a proceeding under this [Act].

UIFSA 2001, *supra* note 1, § 104.

<sup>25</sup> *Id.* § 102(21).

The resultant effect of the 2001 UIFSA Amendments is to give a foreign support order the same gravitas as an order from a U.S. jurisdiction. A party seeking support has essentially four ways to achieve that end. First, the party can seek to invoke the old doctrine of comity, notwithstanding any other specifics of the UIFSA.<sup>26</sup> Second, they can ask the responding state tribunal to examine “the law or established procedures” of the foreign jurisdiction for “substantial similar[ity]” in accordance with § 102(21)(B)(iii), as was the case under the universally adopted the UIFSA.<sup>27</sup> These two avenues represent no change. The third mechanism under § 102(21)(B)(ii) recognizes the inherent power of a sovereign U.S. state to independently agree with a foreign jurisdiction to reciprocate child support.<sup>28</sup> Finally, § 102(21)(B)(i) relinquishes a state’s power to examine the underlying law and procedure of the foreign country whose order a party is seeking to enforce in certain circumstances.<sup>29</sup> It says that the state will entrust the federal government to declare certain countries as foreign reciprocating countries, and will recognize support provisions from those countries.<sup>30</sup> This subtle incorporation of a federal pronouncement into which foreign support orders a state will enforce represents a further shift away from true state sovereignty in family law.

Only the Comments to § 102 identify which part of the federal government will make the declaration of who is and who is not “a foreign reciprocating country or political subdivision”; it is the U.S. State Department.<sup>31</sup> The State Department, with the concurrence of the Secretary of Health and Human Services, has had the authority to make such declarations under Title IV-D of the Social Security Act since 1996.<sup>32</sup> Currently, the countries of Australia, Czech Republic, El Salvador, Finland, Hungary, Ireland, Netherlands, Norway, Poland, Portugal, Slovak Republic, Switzerland, and The United Kingdom and Northern Ireland have been declared to be “foreign reciprocating countries.”<sup>33</sup> Additionally, the Canadian Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland/Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan, and Yukon have achieved the same status.<sup>34</sup> This means that for those states who have adopted the 2001 UIFSA Amendments, an individual seeking to enforce or register a support order from any of the above foreign countries or provinces should need no more action by any tribunal than a trip to the local CSEA office. Likewise, the same fast track treatment should occur at the administrative agency in the other reciprocating country for an order emanating from the 2001 UIFSA Amendments adopting U.S. jurisdiction.

A few cases from around the country have put the UIFSA’s definition of “state” to the test since the UIFSA’s adoption. The case of *Gur v. Gur* involved a support order from Israel and the mother-obligee’s attempt to enforce it in California where the father-obligor had relocated and stopped making payments.<sup>35</sup> The California court focused on the definition of “state” under the UIFSA and found that even though neither the State Department nor California had declared Israel to be a “foreign reciprocating state,” the Israeli court had “established procedures for the issuance and enforcement of support orders which are substantially similar” to California’s law.<sup>36</sup> The father pointed out several dissimilarities between the child support systems in Israel and California, including the exclusive jurisdiction of the Rabbinical Court in Israel.<sup>37</sup> His most compelling argument came when he pointed out that under Israeli law, a court could order support beyond the age of majority, but California law prohibited such an order.<sup>38</sup> The court did not directly refute the father’s arguments, but instead found his

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<sup>26</sup> *Id.* § 104(a)

<sup>27</sup> *Id.* § 102(21)(B)(iii).

<sup>28</sup> *Id.* § 102(21)(B)(ii).

<sup>29</sup> *Id.* § 102(21)(B)(i).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at cmt.

<sup>32</sup> 42 U.S.C. § 659a(a)(1) (2000).

<sup>33</sup> The Department of Health and Human Services maintains the listing on its web page. U.S. Dep’t of Health and Human Servs., Int’l Resources, <http://www.acf.hhs.gov/programs/cse/international> (last visited Nov. 20, 2008).

<sup>34</sup> *Id.*

<sup>35</sup> 2005 WL 3409379 (Cal. Ct. App. 2005).

<sup>36</sup> *Id.* at \*7.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

arguments unpersuasive and grounded its opinion in the fact that a California order could be enforced in Israel and upheld the order under the doctrine of comity.<sup>39</sup>

Similarly, a North Carolina court considered England a “state” under the UIFSA by referencing the New York Convention on the Recovery Abroad of Maintenance, a treaty to which the United States was not even a signatory, as persuasive authority in deciding that England’s procedures satisfied the UIFSA’s “substantially similar” prong.<sup>40</sup> When states have refused to respect foreign country support orders under the UIFSA’s provisions, it has commonly been for wont in the record of evidence of “substantially similar” procedures.<sup>41</sup> Parties seeking enforcement have not met the burden of showing the foreign state’s procedures were “substantially similar” to those of the U.S. state.

A brand new international treaty has the potential to drastically alter states’ involvement in the enforcement of foreign child support orders. The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Hague Convention) was signed by sixty-eight nations on 23 November 2007.<sup>42</sup> The United States was one of the signatories, and on 8 September 2008, President Bush signed the Hague Convention and forwarded it to the Senate with his recommendation that the Senate give it “prompt and favorable consideration.”<sup>43</sup>

The Hague Convention bypasses the splintered federal nature of the United States by exalting a central authority with whom central authorities from other countries can reciprocate and communicate. Rather than separate states agreeing to reciprocate with other countries directly, the Hague Convention would have the federal government do that for them, at least for some activities. This is important because other countries have sometimes refused to enforce state support orders because they did not come from a national central authority. Additionally, the Hague Convention seeks to allow state courts to exercise jurisdiction in a manner consistent with minimum contacts type rules, as opposed to the “habitual residence” of the obligee and child rules, as was the case under previous treaties and in most foreign jurisdictions. Finally, the Hague Convention allows for parties seeking enforcement in other countries to do so without expensive fees in many instances. All of these provisions are designed to enable the flow of support and lessen the ability of deadbeat obligors to find refuge behind international conflicts of law. They do so by further introducing federal involvement in an area constitutionally reserved to the states.

Because family law and child support matters are reserved to the laws of the states, states will have to voluntarily waive additional sovereignty in order to effectuate the Hague Convention’s procedures. To this end, the NCCUSL’s Interstate Family Support Committee is wrangling through the UIFSA and is hashing out an extensive overhaul of the UIFSA for 2008.<sup>44</sup> The proposed language removes the references to foreign countries in § 101 altogether.<sup>45</sup> It adds an entirely new article, Article 7, which references the Hague Convention articles, adopts the Hague Convention’s choice of wording for support related terms, creates a Central Authority for the United States and for each state, and attempts to create a hierarchy of respect so as to both enable enforcement of the treaty, as well as take cognizance of the existing UIFSA arrangements between the states.<sup>46</sup> If states adopt the proposed new UIFSA and its attendant respect for foreign support orders, as well as the ability to enforce U.S. support orders abroad, a new day in international child support will have dawned.

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<sup>39</sup> *Id.*

<sup>40</sup> *Foreman v. Foreman*, 550 S.E.2d 792 (N.C. App. 2001).

<sup>41</sup> In *Haker-Volkening v. Haker*, 547 S.E.2d 127 (N.C. App. 2001), the court found the obligee had not met her burden in showing that the procedures of a Swiss court were “substantially similar” to those of North Carolina. Likewise, the Ohio court in *Kalia v. Kalia*, 783 N.E.2d 623 (Ohio Ct. App. 2002), held that the party seeking to register and enforce an Indian support order had not met her burden under the UIFSA. A Mexican support order was at issue in *In re V.L.C.*, 225 S.W.3d 221 (Tex. App. El Paso 2006) where the party failed to show the issuing Mexican court’s “substantially similar” proceedings to those in Texas. By contrast, the California court found Germany to be a “foreign reciprocating country” under the UIFSA, not by the decree of the U.S. State Department, as the appellant urged was necessary, but instead by the Attorney General of California, in *Willmer v. Willmer*, 51 Cal. Rptr. 3d 10 (Cal. Ct. App. 2006).

<sup>42</sup> Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Nov. 23, 2007), available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=131](http://www.hcch.net/index_en.php?act=conventions.text&cid=131) (last visited Nov. 20, 2008).

<sup>43</sup> Message to the Senate transmitting the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 44 WEEKLY COMP. PRES. DOC. 36, 1187 (Sept. 15, 2008), available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=131](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=131) (follow “Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, message transmitting” hyperlink).

<sup>44</sup> The new language is available on the NCCUSL’s web page which has a link to the 2008 draft of the UIFSA. Uniform Law Comm’n, Interstate Family Support, <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=289> (follow “2008 Annual Meeting Draft” hyperlink).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* art. 7.

## Survivor Benefits Update

*Major Dana J. Chase\**

Recent legislation has changed several components of survivor benefits. Survivor benefits are composed of multiple allowances that surviving spouses, children, and other dependents may be eligible to receive due to the death of a servicemember. These allowances are either in the form of monthly payments such as Dependency and Indemnity Compensation (DIC),<sup>1</sup> Dependent Education Assistance,<sup>2</sup> and Survivor Benefit Program (SBP),<sup>3</sup> or lump sum payments from Service Members Group Life Insurance (SGLI)<sup>4</sup> and the Death Gratuity.<sup>5</sup> This update will highlight those changes so that legal assistance attorneys can effectively assist servicemembers and surviving Family members understand what benefits they are eligible to receive.

### National Defense Authorization Act for Fiscal Year 2007<sup>6</sup>

The National Defense Authorization Act for Fiscal Year 2007 (NDAA 2007) made several changes to SBP, SGLI, and other benefits.<sup>7</sup> First, SBP was amended to allow for the election of a new beneficiary upon the death of the originally designated beneficiary.<sup>8</sup> Previously, when the primary beneficiary died, the only option was to withdraw from the SBP.<sup>9</sup> Now, if the primary beneficiary dies, the servicemember participating in the plan may elect a natural person of insurable interest such as a child, new spouse, or parent within 180 days after the death of the previous beneficiary.<sup>10</sup> However, if the participant in the plan dies within two years of electing the follow on beneficiary, the election of the new beneficiary is deemed ineffective and the amount taken from the participant's retired pay will be paid in lump sum to the deceased participant's follow-on beneficiary.<sup>11</sup> In addition to allowing the selection of a follow-on beneficiary, there are also rules for changes in the premium coverage when a new beneficiary is designated. Specifically, the amount of premiums paid by the participant under the plan will be equal to the amount of retired pay that would have been reduced if the beneficiary had survived and as if the previous beneficiary was the same age as the new beneficiary.<sup>12</sup>

The SBP was further amended by the NDAA 2007 to allow surviving spouses with dependent children to pass the benefits of the SBP to those dependent children for all servicemember deaths occurring after 7 October 2001.<sup>13</sup> The National Defense Authorization Act of Fiscal Year 2004 (NDAA 2004) allowed surviving spouses of servicemembers who died on active duty after 23 November 2004 to receive monthly payments under the SBP.<sup>14</sup> These surviving spouses could also elect that the SBP payments go to the surviving dependent children of the servicemember.<sup>15</sup>

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<sup>1</sup> 38 U.S.C.S. §§1301–1323 (LexisNexis 2008).

<sup>2</sup> *Id.* §§ 3501–3567.

<sup>3</sup> 10 U.S.C.S §§ 1447–1460B (LexisNexis 2008).

<sup>4</sup> 38 U.S.C.S §§ 1965–1980.

<sup>5</sup> 10 U.S.C.S § 1478.

<sup>6</sup> Pub. L. No. 109-364, 120 Stat. 2083 [hereinafter NDAA 2007].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* § 643.

<sup>9</sup> 10 U.S.C.S. § 1448. The other options for withdrawal from SBP include: between the second and third anniversary of enrollment in the program; when a beneficiary is no longer eligible, such as when a child beneficiary is over eighteen or twenty-two if a full-time student; or in the case of spousal coverage, when the spouse and servicemember divorce. *Id.*

<sup>10</sup> NDAA 2007, *supra* note 6, § 643.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* § 644.

<sup>14</sup> Pub. L. No. 108-136, 117 Stat. 1392.

<sup>15</sup> *Id.*



The NDAA 2007 also modified the payment of premiums for SGLI. Servicemembers who were deployed for either Operation Enduring Freedom (OEF) or Operation Iraqi Freedom (OIF) will have the maximum coverage amount of SGLI reimbursed to the servicemember if withdrawn from the servicemember's pay as of 1 November 2006.<sup>16</sup> This section of the NDAA 2007 altered the National Defense Authorization Act for Fiscal Year 2006 (NDAA 2006) which allowed for the reimbursement to the servicemember the increase in the amount of SGLI premiums when the coverage increased \$150,000 from \$250,000 to \$400,000 for those servicemembers deployed to OEF or OIF.<sup>17</sup>

Finally, the NDAA 2007 changed other benefits for surviving Family members of a dual military couple. If one of the members dies, the surviving servicemember will continue to receive the housing allowance of the deceased servicemember for one year after the date of death.<sup>18</sup>

### **National Defense Authorization Act for Fiscal Year 2008<sup>19</sup>**

The SBP changes from the National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008) called for the limitation of recoupment for annuity amounts previously paid subject to offset for DIC and the creation of a special allowance for persons affected by the required offset between SBP and DIC.<sup>20</sup> The limitation on the recoupment amount calls for any amount subject to offset between SBP and DIC previously paid to a surviving spouse or former spouse recouped only to the extent that the amount paid exceeds any amount refunded from the deceased servicemember's retired pay due to the offset between SBP and DIC.<sup>21</sup> For example, if a servicemember used \$3000 of retirement pay as the base amount for the annuity for SBP to the surviving spouse, the amount paid to the surviving spouse would be 55% of the base amount of \$3000 or \$1650. The amount of DIC is currently \$1091 and will reduce the amount of SBP by that same amount. Therefore, the amount of offset leaves SBP in the amount of \$559 going to the surviving spouse and \$2000 of retired pay refunded. Under this section of the NDAA 2008, if the amount paid to the spouse before the offset was more than the \$2000 refunded amount of retired pay, the amount in excess would also be recouped. Spouses affected by section 643 of the NDAA 2008 should receive a notice explaining the DIC offset and refund of retired pay detailing how those amounts were arrived at.<sup>22</sup>

Second, the NDAA 2008 created a special survivor indemnity allowance for persons affected by the offset between SBP and DIC.<sup>23</sup> If a surviving spouse or former spouse is subject to the offset between SBP and DIC beginning 1 October 2008, those surviving and former spouses affected will be entitled to an extra monthly annuity of \$50 a month for fiscal year 2009.<sup>24</sup> This amount increases ten dollars each fiscal year until fiscal year 2013 when the annuity amount stays at \$100 each month until 28 February 2016.<sup>25</sup> This section of the NDAA 2008 will expire on that date.<sup>26</sup>

The NDAA 2008 also changes the designation of beneficiaries for the death gratuity.<sup>27</sup> Starting 1 July 2008, servicemembers "may designate one or more persons to receive all or a portion of the amount payable" of the death gratuity.<sup>28</sup> Each beneficiary designated may receive any amount of the death gratuity in 10% increments up to the full amount.<sup>29</sup> However, if the servicemember has a spouse and the spouse is not a beneficiary of the death gratuity or does not

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<sup>16</sup> NDAA 2007, *supra* note 6, § 606.

<sup>17</sup> Pub. L. No. 109-163, § 613, 119 Stat. 3136.

<sup>18</sup> NDAA 2007, *supra* note 6, § 605.

<sup>19</sup> Pub. L. No. 110-181, 122 Stat. 3.

<sup>20</sup> *Id.* §§ 643, 644.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 643.

<sup>23</sup> *Id.* § 644.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* § 645.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

receive the entire death gratuity amount, the spouse is notified that the servicemember did not designate the spouse as a beneficiary for the entire amount of the death gratuity.<sup>30</sup> Moreover, if the servicemember does not designate 100% of the death gratuity to the named beneficiaries, the death gratuity will be paid to the surviving spouse, if any; if there is no surviving spouse, then to the servicemember's children and their descendants.<sup>31</sup>

Finally, there are other changes that went into effect during 2008. First, the NDAA 2008, allowed for the transportation of the deceased servicemember's children, including step-children and illegitimate children, siblings, and the person authorized to direct disposition to attend the servicemember's burial ceremonies.<sup>32</sup> Second, commencing 1 April 2008, all surviving spouses receiving SBP will receive 55% of the base amount of retired pay designated by the servicemember spouse for SBP.<sup>33</sup> This marked the end of the phase-out of the benefit decrease for surviving spouses once they reached age sixty-two.<sup>34</sup> Moreover, as of 1 October 2008, retirees who are over the age of seventy and have paid into the survivor benefit plan for at least thirty years will no longer have their retirement pay deducted for survivor benefit plan premiums.<sup>35</sup> Those retirees are considered to be paid up for the survivor benefit plan.

### **National Defense Authorization Act for Fiscal Year 2009<sup>36</sup>**

The National Defense Authorization Act for Fiscal Year 2009 (NDAA 2009) further modifies the sections concerning SBP enacted in the NDAA 2008 for SBP. First, section 631 of the NDAA 2009 extends the survivor indemnity allowance to surviving spouses and former spouses of servicemembers who die on active duty.<sup>37</sup> The survivor indemnity annuity payments begin for these survivors on 1 October 2008.<sup>38</sup> Second, section 632 of the NDAA 2009 allows for the correction of reduction in survivor benefit plan payments for those spouses who are age sixty-two and now receiving the full 55% of survivor benefit payments due to the changes in SBP from the National Defense Authorization Act for Fiscal Year 2005.<sup>39</sup> This section states that if, because of the recalculation of annuities under the phase-out of the reduction of SBP and the supplemental SBP, the amount of the annuity would be less than without the phase-out, the Secretary of Defense will adjust the annuity amounts to eliminate the reduction in payment to the surviving spouse or former spouse.<sup>40</sup>

### **Heroes Earnings Assistance and Relief Tax Act of 2008<sup>41</sup>**

The Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act) made several changes in how survivor benefits are taxed, transferred and considered in light of other benefits. Specifically, the HEART Act created a new requirement for civilian qualified retirement plans under a new subsection of Internal Revenue Code (IRC) section 401, tax-qualified plans.<sup>42</sup> The new subsection requires that in the case of participating servicemembers who die while performing qualified military service, that the servicemember's survivors are entitled to any benefits that the participating servicemember would have been entitled to, but for the servicemember's death.<sup>43</sup> Further, for benefit accrual purposes, this section treats the servicemember who cannot return to civilian employment due to death or disability as returning to work the day before death

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* § 632.

<sup>33</sup> Pub. L. No. 108-375, 118 Stat. 1811 (2003).

<sup>34</sup> *Id.*; see also Major Dana Chase, TJAGLCS Practice Notes, *Survivor Benefits Update*, ARMY LAW., Feb. 2006, at 26.

<sup>35</sup> *Id.*

<sup>36</sup> Pub. L. No. 110-417, 122 Stat. 4356 (2008).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Pub. L. No. 110-245, 122 Stat. 1624 (2008) [hereinafter HEART Act].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

or disability and having employment terminate on the date of death or disability.<sup>44</sup> Therefore, if a participating servicemember's qualified plan provides for life insurance benefits or survivor benefits that are contingent upon the death of the employee as termination of employment, then the qualified plan must pay those benefits to the surviving beneficiary of a participating servicemember who dies during qualified military service.<sup>45</sup>

Second, the HEART Act provides that the military death gratuity can be deposited into a Roth IRA or an Education Savings Account (ESA).<sup>46</sup> Contributions of military death gratuities to Roth IRAs and ESAs are treated as qualified rollover contributions under this new statute as long as the contribution is made within one year of the date the beneficiary receives the payment.<sup>47</sup> This means that these contributions are not subject to the annual contribution limits or the adjusted gross income phase-out limits.<sup>48</sup> This new statute is in effect for all death gratuities paid from death or injuries occurring on or after 7 October 2001.<sup>49</sup>

Third, the HEART Act changes the tax treatment of benefits veterans and surviving Family members receive from the state due to a servicemember's duty in a combat zone. Section 112 of the HEART Act amends section 134(b) of the IRC adding certain state payments to the list of non-taxable qualified military benefits.<sup>50</sup> Therefore, any death gratuity, tax credits, or burial benefits paid by a state to a veteran or surviving Family member due to that servicemember's duty in a combat zone, made before or after June 2008, are not taxable by the federal government.

Next, those veterans and Family members receiving social security supplemental income (SSI) had some changes to their benefit under the HEART Act. First, the treatment of all uniformed service cash compensation will now be treated as earned income for SSI purposes.<sup>51</sup> Previously, only military basic pay and pay excluded due to service in a combat zone or qualified hazardous duty area were considered earned income.<sup>52</sup> By treating this pay as earned income, SSI benefits are not reduced as quickly as if the payments were treated as unearned income.<sup>53</sup> Further, the HEART Act provides that state annuities for certain veterans, such as those who receive funds because they are blind, disabled, or elderly will be disregarded in determining supplemental security income benefits.<sup>54</sup> These payments are also not going to be counted as a resource by the SSI program for that month.<sup>55</sup> If these payments were counted as a resource, there would be a dollar for dollar reduction in SSI benefits.<sup>56</sup>

### **Veterans Benefits Improvement Act of 2008<sup>57</sup>**

The Veterans Benefits Improvement Act of 2008 (Veterans Act) makes further changes to survivor benefits with the creation of new services and amending SGLI. First, section 222 of the Veterans Act creates the office of survivors assistance.<sup>58</sup> This office is to serve as a resource for survivors and dependents of veterans and deceased servicemembers

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* § 109.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* Roth IRAs for 2008 is \$5000. I.R.C. §§ 408A and 530; Rev. Proc. 2007-66. The annual contribution limits for Coverdell education savings accounts is \$2000. *Id.* The adjusted gross income phase-out limits for 2008 is \$101,000 to \$116,000 for single taxpayers and \$159,000 to \$169,000 for married filing jointly taxpayers. *Id.*

<sup>49</sup> HEART Act, *supra* note 41, § 109.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* § 201.

<sup>52</sup> Social Security Act § 1612(a), 42 U.S.C.S. § 1382(a) (2000) (Medicare Provision).

<sup>53</sup> *Id.* § 1612(a)(2).

<sup>54</sup> HEART Act, *supra* note 41, § 202.

<sup>55</sup> *Id.*

<sup>56</sup> 20 C.F.R. § 416.1201 (2008).

<sup>57</sup> Pub. L. No. 110-389, 122 Stat. 4145 (2008) [hereinafter Veterans Act].

<sup>58</sup> *Id.* § 222.

regarding benefits and services furnished by the Department of Veterans Affairs.<sup>59</sup> Second, the Veterans Act also calls for the Comptroller General to report on adequacy of DIC to maintain survivors of veterans who die from service-connected disabilities.<sup>60</sup> This report requires the Comptroller General to determine the adequacy of the program in replacing the income of a deceased veteran or servicemember and suggest improvements to the program to “improve or enhance the effects” of DIC payments as replacement income.<sup>61</sup>

Finally, the Veterans Act makes changes to SGLI by allowing servicemembers to treat a stillborn child as an insurable dependent under SGLI.<sup>62</sup> Therefore, stillborn children fall under Family SGLI and are automatically under the \$10,000 coverage for dependent children.<sup>63</sup> The Veterans Act also expands coverage under SGLI to members of the Individual Ready Reserve (IRR) and their spouses.<sup>64</sup> This section also allows the Office of Servicemembers Group Life Insurance to set the premiums for spouses of those servicemembers in the IRR, negating the requirement that all premiums must be the same for all servicemembers.<sup>65</sup> Section 403 of the Veterans Act also reduces the period of coverage for dependents after the servicemember leaves the service.<sup>66</sup> Dependents will no longer be covered under Family SGLI for 120 days after the member separates from service.<sup>67</sup> However, dependents will still be covered for 120 days after the servicemember’s death.<sup>68</sup>

These recent changes to the various components of survivor benefits will have an impact on those currently receiving benefits and those who will receive them in the future. Understanding these changes and how they affect surviving Family members will allow legal assistance attorneys to provide the best service and advice possible to Families who have lost a servicemember.

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* § 223.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* § 402.

<sup>63</sup> 38 U.S.C.S. §§ 1965–1970 (LexisNexis 2008).

<sup>64</sup> Veterans Act, *supra* note 57, § 403.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 38 U.S.C.S. § 1968(a)(5)(B)(i).

## State Survivor Benefits: An Overview

Major Dana J. Chase\* & Major Daniel J. Sennott\*\*

### Introduction

Most servicemembers are familiar with the varied federal benefits that are available to their Family members in the event of the servicemember's death. Collectively, the services call these survivor benefits. In addition to the federal benefits, state veterans administrations provide additional survivor benefits to servicemembers and their surviving Family members from state veteran's organizations in addition to the federal survivor benefits. Casualty assistance officers and Judge Advocates must be aware of these benefits in order to competently assist family members of deceased servicemembers. This article will provide an overview of the state benefits available, along with a matrix summarizing each state's benefits.

### Federal Benefits

#### *Dependency and Indemnity Compensation*

Dependency and indemnity compensation (DIC) is available to surviving Family members of servicemembers who die on active duty, including members of the reserve component and veterans who meet certain disability parameters.<sup>1</sup> For the Family members to be eligible for DIC payments, the servicemember's death must be service-connected and not due to the servicemember's willful misconduct.<sup>2</sup> Further, the Family members that are eligible to receive monthly DIC payments are the surviving spouse and children of the deceased servicemember or the servicemember's parents if they were dependent on the servicemember.<sup>3</sup> Finally, to begin receiving DIC payments, surviving Family members must apply for DIC with the Department of Veterans Affairs (DVA) when the servicemember or veteran passes away.<sup>4</sup> The DVA ultimately determines whether the servicemember's death was service-connected and not due to his own willful misconduct.<sup>5</sup>

#### *Dependent Education Assistance*

Another benefit available through the DVA is Dependent Education Assistance (DEA).<sup>6</sup> The DEA provides up to forty-five months of monetary assistance for a qualified course of study at a DVA-approved school.<sup>7</sup> Surviving Family members are eligible for DEA if the servicemember's death also qualified the Family member for DIC.<sup>8</sup> Specifically, surviving spouses can receive both DIC and DEA and, depending on the circumstances of the servicemember's death, have ten or twenty years to apply for DEA.<sup>9</sup> Conversely, surviving children cannot receive both DIC and DEA.<sup>10</sup> Dependency and Indemnity Compensation for children ends once the child reaches age eighteen or age twenty-three if a full-time student;

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<sup>1</sup> 38 U.S.C.S. §§ 1301–1322 (LexisNexis 2008); 38 C.F.R. pt. 3 (2008).

<sup>2</sup> 38 U.S.C.S. § 1310.

<sup>3</sup> *Id.* §§ 1304, 1311, 1313, 1315.

<sup>4</sup> 38 C.F.R. § 3.400.

<sup>5</sup> *Id.*

<sup>6</sup> 38 U.S.C.S. §§ 3500–3566; 38 C.F.R. pt. 21.

<sup>7</sup> 38 U.S.C.S. §§ 3523, § 3672; 38 C.F.R. § 21.7120.

<sup>8</sup> 38 U.S.C.S. § 3501.

<sup>9</sup> *Id.* § 3512. If a servicemember does not die on active duty, the surviving spouse will have ten years from the date of the veteran's death to apply for DEA. If the servicemember dies on active duty, the surviving spouse will have twenty years from the date of the servicemember's death to apply for DEA. *Id.*

<sup>10</sup> *Id.*

however, DEA does not end until the child turns twenty-six.<sup>11</sup> Furthermore, DEA provides a higher monthly payment than DIC.<sup>12</sup>

### *Survivor Benefit Plan*

The survivor benefit plan (SBP) is a monthly annuity payment to a surviving beneficiary selected by the servicemember at retirement, or to a statutorily mandated beneficiary if the servicemember dies on active duty.<sup>13</sup> Servicemembers eligible to participate in the SBP are those who die on active duty while in the line of duty, who retire from active duty, who are medically retired from active duty with 30% or more disability rating, and reservists who are eligible to retire.<sup>14</sup> Moreover, the eligible beneficiaries for the SBP payments are the surviving spouse of the servicemember, the former spouse of the servicemember, and the servicemember's children.<sup>15</sup> If the servicemember did not have a spouse, former spouse, or child, another person with a financial interest in the survival of the servicemember may be eligible.<sup>16</sup> These beneficiaries generally receive an annuity in the amount of 55% of the base amount of retirement selected in the case of a servicemember who retires, or 55% of either 75% of the servicemember's presumed retired pay or the retired pay of the high three years.<sup>17</sup> Therefore, if a servicemember selects \$2000 of his retirement pay for the SBP, the annuity payments to the surviving spouse will be \$1100 a month.

### *Death Gratuity*

Servicemembers can also name one or more beneficiaries to receive all or a portion of a \$100,000 death gratuity if they die on active duty.<sup>18</sup> The \$100,000 can be divided up in 10% increments among several beneficiaries; however, if the servicemember is married, the spouse will be notified if he or she is not designated as a beneficiary or is not designated to receive the entire amount of the death gratuity.<sup>19</sup> The servicemember identifies beneficiaries for the death gratuity using DD Form 93, Record of Emergency Data.<sup>20</sup>

### *Servicemembers Group Life Insurance*

Servicemembers Group Life Insurance (SGLI) is group term life insurance for servicemembers subsidized by the government from Prudential Life Insurance Company.<sup>21</sup> Premiums are based upon the amount of coverage selected by the servicemember, which can range from \$50,000 up to the maximum of \$400,000.<sup>22</sup> Insurability is guaranteed and the servicemember can select any beneficiary for the SGLI.<sup>23</sup> However, if the servicemember is married, the spouse will be notified if the servicemember does not select the spouse as a beneficiary or elects that the spouse does not receive all the SGLI.<sup>24</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Currently, DIC pays \$271 per month per child or \$462 per month if there is no surviving spouse, whereas DEA currently pays \$881 per month if the child is a full-time student. *Id.* § 1311.

<sup>13</sup> 10 U.S.C.S. §§ 1447–1460B.

<sup>14</sup> *Id.* § 1448.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* § 1451.

<sup>18</sup> *Id.* §§ 1475–1478.

<sup>19</sup> *Id.* § 1477.

<sup>20</sup> U.S. Dep't of Defense, DD Form 93, Record of Emergency Data (Jan. 2008).

<sup>21</sup> 38 U.S.C.S. §§ 1965–1976.

<sup>22</sup> *Id.* § 1967.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## State Benefits

Perhaps because of the longstanding federal benefits available to Families of deceased servicemembers, many states offered very little in the way of survivor benefits prior to September 11th. Since that time, a flurry of new state legislation has greatly increased the state benefits designed to honor servicemembers' sacrifices.<sup>25</sup>

The majority of state survivor benefits can be grouped into four main categories: education, tax benefits, burial benefits, and death gratuity/annuity. Although the extent of such benefits varies greatly from state to state, almost every state has some benefit package.<sup>26</sup>

### *Education Benefits*

In addition to the generous federal DEA benefits discussed above, many states offer complete tuition waivers for children and spouses of servicemembers killed on active duty or who die from a service-connected illness or injury. Thirty-five states have some sort of education benefit available to eligible dependents, with the majority of them offering complete tuition waivers and fees.<sup>27</sup> Almost all of the states require attendance at a state school in order to receive benefits, but Delaware and West Virginia allow for some funding of attendance at private institutions.<sup>28</sup> In addition to tuition and fees, Minnesota offers a \$750 per year stipend, while New Mexico offers a \$150 per semester stipend.<sup>29</sup> Finally, Illinois, Maryland, and Iowa do not offer tuition waivers, but they do offer a limited number of full scholarships to children of qualified veterans.<sup>30</sup> Although all of these statutes appear generous, applicants should note that some of the states limit the tuition waiver to that amount not covered by federal benefits.<sup>31</sup>

### *Tax Benefits*

State tax benefits have always been a point of interest to active duty servicemembers. Many states do not tax the military compensation of servicemembers, leading some servicemembers to establish residency in a state that will grant them favorable tax treatment. However, in addition to offering favorable state income tax treatment to servicemembers, several states also provide tax breaks to surviving spouses and dependents of eligible veterans. Many of the state tax benefits are targeted to homeowners in the form of property tax credits. In fact, twenty-six states have property tax exemptions of some sort.<sup>32</sup> These property tax exemptions almost universally require applicants to satisfy certain conditions: (1) the house had to have been owned by the servicemember prior to death,<sup>33</sup> (2) the house must serve as the principal place of residence, and<sup>34</sup> (3) the surviving spouse must remain unmarried after the death of the servicemember.<sup>35</sup>

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<sup>25</sup> Although most states extend significant benefits for National Guard members serving in a state status, this article is limited to describing those benefits available to servicemembers (either full-time active duty or National Guard on active duty in a federal status) who die on active duty in a Title 10 status.

<sup>26</sup> The states that offer no state death benefits to active duty servicemembers are the District of Columbia, Mississippi, and Oklahoma. *See infra* Appendix.

<sup>27</sup> *See infra* Appendix.

<sup>28</sup> Delaware offers funding for attendance at a state school, or "[i]f the desired major or training is not available in such an institution, then at a private institution in Delaware." DEL. CODE ANN. tit. 14 § 3454 (2008). If no institution in Delaware offers that major, then the state will pay for full tuition at an out-of-state institution. *Id.* West Virginia allows up to \$2000 in benefits per year for eligible students who wish to attend a private institution. W. VA. CODE R. § 18-19-2 (2008).

<sup>29</sup> State of New Mexico Department of Veterans Services, <http://www.dvs.state.nm.us/benefits.html> (last visited Dec. 8, 2008) (providing details of New Mexico's benefits).

<sup>30</sup> Illinois offers one scholarship per county, with preference going to children of deceased veterans. 110 ILL. COMP. STAT. 305/9 (2008). Iowa offers financial assistance up to the total cost of undergraduate education for children of veterans who died on active duty after September 11th. IOWA CODE § 35.8 (2008). Finally, Maryland offers fifteen full scholarships for up to five years of undergraduate education. MD. CODE ANN., EDUC. § 18-601 (LexisNexis 2008).

<sup>31</sup> For example, Arkansas has a federal DEA offset that limits tuition waiver to that not covered under the federal benefits. ARK. CODE ANN. § 6-82-601 (2008).

<sup>32</sup> *See infra* Appendix.

<sup>33</sup> *See, e.g.*, HAW. REV. STAT. ANN. § 246-29 (LexisNexis 2008).

<sup>34</sup> *See, e.g.*, FLA. STAT. ANN. § 196.081(4) (LexisNexis 2008).

<sup>35</sup> *See, e.g.*, NEB. REV. STAT. ANN. § 77-3509 (LexisNexis 2008).

In addition to property tax exemptions, the State of Georgia does not require servicemembers (or, more accurately, their estates) to pay state income tax for the year of death when the servicemember died in a combat zone or as a result of an injury or illness received in a combat zone.<sup>36</sup> Georgia also waives payment of all back taxes, interest, and penalties due at the time of death.<sup>37</sup> This generous exemption, coupled with a property tax exemption, makes Georgia one of the most generous in terms of tax breaks for surviving Family members.

### *Death Gratuity*

The generous SGLI and federal death gratuity benefits available to servicemembers' surviving Family members are supplemented by a number of states' additional death benefits. Twelve states offer some form of a death gratuity or financial assistance after the death of a servicemember on active duty.<sup>38</sup> Five of the states<sup>39</sup> offer loans or grants, while the remaining seven<sup>40</sup> offer funds regardless of financial need. With one exception, none of the states reduce the benefit by the amount of federal benefits received. In Connecticut, however, the \$100,000 death gratuity is "reduced by the amount of any death benefit that is paid to such person for the death of such member under any federal law."<sup>41</sup> As a result, very few surviving Families are eligible for this payment.

The State of Illinois stands out as the most generous for death gratuity benefits. If a servicemember who is an Illinois resident dies "on active duty in connection with Operation Iraqi Freedom or Operation Enduring Freedom," the beneficiary is entitled to file a claim under the Line of Duty Compensation Act (LODCA).<sup>42</sup> The claim must be filed with the Illinois Court of Claims within one year of the date of death.<sup>43</sup> The current payout amount is \$313,887.96.<sup>44</sup> This amount is in addition to any federal benefits the surviving Family members may receive.<sup>45</sup> Furthermore, the amount payable under the statute is adjusted each year in accordance with the Consumer Price Index.<sup>46</sup> Given the substantial sum, servicemembers can and should designate a beneficiary by completing a form available through the Illinois Attorney General's Office.<sup>47</sup> If no beneficiary is designated, the benefits will be paid as outlined in the statute.<sup>48</sup>

This significant benefit illustrates the importance of seriously weighing all state benefits available to a servicemember before making the decision to establish residency in a new state. A servicemember who is unaware of the significant state benefits available in Illinois would be making a costly mistake if he hastily decided to change his state of residency. The Illinois Line of Duty Compensation Act is a good example of the exceptional state benefits available to beneficiaries of servicemembers who meet the residency requirements and die on active duty in connection with OIF or OEF.

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<sup>36</sup> GA. CODE ANN. § 48-7-37 (2008).

<sup>37</sup> *Id.*

<sup>38</sup> *See infra* Appendix.

<sup>39</sup> The states are Iowa, Nebraska, North Dakota, Oregon, and South Carolina. *Id.*

<sup>40</sup> The states are Alaska, Connecticut, Illinois, Maryland, Massachusetts, New Hampshire, and New York. *Id.*

<sup>41</sup> CONN. GEN. STAT. § 27-69a (2008). In addition, in order to be eligible, the servicemember's death had to occur "on or after September 11, 2001, and before July 1, 2006." *Id.*

<sup>42</sup> The Line of Duty Compensation Act, 820 ILL. COMP. STAT. ANN. 315/1 (LexisNexis 2008).

<sup>43</sup> *Id.* 315/3.

<sup>44</sup> Telephone interview with Tiffany Kretzinger, Clerk, State of Illinois Court of Claims, in Charlottesville, Va. (Dec. 15, 2008) [hereinafter Kretzinger Interview].

<sup>45</sup> Information Paper, Illinois National Guard, subject: Death benefits for Armed Forces Members Under the Illinois Line of Duty Compensation Act (8 Nov. 2004) [hereinafter Illinois Death Benefits Information Paper]; Kretzinger Interview, *supra* note 44.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 820 ILL. COMP. STAT. ANN. 315/3. The statute provides for payment to the surviving spouse, then children, then parents, and then siblings. *Id.* However, "if no beneficiary is designated and none of the statutory recipients survive, then no compensation will be paid." Illinois Death Benefits Information Paper, *supra* note 42.



## Burial Benefits

Finally, many states provide assistance with burial costs. Although this assistance ranges from full reimbursement of all burial costs to simply a small allotment, at least eighteen states offer some sort of burial benefit.<sup>49</sup> Most states that have state veterans' cemeteries allow eligible veterans to be buried free of cost in the cemetery. In addition, some states pay for the cost of the grave liner<sup>50</sup> and emplacement of the headstone.<sup>51</sup> Such benefits are typically paid by the state; however, some states require the individual county where the servicemember resided to pay for the burial.<sup>52</sup> Although these benefits are primarily designed to cover the cost of the veteran's burial, many states also allow spouses and children to be buried in a state veterans' cemetery, subject to reasonable fees.<sup>53</sup> Like many of the benefits outlined above, the state burial benefit can often be overlooked. However, this benefit, in conjunction with the federal burial allowances, can defray the significant cost of burying a veteran.

## Federal Tax Treatment of State Benefits

Generally, the federal government taxes all income no matter where it originates from.<sup>54</sup> Under this rule, any benefits received by an individual as compensation for services from a state, whether in the form of cash or tax credits, would be included in gross income on the federal income tax return.<sup>55</sup> However, section 112 of the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act) codifies an Internal Revenue Service (IRS) Ruling and a recent memorandum of advice from the Office of Chief Counsel for the IRS concerning state payments to servicemembers.<sup>56</sup> The Revenue Ruling specifically states that bonuses paid to servicemembers who served in armed conflicts listed in state statutes by state governments are gifts and therefore not includable in gross income.<sup>57</sup> The Chief Counsel Advice takes this further and states that refundable state income tax credits to military members for time served in a combat zone or qualified hazardous duty area are also non-taxable gifts.<sup>58</sup> These tax credits and payments are considered gifts because a gift "proceeds from a detached and disinterested generosity, and is made out of affection, respect, admiration, charity or like impulses" and not "from any moral or legal duty or from the incentive of anticipated benefit of an economic nature."<sup>59</sup> Consequently, payments to a servicemember or surviving Family member in the form of a death gratuity, tax credit, or other bonus are gifts and are not included in gross income when determining income tax.

## Conclusion

Survivor benefits are an integral part of any servicemember's compensation package. In addition to providing financial assistance to surviving Family members, survivor benefits give Soldiers peace of mind. Servicemembers can focus on the mission, knowing that if they make the ultimate sacrifice, the government will provide substantial assistance to their loved ones. As military lawyers, one of our most important duties is to assist servicemembers' Families in obtaining all of the survivor benefits they are entitled to. To that end, all military lawyers must remember that surviving Family members may be entitled to valuable state and federal benefits. In addition, servicemembers must seriously consider what state benefits

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<sup>49</sup> See *infra* Appendix.

<sup>50</sup> See, e.g., MD. CODE ANN., STATE GOV'T § 9-906(h) (LexisNexis 2008). "A grave liner is a concrete container within a grave site in which the casket is placed. It is provided . . . to reduce the amount of grave sinkage subsequent to the interment." State of New Jersey Department of Military and Veterans Affairs, <http://www.nj.gov/military/cemetery/general.html> (last visited Dec. 10, 2008).

<sup>51</sup> See, e.g., 330 ILL. COMP. STAT. ANN. 110/1.1 (2008).

<sup>52</sup> See, e.g., HAW. REV. STAT. ANN. § 363-5 (LexisNexis 2008).

<sup>53</sup> See, e.g., DEL. CODE ANN. tit. 20 § 1204 (2008).

<sup>54</sup> I.R.C. § 61(a) (LexisNexis 2008).

<sup>55</sup> I.R.C. § 61(a)(1); Treas. Reg. § 1.61-2(d).

<sup>56</sup> Pub. L. No. 110-245, 122 Stat. 1624 (citing Rev. Rul. 68-158, 1968-1 C.B. 47; Chief Counsel Advice 200708003 (Feb. 23, 2007)).

<sup>57</sup> Rev. Rul. 68-158, 1968-1 C.B. 47.

<sup>58</sup> Chief Counsel Advice 200708003.

<sup>59</sup> *Id.* (citing *Duberstein v. Comm'r*, 363 U.S. 278 (1960)).

they may be forfeiting before deciding to change their state of residency. By keeping informed of the constant changes in state survivor benefits, military lawyers will be able to help surviving Family members receive all of the benefits they deserve.

**Appendix**

<b>STATE</b>	<b>EDUCATION BENEFITS</b>	<b>TAX BENEFITS</b>	<b>DEATH GRATUITY/ANNUITY</b>	<b>BURIAL BENEFITS</b>
Alabama	§ 31-6-4: Alabama GI Dependents' Scholarship. Children of service members who were killed or died in line of duty or died from disability incurred from military service are exempt from tuition, fees, and book costs for four academic years. § 31-6-5: Same benefit extended to widows of above described veterans.	None.	None.	None.
Alaska	§ 14.43.085: Free undergraduate tuition and fees for a spouse or dependent of a service member who died in the line of duty or as a result of injuries sustained while in the line of duty.	None.	§26.10.080: Death gratuity of \$750 to surviving spouse, or if no spouse, to the personal representative of a qualified veteran (must be resident of AK at the time of entry into service and returned to AK within 1 yr. after discharge from service).	None.
Arizona	None.	§ 42-11111; Property tax exemption for widows and widowers (general exemption not related to veterans' benefits). Exemption dependent on household income.	None.	None.
Arkansas	§ 6-82-601: Spouse or children of disabled veteran or service member killed in action receive free undergraduate tuition and fees. Benefits are limited to the amount not covered by Dependents' Educational Assistance Program. If student is not eligible for DEA, then all costs are covered for tuition and fees.	§ 26-3-306: The unremarried surviving spouse and minor dependent children of service member who was either killed or died in the scope of military duties, or was disabled (loss of limb, total blindness, or 100%) are exempt from homestead and personal property taxes.	None.	None.

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
California	§ 66025.3: Tuition and fees waived for children of a resident veteran who was killed in service or died of a service-connected disability. Child's annual income cannot exceed the national poverty level	Cal. Const., Art. XIII, § 3: Veterans Exemption. Unmarried surviving spouse (and in some cases children) of a deceased veteran receives partial property tax exemption on principal place of residence. Veteran must have died on active duty or from a service-connected illness/injury, or been totally disabled, blind in both eyes, or lost use of two or more limbs.	None.	Cost of burial, monument, and concrete vault waived for eligible veterans when buried in a state veteran's cemetery. <a href="http://www.cdva.ca.gov/Cemetery/Default.aspx">http://www.cdva.ca.gov/Cemetery/Default.aspx</a>
Colorado	None.	None.	None.	None.
Connecticut	§ 10a-77, 10a-99: Free tuition and fees at community colleges or state universities for dependent children or surviving spouse of resident service person who was killed in action while performing active military duty with U.S. Armed Forces on or after 9/11/01 and was a resident of the state.	None.	§ 27-69a. Payment of \$100,000 over ten years to surviving spouse or children of service member killed in action or as a result of an accident or illness sustained while performing active military duty between 9/11/01 and 6/30/06. Payment is reduced by amount of any death benefit provided under federal law.	None.
Delaware	§ 3451 et seq.: Children of resident service members killed on active duty or who died from illness or injury arising from the performance of duty receive four years of state tuition and fees, or may receive funding for private school tuition and fees under certain circumstances.	None.	None.	§ 1204. Veterans may be buried in state veterans cemeteries at no cost. Immediate Family members may be buried, but reasonable fees may apply.
District of Columbia	None.	None.	None.	None.
Florida	§ 295.015 et seq., 295.0185. Children of resident veterans who die on active duty in specific military conflicts, including OIF and OEF, may receive four years of free tuition and fees at state institutions of higher education.	§ 196.081(4): Unremarried spouses of veterans who died from service-connected causes while on active duty are exempt from homestead property taxation.	None.	None.

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
Georgia	None.	<p>§ 48-5-48. Surviving spouse or minor children of a totally disabled veteran of any war or armed conflict may receive a partial property tax exemption if they remain in the homestead occupied by the veteran prior to death.</p> <p>§ 48-7-37. Any member of the Armed Forces who dies in a combat zone or from illness or injury received in a combat zone will not be required to pay taxes for the year of death, nor any taxes from previous years due at the time of death.</p>	None.	§ 38-4-70. Veterans are eligible for interment without cost at a state veterans' cemetery.
Hawaii	None.	§ 246-29. Widow/ers of totally disabled veterans who incurred such disability while on active duty are exempt from property tax on the homestead that they continued to occupy after the death of the disabled veteran.	None.	§ 363-5. Counties are responsible for the cost of interment of service members who are residents or former residents of that county and: die on active duty; are honorably discharged veterans; are widow/ers or minor children of such deceased servicemen or veterans; or are wives/husbands or dependent children who predecease a servicemen or veteran.

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
Idaho	None.	§ 63-701 et seq.: Widow/ers (veteran status irrelevant) may receive a partial property tax exemption, subject to household income limitations.	None.	None.
Illinois	110 ILCS 305/9: Scholarships for children of veterans: one four-year scholarship per county to a state institution of higher education for children of resident veterans of specific named conflicts, including OIF/OEF— preference to children whose parent died or is disabled.	None.	820 ILCS 315/1: Effective 10/18/04, death gratuity paid to surviving spouse (if no spouse, then beneficiaries as outlined in statute) of Armed Forces members who died while on active duty in connection with OIF or OEF. The current payment amount is \$301, 236.05 and increases each year.  330 ILCS 100/4: Compensation in connection with deceased veterans of the GWOT: the widow/er, children, persons standing in loco parentis, brothers and sisters, in the order named, of an Illinois veteran who had a service-connected death as a result of hostile action on or after 9/11/01 shall be paid \$3000. Note that there are other provisions for surviving Family members of previous conflicts, as well.	330 ILCS 110/1.1: \$100 allowance to erect veterans' headstone.
Indiana	§21-14-4-1: Children of resident service members who served in an operation awarding a service or campaign medal and suffered a service-connected death are eligible for free tuition and fees at any state institution of higher education.	None.	None.	None.

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
Iowa	§ 35.8 War Orphans Educational Assistance Fund. Children who have lived for the past two years in Iowa, are less than 31 years old, and had a resident parent who died on active duty after 9/11/01 are eligible for tuition and fee financial assistance up to the cost of the highest undergraduate tuition of a state institution of higher learning, based on financial need, for up to five years.	§ 425.15: Unremarried surviving spouse and children of deceased veteran who was disabled will receive full property tax exemption. This exemption is subject to household income limitations.	§ 35A.15: Surviving spouse of veteran who served for at least ninety days between 9/11/01 and 6/30/08 is eligible for loans and grants for the purchase of a home.	None.
Kansas	§ 75-4364: Spouses and dependents of resident veterans who died on or after 9/11/01, while, and as a result of, military service receive free tuition and fees for up to 10 semesters of undergraduate instruction.	None.	None.	§ 73-304: Each county is responsible for “decently” interring the body of honorably discharged veterans who served in specifically listed conflicts.
Kentucky	§ 164.507: The unremarried spouse, and any child, stepchild, or orphan under the age of 26 of a deceased resident veteran who died on active duty, served in a conflict, or died of a service-connected disability, shall receive free tuition and fees at a state higher education institution for up to 45 months.	None.	None.	None.
Louisiana	§ 29:288: Children (from 16-24 yrs. old) and surviving spouses of resident veterans who died on active duty or of a service-connected disability incurred during wartime receive free tuition and fees at any state institution of higher learning.	None.	None.	§ 29:295: State veterans cemetery available, but fees may apply

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
Maine	§ 505: Surviving spouse, children (16-26 yrs.), and stepchildren of resident veterans who were killed in action, died from a service-connected disability, or were totally disabled due to service-connected disability at the time of death and died from another cause, may attend a state institution of higher education for a maximum of 120 credit hours (8 semesters for children).	§ 653: Up to \$6,000 of the estate of any veteran is exempt from state taxation if the veteran was awarded the Armed Forces Expeditionary Medal or participated in specified conflicts and have attained the age of 62 or received total disability benefits prior to death.	None.	§ 504: Veterans may be buried in state veterans' cemeteries at no expense (burial vault not included). Immediate Family members may be buried in state veterans' cemeteries without charge (burial vault not included).
Maryland	§ 18-601: Children of resident veterans who died as a result of military service may receive one of 15 full scholarships for a period of up to five years of full-time study at a state institution of higher education.	§ 7-208: Dwelling house of surviving spouse of resident veteran who died in the line of duty or surviving spouse of disabled veteran is exempt from property tax if the property was owned by the veteran prior to death and if the surviving spouse owns and resides in the house.	§ 1-202: Surviving spouse, child, dependent parent, or estate of a resident service member who dies in the performance of duties on or after 1/1/06 while serving in Afghanistan or Iraq will receive a \$125,000 death benefit.	§ 9-906: Veterans may be buried without cost at state veterans' cemeteries, including cost of burial and a grave liner. Immediate Family members may be buried at state veterans' cemeteries for the cost of burial.
Massachusetts	§ 16: Tuition and fees waiver for widowed spouses and children of resident veterans who were killed in action or otherwise died as a result of such service.	§ 5: Unremarried surviving spouses and parents of service members who died during combat service, or of injury or illness contracted during such service, are entitled to a partial property tax exemption.	§ 88: Surviving spouse of NG member who dies from injury, sickness or disease received while in the line of duty under Title 10 or 32 will receive \$100,000 single payment.  § 6B: Parents and unremarried surviving spouse of resident veteran who died as a result of injury or disease contracted during active service in time of war or insurrection or combat receive \$2000 per year, paid in two equal installments each year.	None.



STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
Michigan	None.	None.	None.	§ 35.801: \$300 Payment toward burial expenses for resident veterans who served during time of war or the Vietnam Conflict or the spouse of said veteran, subject to estate value limitations.
Minnesota	§ 197.75: Free tuition up to bachelor's degree at participating state institutions of higher learning and \$750 stipend per year for children and spouses of deceased veterans who died as a result of military service.	None.	None.	§ 197.236: No plot or interment fees for the burial of eligible veterans in a state veterans' cemetery, but any Social Security or veterans' burial allowances must be remitted to the commissioner up to the amount of the actual costs of burial. Fees may be charged to immediate Family interred in a veterans' cemetery.
Mississippi	None.	None.	None.	None.

<b>STATE</b>	<b>EDUCATION BENEFITS</b>	<b>TAX BENEFITS</b>	<b>DEATH GRATUITY/ANNUITY</b>	<b>BURIAL BENEFITS</b>
Missouri	None.	None.	None.	§ 42.010: No fee charged for interment, grave liner, and setting of headstone at state veterans' cemetery. <a href="http://www.mv.c.dps.mo.gov/Cemeterys/Benefits/benefits.html">http://www.mv.c.dps.mo.gov/Cemeterys/Benefits/benefits.html</a>
Montana	§ 20-25-421: Tuition and fee waiver for children of residents killed on active duty	None	None	§ 10-2-501: Interment allowance of \$250, \$70 for placement of headstone
Nebraska	§ 80-411: Waiver of tuition of higher education up to a bachelor's degree for children or spouse of a veteran who died on active duty or from a service-connected disability.	§ 77-3509: Property tax relief for unmarried widow/er of service member who died on active duty or veteran who was discharged with honorable or general characterization who died of service-connected disability. Relief dependent on household income.	§ 80-401.03: Veterans' Aid Fund available for needy veterans and their dependents.	
Nevada	None.	None.	None.	§ 417.210: One burial plot for each veteran and each member of the immediate family in a state veteran's cemetery.
New Hampshire	§ 193:19: Free tuition at state institution of higher education for four years for children of veteran who died on active duty or as a result of service-connected disability.	§ 72:35: Widow/er of veteran who had a total and permanent service-connected disability, was paraplegic, or double amputee receives property tax credit from \$700-2000 § 72:28: \$50-500 property tax credit for spouse of a wartime veteran or veteran who died of service-connected disability or on active duty	§ 115-A:16: Service member on or after 9/11/01 eligible for \$100 bonus.	None.

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
New Jersey	<p>§ 18A:62-1: Free tuition for undergraduate or graduate courses for child or widow/er of New Jersey National Guard member who is killed in the performance of his duties while a member of the Guard—must apply for all federal benefits first.</p> <p>War Orphans Tuition Assistance: \$500 per year for child of service member who died on active duty or due to service-connected disability</p>	<p>§ 18:28: Property Tax Exemption for surviving spouses of veteran who died during wartime or from total service-connected disability.</p> <p>§ 18:27: \$250 Property Tax Deduction for surviving spouse of veteran who served during GWOT or other time of war.</p>		None.
New Mexico	<p>Full tuition and \$150/semester stipend for children of veterans who died on active duty or of battle related wounds.</p> <p><a href="http://www.dvs.state.nm.us/benefits.html">http://www.dvs.state.nm.us/benefits.html</a></p>	<p>§7-37-5: Up to \$4000 of taxable value of property is exempt from tax for veteran's surviving spouse. Veteran must have had at least ninety days of continuous service.</p>	None	None
New York	<p>§ 608-a: Scholarship for spouse, child or financial dependent of a service member who died on active duty or as a result of service-connected disability arising from training for or participation in combat operations.</p> <p>§ 604: Regents award (currently \$450) for children of deceased veterans.</p>	<p>§ 458: Certain real property of unremarried surviving spouse of veteran is exempt from taxation up to \$5000.</p>	<p>§ 367: Gold Star Parent Annuity. Annual annuity of \$500 per year to parent who was financially dependent on deceased veteran. Household income limits apply.</p>	<p>§354-b: Surviving Family member of veterans killed in combat or when serving as defined in 37 USC 310(a)(4) receive up to \$6000 reimbursement for burial expenses not otherwise covered.</p>

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
North Carolina	<p>§ 165-21: Children of service members who died as a result of wartime service. Scholarship for tuition, room, board, and fees for four years.</p> <p>§165-22: 100 full scholarships for children of service members who died as a result of service-connected illness or injury.</p>	<p>Six months of gratuity payment to a beneficiary of a deceased service member exempt from income taxation.</p> <p>Insurance dividends and government insurance exempt from income taxation.</p> <p><a href="http://www.doa.state.nc.us/vets/benefits-taxrelief.htm">http://www.doa.state.nc.us/vets/benefits-taxrelief.htm</a></p>	None.	None.
North Dakota	<p>§ 15-10-18.3: Child, stepchild, or widow/er of resident veteran who was killed in action or died of service-connected causes receives free tuition and fees in North Dakota institutions of higher education up to bachelor's degree or certificate of completion. Must be completed in 45 months or a 10-semester period.</p>	None.	<p>§ 37-14-03.3: Veterans Aid Fund Loan up to \$5000 for unmarried surviving spouse of a veteran.</p>	None.
Ohio	<p>§ 3333.26: Tuition and fee waivers for children and spouses of members of the Armed Forces killed in the line of duty.</p> <p>§ 5910.031: War Orphan Scholarship Fund. Children of members of the Ohio NG or Reserves who are killed or permanently and totally disabled on active duty receive a scholarship.</p>	None.	None.	<p>§ 5901.23: Burial plot and interment for veterans.</p>
Oklahoma	None.	None.	None.	None.
Oregon	None.	<p>§ 307.250: Property of war veterans or surviving unremarried spouses is exempt from taxation for up to \$18,000 of assessed value of homestead or personal property.</p>	<p>§ 396.362: Oregon Military Emergency Financial Assistance Program: Provide grants and loans to surviving Family members of Oregon NG Soldiers</p>	None.

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
Pennsylvania	<p>§ 3503: Tuition waiver for children and spouses of deceased Soldiers. Full waiver of tuition costs and fees. Soldier must have been Pennsylvania NG serving in any state or federal status at the time of death.</p> <p>§7203: Post-secondary Educational Gratuity Program. Children of NG members who are on federal or state active duty killed in performance of those duties receive full waiver of tuition, fees, room, and board.</p>	None.	None.	§1911: Up to \$100 contributed toward the burial of deceased service member.
Rhode Island	None.	§ 44-3-5: Gold Star Parents Exemption. Parents of service members killed in the line of duty receive up to a \$39,000 exemption on real and personal property tax (amount varies by county).	None.	None.
South Carolina	§ 59-111-20: Free tuition for certain veterans' children. Child of wartime veteran receives free tuition if veteran was killed in action or died of diseases or disability.	§ 12-37-220: a home owned by surviving spouse of service member killed in action or disabled veteran is exempt from ad valorem taxes.	§ 25-11-320: The South Carolina Military Family Relief Fund. Grants up to \$2000 awarded to next of kin of service member wounded or killed on active duty.	None.
South Dakota	§13-55-6. Free tuition for children of deceased veterans. Child of any veteran who died on active duty receives free tuition.	§ 10-4-24.10: Property tax exemption for surviving spouses of paraplegic veterans.	None.	§ 33-19-3: Maximum payment of \$100 for burial and funeral expenses of veteran.
Tennessee	None.	§ 67-5-704: Unremarried surviving spouse of disabled veteran who was receiving property tax relief will continue to receive the relief if property is used as a home. Relief calculated by formula.	None.	None.

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
Texas	None.	§ 11.22: Unremarried surviving spouse of disabled veteran receive up to \$12,000 property tax exemption. Also, surviving spouse and children under age 18 of service member who died on active duty receive maximum of \$10,000 property tax exemption.	None.	None.
Utah	§ 53B-8-107: Scott B. Lundell Military Survivors Tuition Waiver. Dependents of service members who died on active duty or as a result of wounds or injuries incurred while on active duty receive free tuition.	None.	None.	None.
Virginia	§ 23-7.4:1: Waiver of Tuition and Certain Charges and Fees. Surviving spouse and children of certain military members killed on active duty receive waiver of tuition and certain charges and fees.	None.	None.	None.
Washington	§ 28B.15.621: Tuition Waiver for dependents of veterans and NG members. All tuition and fees waived at all state universities and colleges for surviving children, spouses, or domestic partners of veterans who died on active duty.	§ 84.36.381: Property tax exemption for surviving spouse of veteran who died of service-connected disability and was 100% disabled or died on active duty. Amount dependent on household income and value of property.	None.	None.
West Virginia	<p>§ 18-19-3: No State tuition fees charged to surviving spouse or child of a service member killed on active duty or who died of disease or injury arising from combat.</p> <p>§ 18-19-2: If above students attend a private educational institution, they are eligible for up to \$2000/yr. in benefits.</p>	None.	None.	None.

STATE	EDUCATION BENEFITS	TAX BENEFITS	DEATH GRATUITY/ANNUITY	BURIAL BENEFITS
Wisconsin	§ 36.27: Fee remission for surviving spouses and children of service members who died on active duty or as a result of a service-connected disability.	§ 71.07: Surviving spouse of a 100% disabled veteran receives property tax credit.	None.	None.
Wyoming	§ 19-14-106: Surviving spouse and dependents of service member who died on active duty or of service-connected injury or illness receive free tuition and fees at any state community college or University of Wyoming.	§ 39-13-105: surviving spouse of veteran who died in WWII, Korean Conflict, or Vietnam War receive \$3000 property tax exemption.	None.	§ 19-14-108. Free burial plot in a state veterans' cemetery for any eligible veteran.

## Families First and the Personnel Claims Act

Major Daniel J. Sennott\*

### I. Introduction

Sergeant (SGT) Allen recently moved from Fort Smith to Fort Jones. After receiving his household goods (HHG) shipment, he discovered damage to several pieces of property. He properly documented the damage upon delivery, and within seventy days, visited the local military claims office to file his Department of Defense Form (DD Form) 1840/1840R, Joint Statement of Loss or Damage at Delivery, annotating all of the damage. At the claims office, SGT Allen complained that the movers were unprofessional, that they arrived several hours late for the pick-up, and that they improperly packed certain property. The resulting damage included a fourteen-year-old television that was completely destroyed beyond repair (replacement cost: \$350), a two-year-old veneer wood table that was scratched (replacement cost: \$400, repair cost: \$75), and a twelve-year-old stereo that was missing from the shipment (replacement cost: \$250), for a total claim of \$675. After adjudication under the Personnel Claims Act (PCA),<sup>1</sup> including depreciation, the claimant received \$88 for the television, \$75 for the table, and \$63 for the stereo, for a total of \$226.<sup>2</sup> This is roughly one-third of the original claimed amount.

Significant changes have taken place in the personal property claims arena in the last year that directly impact Soldiers like SGT Allen who wish to file a claim for HHG losses. After years of study, the Army's Military Surface Deployment and Distribution Command (SDDC)<sup>3</sup> recently unveiled the Families First Program. This program, geared toward improving servicemembers' personal property shipment experiences, revolutionizes the way HHG claims are handled. From where to file to how much to expect in reimbursement, the standards have been rewritten. This article will provide the claims practitioner, and anyone filing a HHG claim, with an overview of the program and how claims processing will change as a result. Section II will provide a brief history of the program. Section III will give an overview of the Families First Program and how it differs from traditional PCA claims procedures. Finally, Section IV will highlight some of the issues left to be resolved as the Department of Defense (DoD) transitions to this program.

### II. Background

Over the last several years, the DoD studied servicemember benefits in an attempt to ensure they provide cost-effective, quality programs.<sup>4</sup> These studies revealed at least one clear trend—the mishandling of personal property shipments was a source of frustration for servicemembers, DoD civilians, and their families. From the quality of the movers to the timeliness of claims settlements, the studies revealed significant need for change. As early as 1994, the DoD began to study the effects of several changes through pilot programs.<sup>5</sup> These studies “revealed that Service Members measure quality service by minimum damage and prompt claims handling.”<sup>6</sup> Although this conclusion seems obvious, improving the system was no easy task.

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<sup>1</sup> Military Personnel and Civilian Employees Claims Act (Personnel Claims Act), 31 U.S.C. § 3721 (2000).

<sup>2</sup> Under the Allowance List-Depreciation Guide, all television and home theater systems are depreciated 10% per year, for a maximum of 75%. U.S. Army Claims Service, Allowance List-Depreciation Guide, [https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Claims/USARCS.nsf/\(JAGCNETDocID\)/HOME](https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Claims/USARCS.nsf/(JAGCNETDocID)/HOME) (June 1, 2007) [hereinafter List-Depreciation Guide] (follow “Claims Resources” hyperlink; then follow “III. Personnel Claims Resources” hyperlink; then follow “1. Allowance List-Depreciation Guide”). Similarly, stereo equipment is depreciated 10% per year, for a maximum of 75%. *Id.* Finally, solid wood furniture is not depreciated. *Id.* However, furniture made of veneer and particle board or Formica is depreciated 10% per year for a total of 75%. *Id.* In the scenario presented above, the PCA explains that “[f]or items that can be repaired economically, the measure of the loss is the cost of repair or an appropriate loss in value.” U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 11-14d (21 Mar. 2008) [hereinafter DA PAM. 27-162].

<sup>3</sup> The SDDC mission is to “[p]rovide global surface deployment and distribution services to meet the nation's objectives.” Mission Statement, Surface Deployment and Distribution Command (SDDC), <http://www.sddc.army.mil/Public/Home/About%20SDDC/Mission%20Statement?summary=fullcontent> (last visited Nov. 13, 2008).

<sup>4</sup> U.S. Dep't of Defense, Department of Defense Future Personal Property Program: Families First 2, available at [http://www.sddc.army.mil/sddc/Content/Pub/35838/Families%20First%20Pamphlet\\_v9.pdf](http://www.sddc.army.mil/sddc/Content/Pub/35838/Families%20First%20Pamphlet_v9.pdf) (last visited Nov. 12, 2008) [hereinafter Families First Info. Paper].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*



In conjunction with the commercial moving industry, the DoD devised a complete overhaul of the personal property system.<sup>7</sup> This new system addresses how movers are selected, how claims are filed, and how much money can be recovered under a claim. The result of these efforts is a system that seems to satisfy the concerns of the servicemember, while limiting cost increases to the government. Although this program was devised in 2003, it continues to suffer setbacks that have delayed its implementation.<sup>8</sup> Given the significant deployments and training commitments servicemembers face, this program will likely be a welcome change for future claimants when finally implemented.<sup>9</sup> With more frequency, servicemembers' spouses are solely responsible for accepting HHG shipments and filing the resulting personal property claims. By improving the quality of moves and decreasing the complexity of claims processing, servicemembers and their families will experience one less worry during the transition to a new duty assignment.

### III. The Families First Program

The final program proposed by DoD has three primary features relevant to claims practitioners: (1) contracts awarded based on Best Value; (2) Full Replacement Value (FRV) coverage on lost or damaged property; and (3) on-line filing under the Defense Personal Property Shipping System (DPS).<sup>10</sup>

#### A. Contracts Awarded Based on Best Value

The new program changes the procedures for awarding personal property shipping contracts. Currently, shipping contracts are awarded solely based on cost,<sup>11</sup> so generally the lowest qualified bidder receives the contract. While systems are in place to bar certain poorly rated shippers from competing, these bars are few and far between. Under the new system, however, the government will award the contract to the bidder offering the best value.<sup>12</sup> Under this system, contracts are assessed a score based 70% on past performance and only 30% on cost.<sup>13</sup> The performance record is based on customer satisfaction surveys (CSS) completed by all servicemembers after their moves. The DoD began distributing these surveys last year.<sup>14</sup> Currently, however, few surveys are being completed by servicemembers, leaving contracting officials with little information with which to make future performance evaluations.<sup>15</sup> Whether awarding contracts under the best value system will result in improved customer satisfaction is yet to be seen, but what is certain is that the change directly addresses one of the chief complaints of servicemembers.

#### B. Full Replacement Value

Perhaps the centerpiece of the new Families First Program relates to the filing of claims following a servicemember's HHG shipment. Under the PCA, claims are filed directly with the military claims office at the local staff judge advocate office and, for Army claims, processed under Chapter 11 of Army Regulation 27-20.<sup>16</sup> The claimant files the hard-copy DD Form 1840 and 1840R within seventy days, the claims office forwards the notification to the carrier within seventy-five

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<sup>7</sup> *Id.*

<sup>8</sup> The SDDC elected to delay implementation of Families First until after the Defense Personal Property System computer program was developed and operational. Mandatory Provision of Full Replacement Value Coverage by Department of Defense Personal Property Transportation Service Providers (TSPs)/Contractors, 72 Fed. Reg. 67,921 (Dec. 3, 2007).

<sup>9</sup> As the 2008 Army Posture Statement makes clear, "Today's Army is out of balance. . . . Soldiers, Families, support systems, and equipment are stretched and stressed by the demands of lengthy and repeated deployments, with insufficient recovery time." The Honorable Pete Geren & General George W. Casey Jr., A Statement on the Posture of the United States Army 2008 (26 Feb. 2008). Although DoD civilians are also eligible for all of the benefits discussed herein, this article will primarily refer to servicemembers and their families.

<sup>10</sup> U.S. Army Surface Deployment and Distribution Command, CSS Talking Paper, subject: Families First (FF) Customer Satisfaction Survey (CSS) (n.d.).

<sup>11</sup> See Memorandum from Joseph Goetzke, Chief, Personnel Claims and Recovery Division, U.S. Army Claims Service, to Army Claims Personnel, subject: New Full Replacement Value Claims Program 2 (7 Aug. 2007) [hereinafter FRV Memo].

<sup>12</sup> Families First Info. Paper, *supra* note 4, at 3.

<sup>13</sup> FRV Memorandum, *supra* note 11, at 2.

<sup>14</sup> Interview with Joseph Goetzke, U.S. Army Claims Service, in Bad Kissingen, F.R.G. (Oct. 16, 2008).

<sup>15</sup> Joseph Goetzke, U.S. Army Claims Service, Personnel Claims & Recovery: New Developments (Oct. 16, 2008) [hereinafter Goetzke PowerPoint Presentation] (unpublished PowerPoint Presentation) (on file with author).

<sup>16</sup> U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS ch. 11 (8 Feb. 2008) [hereinafter AR 27-20].

days,<sup>17</sup> and the claimant must perfect the claim within two years.<sup>18</sup> In order to perfect the claim, among other things the claimant must provide substantiation regarding ownership, the nature of the property, the value of the property, and the nature and extent of the loss or damage.<sup>19</sup> The cost of repair or replacement is usually evidenced by an estimate obtained by the claimant. If the claim is cognizable, the claimant typically receives only a fraction of the claimed amount after deductions for depreciation.<sup>20</sup> Servicemembers are particularly penalized regarding electronic equipment claims, which, as the hypothetical illustrates, are subject to rapid depreciation.<sup>21</sup> Under the new system, many of the negative features of HHG claims processing under the PCA are either eliminated or substantially mitigated.

The new Families First Program drastically changes the claims process. First, claimants no longer file their HHG claims with the military claims office, but instead file directly with the carrier.<sup>22</sup> However, to receive full replacement value, the claimant must perfect the claim within nine months of the date of delivery, rather than the two years provided under the PCA.<sup>23</sup> The claimant does receive additional assistance from the carrier in perfecting the claim. Namely, the burden is on the carrier to establish the value of the loss and to obtain estimates of loss or damage.<sup>24</sup> Once the claim is perfected, the claimant will then receive the lesser of full replacement value or the cost of repair for each item.<sup>25</sup> However, the carrier's total liability for a shipment is limited to \$4.00 per pound for a maximum of \$50,000.<sup>26</sup> If the claim exceeds this amount, the claimant can still file with the Army for the difference, but will only receive the depreciated value of any loss.

In the case of SGT Allen from the hypothetical, instead of delivering his DD Form 1840/1840R to the claims office, he would instead file online directly with the carrier within the seventy-five day deadline.<sup>27</sup> The carrier would then be responsible for obtaining estimates for the property.<sup>28</sup> If he met this timeline, SGT Allen would likely receive the full replacement cost of the TV and the stereo, and the repair cost for the table. This would increase SGT Allen's compensation for the losses nearly threefold, from \$226 to \$675.

Despite the dramatic increase in compensation, many servicemembers may be hesitant to file with a commercial carrier instead of their local claims office. To be sure, the aims of the claims office vice a commercial enterprise are different. While the PCA is a morale program, giving Soldiers the benefit of the doubt, a moving company is a commercial enterprise, primarily concerned with making money. However, there are two significant safeguards in place to ensure that commercial carriers treat claimants fairly.

The first safeguard under Families First is that claimants complete a CSS that specifically asks them about their moving experience and the settlement of any claim associated with the move. In the case of SGT Allen, he would fill out a CSS detailing the unprofessional attitude of the movers and their shoddy packing.

The most important safeguard, however, is that claimants may still file with their local military claims office if they are dissatisfied with the carrier's offer, or even if they would simply rather not deal with the carrier.<sup>29</sup> If the claimant satisfies the seventy-five day and nine month filing requirements, and then rejects the carrier's claim settlement offer because he believes

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<sup>17</sup> Under Department of the Army Pamphlet 27-162, "The submission of the DD Form 1840R within 75 days of delivery to a military claims office creates a presumption that items listed on the form were lost in transit and, therefore, were lost or damaged incident to service." DA PAM. 27-162, *supra* note 2, para. 11-14(i)(1). Although the claimant must provide "timely notice" to the carrier within 75 days, "the form advises the claimants to submit it within 70 days, in order to give the claims office time to dispatch a copy to the carrier within 75 days." *Id.*

<sup>18</sup> *Id.* para. 11-7a.

<sup>19</sup> See AR 27-20, *supra* note 16, para. 11-11.

<sup>20</sup> DA PAM. 27-162, *supra* note 2, para. 11-14g.

<sup>21</sup> List-Depreciation Guide, *supra* note 2.

<sup>22</sup> Families First Info. Paper, *supra* note 4, at 3.

<sup>23</sup> U.S. Army Surface Deployment and Distribution Command, Guidelines for Full Replacement Value 1, available at <http://www.sddc.army.mi./Content/Pub/38216//GuidelinesFRV.pdf> (last visited Nov. 19, 2008) [hereinafter FRV Guidelines].

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.* at 9.

<sup>26</sup> Regardless of the weight of the shipment, the carrier is liable for a minimum of up to \$5000 on any shipment. FRV Memo, *supra* note 11, at 2.

<sup>27</sup> DA PAM. 27-162, *supra* note 2, para. 11-14i. He may also elect to give it to the MCO with 70 days, who will forward it to the carrier.

<sup>28</sup> See Families First Info. Paper, *supra* note 4, at 3; FRV Guidelines, *supra* note 23.

<sup>29</sup> FRV Guidelines, *supra* note 23, at 6, 7. Note that "the owner can accept payment from the TSP on those items on which the owner and the TSP have reached agreement. If the owner elects to accept partial settlement, the TSP may pay the owner on the items on which they have reached an agreement." *Id.*

it is too low, the claimant may file the claim with the military claims office within two years of the original date of delivery.<sup>30</sup> If the claim is meritorious, the claimant may recover his losses under the PCA. However, the claim will be subject to the PCA depreciation rules, so the client may actually receive less than the carrier's offer.<sup>31</sup>

If the claimant accepts the depreciated values for his claim, the claims office will then seek recovery for the full replacement value from the carrier.<sup>32</sup> If the claims office is able to recover the undepreciated value of the loss, the claimant will then receive the difference.<sup>33</sup> Finally, if a claimant is simply not comfortable filing directly with the carrier, he may still file a HHG claim directly with the military claims office, but, once again, will still be subject to the PCA depreciation rules.<sup>34</sup> Based on the new options available, claimants have nothing to lose, and a substantial amount to gain, by filing their HHG claim with the carrier before using the traditional claims process.

Because the Families First Program has yet to be instituted, the full replacement feature of this program is still pending release. However, the 2007 National Defense Authorization Act mandated that the DoD provide interim full replacement coverage for all shipments no later than March 2008, regardless of the final implementation date of the Families First Program.<sup>35</sup> In response to this mandate, full replacement value (FRV) coverage has been available on all HHG government bill of lading<sup>36</sup> shipments.<sup>37</sup> All contracts for international shipments picked up on or after 1 October 2007 and domestic shipments picked up on or after 1 November 2007 included the full replacement value coverage.<sup>38</sup> However, FRV was not available for non-temporary storage shipments and local move shipments until 1 March 2008.<sup>39</sup> While it is not a part of the full Families First Program, the current FRV coverage has nonetheless been a welcome change for many military families.

### C. Defense Personal Property Shipping System (DPS)

The final feature of the Families First Personal Property Program initiative is a change in the way HHG shipments are managed and claims are filed. Among other features, the DPS will allow servicemembers and qualified DoD civilians to book their shipments on-line, rather than visiting the transportation office.<sup>40</sup> In addition, DPS will provide information about the status of shipments and scheduling deliveries.<sup>41</sup> Finally, the system will allow claimants to file their claims with the carrier online without going to the military claims office.<sup>42</sup>

This web-based program was intended to be the "cornerstone of Families First,"<sup>43</sup> but problems have plagued its development for the last three to four years.<sup>44</sup> As a result, all other features of the program have been delayed in anticipation

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<sup>30</sup> *Id.*

<sup>31</sup> List-Depreciation Guide, *supra* note 2.

<sup>32</sup> Goetzke PowerPoint Presentation, *supra* note 15.

<sup>33</sup> *Id.*

<sup>34</sup> FRV Guidelines, *supra* note 23, at 7.

<sup>35</sup> 10 U.S.C. § 2636a (2000).

<sup>36</sup> Shipment under government bill of lading is the most common method of shipping HHG. Under this method, the government posts a revolving solicitation for carriers, and then assigns a carrier to a shipment as soon as one becomes available. However, under certain circumstances, shipments may be individually contracted for under the Direct Procurement Method (DPM). In such cases, the local transportation officer, through a contracting officer, arranges for a solicitation and contract award for one HHG shipment. Interview with Steven Kelly, U.S. Army Claims Service, in Willingen, F.R.G. (Oct. 24, 2008) [hereinafter Kelly Interview].

<sup>37</sup> 10 U.S.C. § 2363a.

<sup>38</sup> News Release, Military Surface Deployment and Distribution Command, Servicemembers and DoD Civilians are Eligible for Full Replacement Value (FRV) (Aug. 1, 2007), available at <http://www.sddc.army.mil/Public/Top%20Nav%20Bar/Press%20Releases/2007?summary=fullcontent> (follow link on side of screen to Press Release 005-2007).

<sup>39</sup> *Id.*

<sup>40</sup> Families First Info. Paper, *supra* note 4, at 3.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> News Release, Military Surface Deployment and Distribution Command, Families First Takes Strategic Pause to Ensure a High Quality Program (Nov. 9, 2005), available at <http://www.sddc.army.mil/sddc/Content/Pub/36143/JTCNPR.pdf>. In November 2005, the SDDC informed the public that they would

of the underlying computer tracking system. Meanwhile, the Air Force, which recently consolidated all of its military claims offices in Dayton, Ohio, has an online filing program (unrelated to Families First) that has received positive reviews from claimants and claims practitioners alike.<sup>45</sup> If the Air Force program is any indication, the DPS will be a welcome improvement to current claims processing procedures.

#### IV. Issues for Claims Practitioners

The Families First Program promises much-anticipated improvements to the HHG claims processing system. However, claims practitioners should be aware of some issues that may arise during the early stages of implementation.

First, the entire premise of the best value procurement relies on accurate and timely feedback from clients regarding their personal property shipment experience. Seventy percent of the score received by shippers is based on their performance. As mentioned earlier, even in the first months of implementation, SDDC has recognized that few claimants are filing out the CSS forms as required.<sup>46</sup> If this trend continues, the performance evaluations will be inaccurate or incomplete, and contracts will once again, by default, be awarded based primarily on cost. Claims practitioners and transportation offices must emphasize to all clients the importance of completing these forms. Otherwise, an extremely important component of the program will be rendered useless.

The second issue is that although claimants will likely benefit by filing their claim directly with the carrier, they must be aware of the pitfalls associated with this feature. First, the claimants must perfect their claims within nine months in order to receive FRV.<sup>47</sup> With deployments and training, many claimants will find it difficult to meet this timeline. Therefore, military claims offices should be diligent about publicizing the program and the new timelines to all potential claimants. In addition, the claimant should be cautious regarding the carrier's responsibility for obtaining repair and replacement estimates. Although this can be a great convenience, claimants must be ready to obtain independent estimates if they believe the carrier's estimates are too low. Trusting the carrier to establish the value of the loss without verifying it could prevent the claimant from reaping the benefit of the FRV program.

Finally, the Families First Program is still too new to know its potential effects on military claims offices. In the short term, claims offices will be busy processing claims under the old system and assisting claimants unfamiliar with or uncomfortable with the new procedures. However, once the DPS program is operational, military claims offices will likely see a precipitous drop in the number of HHG claims filed. Household goods claims make up a large portion of the work conducted in most claims offices. Once the program is fully operational, will these offices be closed or, at the very least, consolidated? If so, a new host of problems may arise as customers adjust to a reduction in face-to-face customer service. While it is too early to make a definitive judgment on the effects, it is clear that all legal offices must continue to disseminate accurate and timely information regarding all aspects of the program.

#### VI. Conclusion

The Families First Program is the realization of several years of research and studies on how best to serve the military community. The program will largely improve the way claims are processed, and it comes at a time when it is most needed by our fully-engaged military. While the program appears to achieve its primary goals—providing “quality service [through] minimum damage and prompt claims handling”<sup>48</sup>—there are some potential pitfalls. For Soldiers like SGT Allen, although he may be able to receive additional compensation for his items, that compensation comes with tighter filing deadlines and the uncertainty of dealing directly with the carrier. The key to successful implementation of the Families First Program remains with the military claims office, which will be responsible for disseminating timely and accurate information on claimants' filing options. Regardless of when it is finally implemented, the Families First Program will be a great benefit to servicemembers, DoD civilians, and families.

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not meet their original February 2006 roll-out date. *Id.* The news release explained that “[r]ecent hardware and software integration problems have caused us to step back and reevaluate current efforts.” *Id.*

<sup>45</sup> Not only has the Air Force claims program streamlined the claims filing process, but it has also improved claims processing timely markedly. By directly interfacing with DFAS, Air Force claims are paid within days of filing. Kelly Interview, *supra* note 36.

<sup>46</sup> Goetzke PowerPoint Presentation, *supra* note 15.

<sup>47</sup> Families First Info. Paper, *supra* note 4, at 3.

<sup>48</sup> *Id.* at 2.

## Street FOIA<sup>1</sup> 101: Nuts, Bolts, and Loose Change

*Lieutenant Colonel Craig E. Merutka\**

### Introduction—The FOIA Team: It Takes a Village

In a 17 September 2008 memorandum, the Director of the Army Staff and the Administrative Assistant to the Secretary of the Army emphasized the importance of the “FOIA Team,” a group of professionals charged with implementing the Freedom of Information Act (FOIA)<sup>2</sup> throughout the Army. They discussed the bare bones team consisting of “FOIA Officers, Public Affairs Officers, servicing judge advocates, and Initial Denial Authorities,”<sup>3</sup> but there are certainly more members. The gist of the FOIA Team concept is that it takes a lot of coordinated effort to successfully implement the FOIA program, and it is important that this effort receive command and organizational support.<sup>4</sup> Managing and implementing the FOIA program is simply not a one-person job and it may very well take a village to do it correctly.

With over 34,000 FOIA requests received each year, the Army’s FOIA program is and must be decentralized. Reliance upon installation FOIA Teams, therefore, is a necessity. Most installations and commands employ a designated FOIA Official who leads this team, though the amount of time each official can designate solely to the FOIA varies from location to location. At most locations, FOIA duties comprise only part of the duty day for the appointed official, who is typically also responsible for duties involving the Privacy Act, records management, the mail room, and/or command publications. Worse, with tight manning tables and perhaps an unrealistic hope that FOIA requesters will not find them overseas, most units even deploy to the combat zone without a designated FOIA Official. As a result, the management of the FOIA process often falls to Judge Advocates (JA) at the brigade and division levels who, back at home station, may or may not have even been a member of the FOIA Team. For an overwhelming majority of these JAs, processing FOIA requests during the deployment is not their primary duty. So, unlike other federal agencies that operate consolidated FOIA offices manned by full-time FOIA employees who process most agency FOIA requests, the Army must rely upon installation and command part-time FOIA employees and deployed JAs at division and brigade levels to manage a decentralized FOIA operation. This decentralization and reliance upon personnel, “down in the trenches,” whose FOIA focus is often only part-time has been referred to by at least one anonymous JA as “street FOIA.”

This article is written for members of the “street FOIA Teams” at various levels. It provides up to date information on recent changes and some practical nuts and bolts information on a number of FOIA topics. The issues raised are those that have impact at the installation and lower level, those that have been the subject of inquiry here at the Judge Advocate General’s Legal Center and School, or are details the author did not necessarily know about when he was practicing out on the street but wishes he did.

### FOIA Changes—The “Openness Promotes Effectiveness in Our National Government Act of 2007,” (or the “OPEN Government Act of 2007”): Just When You Thought It Couldn’t Get Any More Complex

Every ten years or so, Congress passes a major amendment to the FOIA. Prior to 2007, the last one was the E-FOIA Act in 1996.<sup>5</sup> Like the E-FOIA Act, the most recent amendment, the OPEN Government Act of 2007,<sup>6</sup> made several significant procedural changes to the FOIA.<sup>7</sup> Chief among those involve attorney fees, time limits, and annual reporting requirements.

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<sup>1</sup> The Freedom of Information Act, 5 U.S.C. § 552 (2000).

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<sup>2</sup> Memorandum from Lieutenant General David H. Huntoon, Jr., Director of the Army Staff, & Joyce E. Morrow, Admin. Assistant to the Sec’y of the Army, to Principal Officials of HQDA et. al., subject: Freedom of Information Act (FOIA) Program (17 Sept. 2008), <https://www.rmda.army.mil/foia/docs/foiaProgramMemo.pdf> [hereinafter Huntoon Memo].

<sup>3</sup> *Id.* para. 2.

<sup>4</sup> “It is essential that core members of the ‘FOIA Team’ receive command and organizational support and are provided the training necessary to implement [the FOIA] program professionally, and in accordance with the mandates of law and regulation.” *Id.* para. 3.

<sup>5</sup> The Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 3048.

<sup>6</sup> The Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 [hereinafter OPEN Government Act].

*OPEN Government Act of 2007 Section 4—Recovery of Attorney Fees and Litigation Costs: Don't Be the First to Have to Tell Your Commander He Has to Pay the Plaintiff's Lawyers*

The FOIA establishes a statutory right, *enforceable in court*, of access to government agency records.<sup>8</sup> Unsatisfied requesters can file a FOIA lawsuit in response to a variety of situations, most common are when an agency fails to meet a statutory deadline for responding to a request or addressing an appeal, or when records are not released. In addition to obtaining the requested records, the only relief available is the recovery of attorney fees and litigation costs that may be awarded to those requesters who “substantially prevail” in court.<sup>9</sup>

Immediately prior to the enactment of the OPEN Government Act, a complainant “substantially prevailed” only when a court ordered an agency to change its position or approved a consent decree between the parties.<sup>10</sup> Absent such an order or decree, agencies would not be liable for fees or costs. Agencies could, and sometimes would, release documents prior to the issuance of an order if they felt the court would rule against them, in order to avoid a court ordered release.<sup>11</sup> As a result, FOIA plaintiffs would not be awarded fees and costs even though their lawsuit essentially caused the agency to change their position regarding the previously withheld records.

The OPEN Government Act changed this analysis and reinstated the pre-*Buckannon* “catalyst” test which allowed for the awarding of fees and costs if a FOIA plaintiff’s lawsuit was the catalyst that caused the government to change course.<sup>12</sup> Under this “catalyst” test, a plaintiff was deemed to have substantially prevailed if prosecution of the action was required and had caused the agency to release the records sought.<sup>13</sup> The OPEN Government Act defines substantially prevailed as relief obtained through either “a judicial order, or an enforceable written agreement or consent decree; or a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.”<sup>14</sup> If a lawsuit is filed and the suit causes the agency to change course, attorney fees and litigation costs can be awarded to a FOIA plaintiff.

Until the OPEN Government Act, however, the attorney fee and litigation cost provision of the FOIA was perhaps of little concern to the installation FOIA Team since any such award was paid for by the federal government out of the United States Judgment Fund.<sup>15</sup> This is no longer the case. Congress now mandates that any award of fees and costs be paid “only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered.”<sup>16</sup> As of December 2008, the Department of Defense (DoD) has not issued definitive guidance on whether such judgments will be paid for by DoD or whether it will be passed down to components or even further—down to installations and units. Passing the responsibility down to that level has some precedence<sup>17</sup> and the possibility that an installation could be required to pay attorneys fees and litigation costs to a FOIA requester who files a lawsuit is very real. Doing things the right way will go a long way in keeping this from happening.

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<sup>7</sup> See FOIA Post, Congress Passes Amendments to the FOIA (Jan. 9, 2008), available at <http://www.usdoj.gov/oip/foiapost/2008foiapost9.htm> (providing summary and explanation of the OPEN Government Act of 2007).

<sup>8</sup> U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE 5 (Mar. 2007) [hereinafter DOJ FOIA GUIDE].

<sup>9</sup> 5 U.S.C. § 552(a)(4)(E)(i).

<sup>10</sup> *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598 (2001).

<sup>11</sup> Telephone Interview with Richard L. Huff, former Co-Director, Office of Info. and Privacy, U.S. Dep’t of Justice (Nov. 25, 2008).

<sup>12</sup> See, e.g., *Weisberg v. U.S. Dep’t of Justice*, 848 F.2d 1265 (D.C. Cir. 1988).

<sup>13</sup> *Id.*

<sup>14</sup> 5 U.S.C. § 552(a)(4)(E)(ii).

<sup>15</sup> 31 U.S.C.S. § 1304 (LexisNexis2008) (authorizing payment from the US Judgment Fund of final judgments issued by a federal court).

<sup>16</sup> OPEN Government Act, *supra* note 6, sec. 4.

<sup>17</sup> In 2002, President Bush signed the Notification and Federal Employee Anti-discrimination and Retaliation of 2002 (No FEAR) Act into law. No FEAR Act, 5 U.S.C. § 2301 note (2007). It mandates that all judgments, awards, and compromise settlements paid to a complainant as the result of a violation of anti-discrimination and whistleblower protection laws be paid from “any appropriation, fund, or other account . . . available for operating expenses of the federal agency to which the discriminatory conduct involved is attributable.” *Id.* § 201. As a result, installations and units are paying these fees from their operations and maintenance funds.

FOIA plaintiffs often go into court when an agency fails to meet a statutory time limit. Unfortunately, one of the most difficult requirements of the FOIA is the twenty working-day period allotted to agencies to initially respond to a valid FOIA request.<sup>18</sup> Though this deadline can be extended an additional ten working-days in unusual circumstances,<sup>19</sup> even this extended deadline is often difficult to meet. It is critical then that it is understood when the time starts, when it is tolled, and when it actually ends.

Starting on 31 December 2008, the OPEN Government Act provides that the twenty working-day period starts when “the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency’s regulations . . . to receive requests.”<sup>20</sup> Army regulations designate Army field commands, installations, and organizations with FOIA Officials as organizations authorized to receive FOIA requests.<sup>21</sup> The OPEN Government Act provision actually provides for two start dates. First, the time starts when a valid request is received by the appropriate component of the agency.<sup>22</sup> So, when the appropriate Army installation FOIA Official receives a FOIA request for an Army record, the time starts. Second, when a component within an agency receives a request that asks for records of another component, the clock starts when the correct component receives the forwarded request or in ten days, whichever is shorter.<sup>23</sup> This imposes a duty to promptly forward misdirected requests to the correct component. So, an Army installation FOIA Official who receives a request for a Navy record has the obligation to forward the request to the Navy since Army installation FOIA Officials are those designated in Army regulations as those authorized to receive FOIA requests. The clock for the Navy starts the day the Navy receives the forwarded request from the Army or ten days after the Army first received it, whichever time is shorter.

The requirement to forward misdirected requests has existed *intra*-Army for some time now. Current Army regulation requires that misdirected requests be forwarded promptly to the component with the responsibility for the records requested, and that the period allowed for responding to the request does not start until the request is received by the component that manages those records.<sup>24</sup> The OPEN Government Act now requires Army FOIA Officials to forward misdirected FOIA requests to the correct installation or command within ten working-days. This should actually be viewed as neither a positive or negative development within the Army since forwarding misdirected requests is a current Army requirement and the ten working-day requirement serves as either a grace period or a limitation depending upon how it is viewed.

The best practice when it comes to misdirected FOIA requests is to forward any request as soon as it is determined that another DoD component or another Army installation or command is the correct recipient. Failure to do so only harms FOIA Teammates at other locations. Also, whenever forwarding requests to another component or location, the original receiving organization should keep the FOIA requester informed of the action, unless notifying him will reveal information that is rightfully protected by a FOIA exemption.

Starting with requests received on 31 December 2008, once the twenty working-day clock starts, the OPEN Government Act limits agencies ability to toll the clock to two circumstances.<sup>25</sup> “Tolling” refers to the situation where the twenty working-day clock stops. The first circumstance that tolls the clock is when an agency makes a “reasonable” request to the requester for additional information about the requested records. This information must not be fee related and can only toll the clock one time. While agencies may of course ask for additional information from the requester more than once, the

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<sup>18</sup> 5 U.S.C § 552(a)(6)(A)(i).

<sup>19</sup> *Id.* § 552(a)(6)(B)(i).

<sup>20</sup> *Id.* § 552(a)(6)(A)(ii); see also FOIA Post, OIP Guidance: New Requirement to Route Misdirected FOIA Requests (Nov. 18, 2008), <http://www.usdoj.gov/oip/foiapost/2008foiapost31.htm> (providing Department of Justice (DoJ) guidance regarding misdirected FOIA requests).

<sup>21</sup> Department of the Army Freedom of Information Act Final Rule, 32 C.F.R. pt. 518, § 518.7(a) (Feb. 22, 2006) [hereinafter Final Rule], available at [http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title32/32cfr518\\_main\\_02.tpl](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title32/32cfr518_main_02.tpl); U.S. DEP’T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM para. 5-206, at app. B. (1 Nov. 1997) [hereinafter AR 25-55] (requiring that requests for current publications and records of Army field commands, installations, and organizations be sent to the “commander of the command, installation, and organization, to the attention of the FOIA Official”).

<sup>22</sup> A FOIA request for Army records is not perfected and the time does not start until “the request arrives at the FOIA office of the Activity in possession of the records” Final Rule, *supra* note 21.

<sup>23</sup> 5 U.S.C § 552(a)(6)(A)(ii).

<sup>24</sup> AR 25-55, *supra* note 21.

<sup>25</sup> *Id.* § 552(a)(6)(A)(ii).

clock tolls only one time. The second circumstance that tolls the clock occurs when it is “necessary to clarify with the requester issues regarding fee assessment.”<sup>26</sup> There is no limit to how many times the agency can ask for fee related information from a requester and as long as the request is necessary to clarify a fee related issue the clock tolls every time. For both tolling situations the tolling stops and the clock starts ticking again when the information sought is received by the agency.<sup>27</sup>

Although agencies have twenty working-days to respond to a FOIA request, the clock does not stop ticking on day twenty-one – it keeps ticking until the request is answered. When it ultimately stops depends upon when the agency makes a release determination and responds to the request.<sup>28</sup> If the FOIA Official sends out all requested documents, the clock stops when the response is placed in the mail. If information is redacted and withheld from release, however, the request and all responsive records must be sent to an appropriate denial authority for action. “Only an IDA [Initial Denial Authority], his or her delegate, or the Secretary of the Army can deny FOIA requests for DA records.”<sup>29</sup> Until one of these officials makes a release determination regarding the withheld information, and responds to the request the clock keeps ticking. It is important to know that the actions at the installation and command level by those engaged in “street FOIA” are only part of the twenty working-day process.

#### *OPEN Government Act of 2007 Section 8—Reporting Requirements: Just the FACTS, Ma’am*

The OPEN Government Act requires the use of additional requester notification procedures and mandates agencies to capture and include more detailed data on their annual FOIA report.<sup>30</sup> Beginning with requests received on 31 December 2008, agencies must assign individual tracking numbers to requests that will take more than ten days to process. Agencies must also establish a phone line or internet service that requesters can use to access information about the status of their requests. New extensive breakdown of data, such as the amount of time it takes to respond to requests in twenty day increments up to 200 days, and then by 100 day increments up to 400 days; median and average number of days required to respond to all requests; number of expedited review requests and fee waiver requests, and a listing of the ten longest pending requests, must now be maintained and submitted with annual FOIA reports. To top it all off, this information and more must all be made available to the public electronically.<sup>31</sup>

The Army’s solution to these new requirements is the Freedom of Information and Privacy Acts Case Tracking System (FACTS). “FACTS is a web-based enterprise solution . . . designed to provide uniform data collection, reporting, and worldwide tracking of Army FOIA requests.”<sup>32</sup> It is the “official Army tracking system, and it is mandatory that all Army FOIA offices enter, track, and close their FOIA requests in FACTS beginning 1 October 2008.”<sup>33</sup> Registration of designated FOIA personnel is highly encouraged and can be accomplished by visiting <https://www.foia.army.mil/facts/newUsrRegister.asp>. The new FACTS is a great tool that can ease the record keeping burden of the FOIA (and of course, its use is mandatory).

#### ***The Exemptions: Protecting Government Interests***

The FOIA is a release statute. As such, there is a presumption that upon receipt of a valid request for government records or information, executive branch agencies will disclose and release all records that are responsive to the request. Full disclosure and release, however, may run afoul of several other governmental interests. “Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and,

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<sup>26</sup> *Id.*

<sup>27</sup> FOIA Post, OIP Guidance: New Limitations on Tolling the FOIA’s Response Time (Nov. 18, 2008), <http://www.usdoj.gov/oip/foiapost/2008foiapost29.htm> (providing DoJ guidance regarding the tolling of twenty working-day response period).

<sup>28</sup> DoJ FOIA Guide, *supra* note 8, at 93.

<sup>29</sup> Final Rule, *supra* note 21, para. 518.16.

<sup>30</sup> 5 U.S.C § 552(a)(7).

<sup>31</sup> FOIA Post, OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests (Nov. 18, 2008), <http://www.usdoj.gov/oip/foiapost/2008foiapost30.htm> (providing DoJ guidance regarding new tracking and data collection and reporting requirements).

<sup>32</sup> Memorandum from Larry Stubblefield, Deputy Admin. Assistant to the Sec’y of the Army, to Assistant Sec’y of the Army et.al., subject: Freedom of Information and Privacy Acts Case Tracking System (FACTS) (May 16, 2008); *see also* Huntoon Memo *supra* note 2.

<sup>33</sup> *Id.*



not least, preserving personal privacy.”<sup>34</sup> It is for the protection of these other governmental interests that Congress included nine exemptions to the release requirement of the FOIA.<sup>35</sup>

### *Discretionary Releases: Do We or Don't We?*

The question often arises whether information *must* be redacted if one of the nine exemptions applies. The simple answer is no; the FOIA allows agencies some discretion to release information that the statute otherwise exempts from mandatory disclosure.<sup>36</sup> The current policy of the Department of Justice (DoJ), however, does not encourage discretionary releases. Set by Attorney General Ashcroft in 2001, the policy allows agencies “to disclose information protected under the FOIA . . . only after full and deliberate considerations of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.”<sup>37</sup> It also states that the DoJ will defend in litigation all withholding decisions “unless they lack a sound legal basis.”<sup>38</sup> In other words, if an exemption is correctly applied, the DoJ will defend the decision. In response to Attorney General Ashcroft’s policy, the DoD issued its current policy stating that discretionary releases within the DoD were “no longer encouraged.”<sup>39</sup>

Contrast Attorney General Ashcroft’s policy with the previous policy under Attorney General Reno. Attorney General Reno required, in addition to the applicability of an exemption, that it was “reasonably foreseeable that disclosure would be harmful” to an interest protected by the law, before the DoJ would defend an agency action.<sup>40</sup> This had the effect of encouraging discretionary releases. It is important to stay abreast of the policy, especially as 2009 arrives. A new Administration will undoubtedly issue new FOIA guidance. Keeping with previous trends it is likely that a rule similar to that under Attorney General Reno will emerge.

Any change in policy, however, will not affect the primary purpose of the FOIA or the function served by the nine FOIA exemptions. This function is the protection of the other interests involved in the decision whether to disclose government records to the public. Regardless of whether discretionary releases are encouraged or discouraged, a familiarization with all the exemptions is required if the FOIA will be properly applied. Of the nine exemptions provided for by Congress, only the first seven are routinely utilized by DoD organizations. Among these seven, however, only four are discussed below.

### *Exemption 1: Do Not Rely Solely on the Markings*

The federal government has a significant interest in preventing the release of classified information, particularly in time of war. Exemption 1 to the FOIA protects national defense and foreign policy information properly classified pursuant to Executive order, currently Executive Order 12,958 as amended.<sup>41</sup> Only national security and foreign policy records—such as those involving military plans, weapons systems, operations, intelligence activities, intelligence sources or methods, and

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<sup>34</sup> Memorandum from John Ashcroft, U.S. Attorney Gen., to Heads of all Fed. Dep’ts and Agencies, subject: The Freedom of Information Act (Oct. 12, 2001), available at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm> [hereinafter Ashcroft Memo]. The DoJ is the executive agent for the implementation of the Freedom of Information Act. See 5 U.S.C. § 552(e)(6).

<sup>35</sup> 5 U.S.C. § 552(b) (Exemption 1: Classified information, Exemption 2: Internal personnel rules and practices, Exemption 3: Other Federal withholding statutes, Exemption 4: Certain business information, Exemption 5: Privileged agency communications, Exemption 6: Protection of personal privacy, Exemption 7: Certain law enforcement records, Exemption 8: Financial institution examination information, Exemption 9: Geological and geophysical information).

<sup>36</sup> These are referred to as discretionary releases. The following exemptions, however, are not appropriate for discretionary release: 1, 3, 4, 6, and 7. This leaves 2 and 5 for consideration. AR 25-55, *supra* note 21, para.1-504.

<sup>37</sup> Ashcroft Memo, *supra* note 34.

<sup>38</sup> *Id.*

<sup>39</sup> Memorandum from H. I. McIntyre, DoD Directorate for Freedom of Info. and Security Review for Distribution, subject: DoD Guidance on Attorney General Freedom of Information (FOIA) Memorandum (Nov. 19, 2001), available at <http://www.dod.mil/pubs/foi/AGmemo.pdf> [hereinafter McIntyre Memo].

<sup>40</sup> Memorandum from Janet Reno, U.S. Attorney Gen., to Heads of Dep’ts and Agencies, subject: The Freedom of Information Act (Oct. 4, 1993), available at [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page3.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm).

<sup>41</sup> 5 U.S.C. § 552(b)(1) (implemented by Exec. Order No. 12,958, 3 C.F.R. 335 (1996)), as amended in Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003) (referred to as Executive Order 12,958 (as amended)) [hereinafter EO 12,958].

foreign government information—qualify for classification.<sup>42</sup> Further, only documents properly classified as Confidential, Secret, or Top Secret qualify for Exemption 1 protection.

The classification of qualified information as Confidential, Secret, or Top Secret depends upon the potential harm that will result from the information's improper release. The more significant the potential harm, the higher the security classification. Obviously, the degree of harm that could result from release of classified information varies as time passes and circumstances change. In addition, some military units may over-classify some information, particularly while deployed. Before relying upon Exemption 1, therefore, it must be determined whether the information is *properly classified* in accordance with the Executive order at the time the FOIA request is made.

Some documents may still be marked but may have already been automatically declassified.<sup>43</sup> Still others may appear to be eligible for continued classification but still must be reviewed. Classification markings alone are not dispositive of whether a classification is still valid. A declassification review is required to make this determination.<sup>44</sup>

Just as the authority to originally classify information within the Army is limited, so is the authority to review and declassify information. For this reason, appropriate officials authorized to declassify documents must be an integral part of the FOIA Team when classified information is involved. This is not to say that those authorities themselves conduct the initial review (declassification authorities are typically high-ranking officials). Like many decisions made within the military, good preliminary staff work by someone familiar with the issue will expedite the process. Judge Advocates need to reach out and find members of the staff who can conduct this preliminary work. This is critical since time to respond to a FOIA request is limited.

Judge Advocates must also be familiar with the other authorized document markings. Document markings, such as For Official Use Only, Limited Distribution, or Controlled Unclassified Information<sup>45</sup> do not qualify for Exemption 1 protection but they should alert the reviewer that another FOIA exemption might apply. Also, if after a declassification review is conducted, previously classified information no longer qualifies for Exemption 1 protection, other exemptions may be applicable.

#### *Exemption 2: Rise of High Two*

Exemption 2 prevents the mandatory disclosure of records that are “related solely to the internal personnel rules and practices of an agency.”<sup>46</sup> Since the passage of the FOIA in 1966, the courts have interpreted this exemption to include two different categories of information. “Low 2” covers internal agency information that is “trivial and housekeeping in nature

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<sup>42</sup> *Id.* sec. 1.4.

Classification Categories. Information shall not be considered for classification unless it concerns: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or (h) weapons of mass destruction.

<sup>43</sup> *Id.* sec. 1.5. EO 12,958 provides for automatic declassification based upon a date or event determined at the time of original classification, or upon the passage of time (ten year automatic declassification of most documents unless agency takes affirmative steps to keep classification in affect for a different amount of time up to twenty-five years).

<sup>44</sup> While declassification reviews can be burdensome, there are limits on how often they must be conducted. Units may rely upon a previous declassification review if conducted within two years of the FOIA request. *See* U.S. DEP'T OF DEFENSE, REG. 5200.1-R, INFORMATION SECURITY PROGRAM (Jan. 1997) [hereinafter DOD REG. 5200.1-R].

<sup>45</sup>

‘Controlled Unclassified Information’ is a categorical designation that refers to unclassified information that does not meet the standards for National Security Classification under Executive Order 12958, as amended, but is (i) pertinent to the national interests of the United States or to the important interests of entities outside the Federal Government, and (ii) under law or policy requires protection from unauthorized disclosure, special handling safeguards, or prescribed limits on exchange or dissemination.

President's Memorandum to the Heads of Executive Dep'ts and Agencies, subject: Designation and Sharing of Controlled Unclassified Information (CUI), 44 WEEKLY COMP. PRES. DOC. 673 (May 7, 2008). This categorical designation, with accompanying document markings, is currently being implemented Government-wide and will replace markings currently used for controlled unclassified information within DoD (e.g., FOUO, FOUO-LES, LIMITED DISTRIBUTION). Memorandum from David M. Wennegren, DoD Deputy Chief Info. Officer, to Secretaries of the Military Dep'ts, subject: Transition to New Markings for Controlled Unclassified Information (CUI) (Dec. 28, 2007).

<sup>46</sup> 5 U.S.C. § 552(b)(2).

for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records.”<sup>47</sup> Examples include unit physical training rosters, office smoking policies, and holiday leave schedules. While DoD 5400.7-R, dated September 1998, states that DoD components shall not invoke low 2,<sup>48</sup> more recent DoD policy has rescinded this prohibition and low 2 is currently a viable option.<sup>49</sup>

Much more important than low 2, however, is the other half of Exemption 2. “High 2” provides authority to withhold internal agency information that would provide the means to circumvent an agency regulation or frustrate an agency function or mission.<sup>50</sup> This part of Exemption 2 has become increasingly more important since the start of the Global War on Terrorism and is used to protect sensitive yet unclassified information. In fact, DoD’s invocation of Exemption 2 steadily increases every year – its total usage DoD-wide increasing over 130% from FY01 to FY07.<sup>51</sup>

Examples of high 2 information provided in DoD 5400.7-R include “operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, or examiners . . . examination questions and answers used in training course . . . [and] [c]omputer software, the release of which would allow circumvention of a statute or DoD rules, Regulations, orders, Manuals, Directives, or Instructions.”<sup>52</sup> Courts have recently allowed agencies to protect agency research facility blueprints;<sup>53</sup> information concerning the design, array, structure, and construction of ammunition storage facilities;<sup>54</sup> aviation watch lists;<sup>55</sup> and unclassified rules of engagement.<sup>56</sup> Pursuant to the holdings of these courts and in light of current policy, sensitive items – such as rules of engagement cards, unit standard operating procedures and battle drills, and other information that would allow circumvention of security and force protection measures – should routinely be withheld from release using “High 2.”

### *Exemption 3: How Am I Supposed to Know All Those Other Statutes?*

The third exemption to the FOIA incorporates other federal statutes that have nondisclosure provisions.<sup>57</sup> The statute must require either “that the matter be withheld from the public in such a manner as to leave no discretion” to the agency or it must establish “particular criteria for withholding or refer to particular types of matter to be withheld.”<sup>58</sup> A useful example is 10 U.S.C. §130b, which allows withholding of information on personnel of overseas, sensitive, or routinely deployable units. This statute protects from mandatory disclosure most personal identifying information, such as names and addresses, of servicemembers serving in those particular units. As a result, most of this information should be redacted from responsive records prior to release.

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<sup>47</sup> U.S. DEP’T OF DEFENSE, REG. 5400.7-R, DOD FREEDOM OF INFORMATION ACT PROGRAM para. C3.2.1.2.2 (Sept. 1998) [hereinafter DOD REG. 5400.7-R]; see also *Dep’t of the Air Force v. Rose*, 425 U.S. 352 (1976) (ruling that “low 2” applies only to information in which there is little or no public interest); *Pruner v. Dep’t of the Army*, 755 F.Supp. 362 (D. Kan. 1991).

<sup>48</sup> DOD REG. 5400.7-R, *supra* note 47, para. C3.2.1.2.2.

<sup>49</sup> McIntyre Memo, *supra* note 39.

<sup>50</sup> *Crooker v. BATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (withholding ATF surveillance manuals).

<sup>51</sup> In Fiscal Year 2001, DoD and its components utilized Exemption 2, 1219 times, while in FY07 the number had increased 134% to 2855 times. See U.S. DEP’T OF DEFENSE (DOD) FREEDOM OF INFORMATION ACT PROGRAM REPORT FOR FISCAL YEAR (FY) 2001, available at <http://www.dod.mil/pubs/foi/01report.pdf> [hereinafter DOD ANNUAL FOIA REPORT FOR FY01]; U.S. DEP’T OF DEFENSE FREEDOM OF INFORMATION ACT REPORT FOR FISCAL YEAR 2007, available at <http://www.dod.mil/pubs/foi/dfoipo/docs/FY2007report.pdf> [hereinafter DOD ANNUAL FOIA REPORT FOR FY07].

<sup>52</sup> DOD REG. 5400.7-R, *supra* note 47, para. C3.2.1.2.1.

<sup>53</sup> *Elliott v. USDA*, 518 F.Supp.2d 217, 219 (D.D.C. 2007) (protecting agency research facility blueprints; records are internal because they are used for a variety of purposes by several sections within the facility; disclosure could render facility “vulnerable to potential threats and unnecessary risk in maintaining physical security”).

<sup>54</sup> *Milner v. U.S. Dep’t of the Navy*, No. 06-1301, 2007 U.S. Dist. Lexis 80221, at \*23 (W.D. Wash. Oct. 30, 2007) (holding information concerning the design, array, structure, and construction of ammunition storage facilities is predominantly internal, notwithstanding that it was shared with local municipalities; ruling that disclosure “could provide essentially a roadmap to wreak the most havoc possible to those persons bent on causing harm”).

<sup>55</sup> *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005) (releasing aviation watch lists would allow terrorists to educate themselves and evade capture).

<sup>56</sup> *Hiken v. DoD*, 521 F. Supp. 2d 1047 (N.D. Cal. 2007) (unclassified rules of engagement eligible for protection even though the enemy may be aware of the ROE through experiences with U.S. forces in Iraq).

<sup>57</sup> 5 U.S.C. § 552(b)(3).

<sup>58</sup> *Id.*

There are many more Exemption 3 statutes, some that require the withholding of information and some that simply allow the withholding of information. The annual DoD FOIA Report lists all the Exemption 3 statutes DoD components relied upon during the report year.<sup>59</sup> Installation FOIA Teams should have a working knowledge of this list.

### *Exemption 6: Keeping Some Personal Things Private*

Exemption 6 of the FOIA allows the withholding of records that are “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”<sup>60</sup> “Personal and medical files” are normally easy to identify. They include Service members’ Official Military Personnel Files, local unit personnel files, and military medical records. “Similar files” includes records containing any information of a personal nature.<sup>61</sup>

Exemption 6 protects this personal information if disclosure would constitute a clearly unwarranted invasion of privacy.<sup>62</sup> This determination requires the balancing of the personal privacy interest in the records against the public interest in the records. The Supreme Court has limited the concept of public interest under the FOIA to the “core purpose” for which Congress enacted it: to “[shed] light on an agency’s performance of its statutory duties.”<sup>63</sup> Therefore, if the records are not informative on the operations and activities of the government there is no public interest in their release. Then if there is at least some identifiable privacy interest involved, the balance tips in favor of withholding the information.

The identification of the personal privacy interest is critical. Prior to 9/11, FOIA Officials relied upon Exemption 6 to redact some personal information, such as social security numbers and home addresses, but it was not widely used to redact names except those of victims and other individuals whose privacy interests were obvious. As a result, stateside records were not redacted like records involving those units described in 10 U.S.C. § 130b. Since 9/11, however, there is a heightened interest in the personal privacy of DoD personnel resulting from terrorist activity likely to weigh heavily in favor of protecting more personal information.<sup>64</sup> The result is that Exemption 6 usage has increased almost 60% since FY01 even though the overall number of FOIA requests received has actually decreased.<sup>65</sup>

After 9/11, the DoD issued several memoranda describing this heightened sense of privacy in the personally identifying information of those associated with DOD.<sup>66</sup> While these memoranda did not specifically state that names and other personal information should be automatically redacted from DoD records, they did lay the groundwork for courts to support the notion that the Exemption 6 balancing test will routinely tip in favor of personal privacy when it comes to the personal information of Service members and DoD civilian employees, particularly those of lower rank. For example, in 2006, the Federal District Court for the District of Columbia ruled that the protection of “names of civilian personnel below the level of office-director and military personnel below the rank of Colonel” in documents was valid because disclosure of those names would not shed light on the operations and activities of DoD.<sup>67</sup> The court also determined that it had “no reason to question” the DOD policy expressing “concern that employees of DOD could become targets of terrorist assaults.”<sup>68</sup> The court confirmed this analysis

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<sup>59</sup> See, e.g., DOD ANNUAL FOIA REPORT FOR FY07, *supra* note 51, at 5–6.

<sup>60</sup> 5 U.S.C. § 552(b)(6).

<sup>61</sup> U. S. Dep’t of State v. Washington Post, 456 U.S. 595 (1986) (“similar files” provision extends to any information of a “personal” nature, such as ones citizenship).

<sup>62</sup> U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

<sup>63</sup> *Id.* at 775.

<sup>64</sup> Memorandum from D.O. Cooke, Director, Admin. and Mgmt., Office of the Sec’y of Defense, to DoD FOIA Offices, subject: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA) (Nov. 9, 2001) [hereinafter Cooke Memo]. Since DoD personnel are at increased risk regardless of their duties or assignment, release of names and other personal information must be more carefully scrutinized and limited. Memorandum from Howard G. Becker, Deputy Dir., Admin. and Mgmt., Office of the Sec’y of Defense, to Secretaries of the Military Dep’ts et.al., subject: Withholding of Information that Personally Identifies DoD Personnel (Sept. 1, 2005) [hereinafter Becker Memo] (“In general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns”), available at [http://www.acq.osd.mil/dpap/pcard/Withholding\\_personally\\_identifying\\_information\\_09-01-05.pdf](http://www.acq.osd.mil/dpap/pcard/Withholding_personally_identifying_information_09-01-05.pdf).

<sup>65</sup> In FY01, DoD and its components utilized Exemption 6 6,729 times while processing 81,682 FOIA requests; however, in FY07 the number had increased 60%, to 10,679 times in 78,392 requests. Compare DOD ANNUAL FOIA REPORT FOR FY01, *supra* note 51, with DOD ANNUAL FOIA REPORT FOR FY07, *supra* note 51.

<sup>66</sup> Cooke Memo, *supra* note 64; Becker Memo, *supra* note 64.

<sup>67</sup> Kimmel v. DOD, No. 04-1551, 2006 WL 112682 (D.D.C. Mar. 31, 2006)

<sup>68</sup> *Id.* at 10–11.

as late as August 2008 when it upheld the withholding of names of Air Force personnel below the office director level amid post-9/11 security concerns and the fact that revealing names would not shed any light on the Air Force's performance of its statutory duties.<sup>69</sup>

Following this trend, it appears that the privacy interest of DoD personnel in their personally identifiable information will often outweigh the public's interest in knowing that information, particularly when dealing with lower ranking personnel. Those reviewing records for release should be familiar with the balancing test and ensure it is applied with the post 9/11 heightened security and personal privacy interests in mind. The result should be that most personal information qualifies for redaction.

### **Conclusion: Managing FOIA—OK, Maybe Not a Village but Certainly a Team**

With so many FOIA requests to respond to and an expanding list of FOIA requirements to address, the Army relies upon FOIA Teams at installation and command levels to implement the Army FOIA program. To satisfy the new requirements of the OPEN Government Act of 2007 and in order to correctly apply FOIA exemptions to the current situation within DoD, FOIA Teams must stay up to date on changes to the FOIA and the way it is implemented. The OPEN Government Act imposed several new procedural requirements, chief among them involve attorney fees and litigation costs, time limits, and annual reporting requirements. And while the FOIA exemptions have not changed recently, the way they are applied has changed, most notably Exemptions 2 and 6. Undeniably, there are a lot of requirements imposed by the FOIA and meeting the requirements, particularly the response time requirement, is often difficult. Certainly, one person cannot do it. Fortunately, one person does not have to do it because although it probably does not really take an entire village, hopefully there is a FOIA Team, properly trained and supported, available to do the job.

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<sup>69</sup> Schoenman v. FBI, No. 04-2202, 2008 U.S. Dist. LEXIS 64833 (D.D.C. Aug. 25, 2008; *see also* Cochran v. United States, 770 F.2d 949 (11th Cir. 1985) (holding that adverse information on high ranking official (major general) found guilty at disciplinary hearing of wrongful appropriation of government aircraft and improper use of government facilities and manpower “qualifies as a textbook example of information the FOIA would require to be disclosed. According to the court, the public interest in disclosure of information relating to a violation of the public trust by a senior government official was overwhelming and outweighed MG Cochran's right to privacy); Schmidt v. U.S. Air Force, No. 06-3069, 2007 U.S. Dist. Lexis 69584 (C.D. Ill. Sept. 20, 2007) (holding that the Air Force properly released adverse information on pilot (major) involved in friendly fire mishap in Afghanistan that resulted in the deaths of several members of the Canadian Army. While the pilot had a privacy interest in maintaining the confidentiality of the information, this privacy interest was outweighed by the public interest in disclosing information about the highly publicized incident (the incident garnered significant public and media attention, was a deadly incident, and had international effects.) The information gave the public “insight into the way in which the United States government was holding its pilot accountable.”)

## Whistleblower Protection for Military Members

Major William E. Brown<sup>1</sup>

### Introduction

*You Cannot Choose Your Battlefield, God Does That for You; But You Can Plant a Standard Where a Standard Never Flew.*<sup>2</sup>

In January 2004, Specialist (SPC) Joseph M. Darby, a military police officer, 372nd Military Police Company, triggered an investigation into prisoner abuse at Abu Ghraib Prison in Iraq.<sup>3</sup> Specialist Darby provided incriminating photographs of the prisoner abuse to the U.S. Criminal Investigation Command.<sup>4</sup> Despite his desire to remain anonymous, Secretary of Defense Donald Rumsfeld publicly named SPC Darby as the whistleblower during a U.S. congressional hearing televised worldwide by cable news networks.<sup>5</sup> Labeled a traitor by some members of his National Guard military unit and hometown community, SPC Darby feared retaliation and reprisal<sup>6</sup> and he was quickly taken out of Iraq.<sup>7</sup> Specialist Darby and his wife were placed under military protection, moved to an undisclosed location, and assumed new identities.<sup>8</sup> Two years after the scandal, in an interview with the *Associated Press*, SPC Darby declared “that if presented with the same circumstances at Abu Ghraib today, he would do the same thing.”<sup>9</sup>

In most cases, blowing the whistle is a painstaking choice that entails enormous professional and personal risk for the servicemember. It should not be the sound of career suicide for the whistleblower. The plight of SPC Darby following the abuse scandal at Abu Ghraib, highlights the need for commanders, supervisory officials, and Judge Advocates (JAs) to better understand the protections afforded servicemembers under the Military Whistleblower Protection Act (MWPA),<sup>10</sup> as well as the need for changes to the statute to further protect servicemembers from retaliatory personnel actions.

The MWPA precludes responsible management officials (RMOs)<sup>11</sup> from restricting a military servicemember’s lawful communication to a member of Congress, an inspector general (IG), or certain investigating agencies and personnel.<sup>12</sup> Further, the MWPA prohibits retaliatory personnel actions as reprisal against a servicemember for making or preparing a protected communication.<sup>13</sup> As an enforcement mechanism, Congress has made a violation of the MWPA a punitive offense.<sup>14</sup>

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<sup>2</sup> LIEUTENANT GENERAL HAROLD G. MOORE (RET.) & JOSEPH L. GALLOWAY, *WE WERE SOLDIERS ONCE . . . AND YOUNG 3* (Harper Perennial ed. 1992).

<sup>3</sup> *60 Minutes: Exposing the Truth About Abu Ghraib: Anderson Cooper Interviews Whistleblower Joe Darby* (CBS television broadcast 24 June 2007), <http://www.cbsnews.com/stories/2006/12/07/60minutes/main2238188.shtml> [hereinafter *60 Minutes*].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Hanna Rosin, *When Joseph Comes Marching Home* (17 May 2004), [http://www.washingtonpost.com/wp-dyn/articles/A32048-2004May16\\_2.html](http://www.washingtonpost.com/wp-dyn/articles/A32048-2004May16_2.html) (last visited Dec. 26, 2008).

<sup>7</sup> Richard Pyle, *GI Who Exposed Abu Ghraib Feared Revenge*, ASSOC. PRESS ONLINE, Aug. 10, 2006.

<sup>8</sup> *60 Minutes*, *supra* note 3.

<sup>9</sup> Pyle, *supra* note 7 (“At least eleven soldiers have been convicted in the scandal. Specialist Charles Garner and Private First Class Lynndie England who were depicted in the photos are serving 10 years and three years in prison respectively.”).

<sup>10</sup> 10 U.S.C. § 1034 (2000).

<sup>11</sup> U.S. DEP’T OF DEFENSE, INSPECTOR GENERAL GUIDE 7050.6, GUIDE TO INVESTIGATING REPRISAL AND IMPROPER REFERRALS FOR MENTAL HEALTH EVALUATIONS para. 2.5 (6 Feb. 1996) [hereinafter IG GUIDE 7050.6]. Responsible management officials are the official(s) who influence or recommend to the deciding official that he or she take, withhold, or threaten action; the official(s) who decide to take, withhold, or threaten the personnel action; and any other official(s) who approve, reviewed, or indorsed the actions.

<sup>12</sup> Military Whistleblower Protection Act, 10 U.S.C. § 1034.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* § 1034(f)(6). “If the Board [for Correction of Military Records] determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such

Like SPC Darby, legitimate whistleblowers are an invaluable resource for the oversight of government operations. Judge Advocates must understand the MWPA in order to advise commanders about this issue. A thorough understanding of the MWPA will help JAs avoid liability. A JA who improperly recommends a retaliatory personnel action, such as a letter of reprimand against a servicemember, will be considered a RMO and may be held liable for a substantiated reprisal allegation along with the commander taking the action.

In the capacity of a trial defense service (TDS) attorney or legal assistance attorney, JAs must also be prepared to represent and advise servicemembers who are the subject of a retaliatory personnel action imposed as reprisal for making a lawful communication to a statutorily designated official. According to the U.S. Army Trial Defense Service's (USATDS) policy, if a Soldier's alleged reprisal complaint is related to pending or recently completed criminal proceedings, non-judicial punishment, or administrative separation actions, the TDS attorney may advise and represent the Soldier with respect to the complaint.<sup>15</sup> Legal assistance attorneys may provide servicemembers advice on pending IG investigations as part of their regular duties.<sup>16</sup> Judge Advocates and commanders must fully understand the standards under the MWPA, adhere to the statute, and protect the due process rights of servicemembers.

This article provides an analysis of the MWPA to serve as the basic framework for JAs who are analyzing questions involving the statute. First, it examines the history, purpose, and current provisions of the MWPA. Second, it discusses the types of lawful communications granted protection under the statute. Third, it examines the prohibition on retaliatory personnel actions, investigation of reprisal actions, and administrative remedies. Finally, it provides practical guidance to JAs on advising commanders, other supervisory officials, and clients on MWPA cases.

## **The Enactment of the Military Whistleblower Protection Act**

### *History, Purpose, and Amendments to the MWPA*

Legitimate protection for military whistleblowers began in 1951 when Congress amended the Universal Military Training and Service Act<sup>17</sup> with the inclusion of the Byrnes Amendment.<sup>18</sup> The Byrnes Amendment granted military personnel the authority to have direct and unrestricted lawful communications with members of Congress.<sup>19</sup> For nearly forty years, the provisions of the Byrnes Amendment remained unchanged until Congress enacted the Military Whistleblower Protection Act of 1988 (MWPA of 1988).<sup>20</sup> The MWPA of 1988 bolstered protections for servicemembers by prohibiting any RMO from retaliating or taking reprisal actions against a member of the armed forces who discloses information regarding government fraud, waste, and abuse to a member of Congress or an IG.<sup>21</sup> Congress further amended the MWPA

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personnel action." Violations by persons subject to the Uniform Code of Military Justice (UCMJ) are punishable as a violation of Article 92 of the UCMJ. *Id.*; see 10 U.S.C. § 892.

<sup>15</sup> If a USATDS counsel represents a servicemember during a criminal proceeding, and the alleged reprisal is related to that proceeding, the USATDS counsel may assist the servicemembers in challenging reprisal. Telephone Interview with Lieutenant Colonel Patricia Harris, Deputy, and Captain Yolanda McCray, Training Officer, Headquarters, U.S. Army Trial Defense Service, Falls Church, Va. (24 Dec. 2008) [hereinafter Harris Telephone Interview].

<sup>16</sup> U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6g(4)(k), (l), (m) (21 Feb. 1996) [hereinafter AR 27-3].

<sup>17</sup> Universal Military Training and Service Act, 50 U.S.C. § 451(a) (1951).

<sup>18</sup> See *Brown v. Glines*, 444 U.S. 348, 359 (1980).

Congressman Byrnes' purpose was "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." The entire legislative history of the measure focuses on providing an avenue for the communication of individual grievances. The Chairman of the Armed Services Committee succinctly summarized the legislative understanding. The amendment, he said, was intended "to let every man in the armed services have the privilege of writing his Congressman or Senator on any subject if it does not violate the law or if it does not deal with some secret matter." It therefore is clear that Congress enacted § 1034 to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels.

*Id.* (citations omitted).

<sup>19</sup> 1951 Amendment to the Universal Military Training and Service Act, 82 Pub. L. No. 51, ch. 144, 65 Stat. 75.

<sup>20</sup> National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 846, 102 Stat. 1918, 2027-30 (1988).

<sup>21</sup> *Id.* § 846(b) ("No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted.").

from 1989 to 1994 by widening the class of persons (i.e. the Coast Guard, when operating under the Navy) that could make<sup>22</sup> and receive protected communications;<sup>23</sup> by making violations of the MWPA punitive;<sup>24</sup> and by expanding the classifications of protected communications that a servicemember can make.<sup>25</sup> In the 1994 amendment, Congress authorized the Department of Defense IG (DoDIG) to delegate reprisal investigations to impartial service IGs.<sup>26</sup> In 1999, the Strom Thurmond National Defense Authorization Act<sup>27</sup> extended authority to IGs within the military departments to provide whistleblower protection for reprisal allegations submitted directly to them by members of the armed forces.<sup>28</sup>

*Current Provisions of the Military Whistleblower Protection Act—The Protected Right to Communicate  
Allegations of Improprieties*

The language of the MWPA is straightforward. Under the provisions of the MWPA, no person may restrict a member of the armed forces from making or preparing a lawful communication with a member of Congress or an IG.<sup>29</sup> Furthermore, no person may initiate or threaten to take an unfavorable personnel action, or preclude (or threaten to withhold) a favorable personnel action, as a form of reprisal against a member of the armed forces for making or preparing such lawful communication.<sup>30</sup> The purpose of the MWPA is to provide sufficient protections to military personnel who come forward and report information on improper or illegal activities by other members of the armed forces.<sup>31</sup>

### Types of Protected Communications

#### *Lawful Communications to Congress or an IG*

The MWPA establishes two categories of protected communications. First, the MWPA protects lawful communications between a member of the armed forces<sup>32</sup> and a member of Congress or an IG.<sup>33</sup> No person may restrict a member of the armed forces in communicating with a member of Congress or an IG, unless the communication is unlawful<sup>34</sup> or violates a regulation necessary to the security of the United States.<sup>35</sup> “An example of an unlawful communication is a false statement (Article 107, Uniform Code of Military Justice (UCMJ)) [submitted by a servicemember to an IG].”<sup>36</sup> Judge Advocates should be aware that a lawful communication made to a member of Congress or an IG will not always disclose information

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<sup>22</sup> Coast Guard Authorization Act of 1989, Pub. L. No. 101-225, § 202, 103 Stat. 1908, 1910–11.

<sup>23</sup> National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 531(a)(2)(B)(iv), 108 Stat. 2663, 2756 (1994). The Act was amended to expand the class of persons that can receive protected communications to, “any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications.” *Id.*

<sup>24</sup> National Defense Authorization Act of Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 843(b), 105 Stat. 1290, 1449 (1991).

<sup>25</sup> National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 531(b)(2), 108 Stat. 2663, 2756 (1994).

<sup>26</sup> *Id.* § 531(b)(1).

<sup>27</sup> Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 933(a), 112 Stat. 1920 (1998).

<sup>28</sup> U.S. DEP’T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 8-10(c)(1) (1 Feb. 2007).

<sup>29</sup> 10 U.S.C. § 1034(a) (2000).

<sup>30</sup> *Id.* § 1034(b).

<sup>31</sup> *Hernandez v. United States*, 38 Fed. Cl. 532, 535 (1997).

<sup>32</sup> The MWPA does not define the term “armed forces,” however, DoD Directive 7050.06 defined member or former member of the armed forces as:

All Regular and Reserve component officers (commissioned and warrant) and enlisted members of the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard (when it is operating as a Military Service in the Navy) on active duty; and Reserve component officers (commissioned and warrant) and enlisted members in any duty or training status (includes officers and enlisted members of the National Guard).

U.S. DEP’T OF DEFENSE, DIR. 7050.06, MILITARY WHISTLEBLOWER PROTECTION sec. E.2.7 (23 July 2007) [hereinafter DoDD 7050.06].

<sup>33</sup> 10 U.S.C. § 1034(a)(1).

<sup>34</sup> See AR 20-1, *supra* note 28 para. 1-11(c).

<sup>35</sup> 10 U.S.C. § 1034(a)(1).

<sup>36</sup> AR 20-1, *supra* note 28, para. 1-11(c).



or evidence of illegal conduct.<sup>37</sup> For example, a Soldier may disclose information to the IG regarding unfair labor practices imposed by management against civilian employees who are members of a union. If a servicemember contacts a member of Congress or an IG, but fails to disclose any specific wrongdoing, the IG will treat the communication as protected and proceed with an investigation.<sup>38</sup> The IG will have the Soldier complete a Department of the Army (DA) Form 1559, Inspector General Action Request, and a follow-on interview of the servicemember will be conducted.<sup>39</sup>

Second, members of the armed forces are protected from retaliatory personnel actions when making or preparing a communication that alleges illegal conduct<sup>40</sup> to statutorily recognized recipients of protected communications, e.g., a member of Congress; an IG; a member of a DoD audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command; or any designated person or organization.<sup>41</sup> These violations may include unlawful discrimination, sexual harassment, fraud,<sup>42</sup> gross waste of government resources, abuse of authority, or significant and specific danger to public health or safety.<sup>43</sup> The scope of protected communications has been expanded to include those made by a third party, e.g., spouse, relative, or co-worker of a servicemember, to a member of Congress, an IG, or another designated official so long as the RMO believes that the communication was made on behalf of the servicemember.<sup>44</sup>

The right to communicate to a statutorily recognized recipient is not absolute. The MWPA does not apply to a communication that is unlawful.<sup>45</sup> For instance, if the servicemember discloses information that involves national security or its disclosure would violate national security or other laws, the MWPA would not protect the servicemember.<sup>46</sup> Having considered the various types of protected communications this article now examines the prohibition on adverse personnel actions taken against a servicemember who makes or prepares a protected communication to a statutorily recognized recipient.

## Prohibition of Retaliatory Personnel Actions

### *Adverse Personnel Actions and Reprisals Defined*

An adverse personnel action may not be utilized as a form of reprisal against a member of the armed forces who lawfully communicates to a member of Congress or an IG a report of a violation of law or regulations. Reprisal is defined as “[t]aking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action,

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<sup>37</sup> IG GUIDE 7050.6, *supra* note 11, para. 2.3.

<sup>38</sup> *Id.*

<sup>39</sup> Telephone Interview with Lieutenant Colonel Quincy Norman, Deputy Inspector General, Office of the Inspector General, Headquarters, USARCENT, in Fort McPherson, Ga. (Jan. 5, 2009).

<sup>40</sup> *See* 10 U.S.C. § 1034(c)(2).

A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following: (A) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination. (B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

*Id.*

<sup>41</sup> *Id.* § 1034(b)(1)(B).

<sup>42</sup> *See* AR 20-1, *supra* note 28, sec. II, Terms, at 103.

**Fraud.** Any intentional deception designed to deprive the United States unlawfully of something of value or to secure from the United States for an individual a benefit, privilege, allowance, or consideration to which he or she is not entitled. Such practices include, but are not limited to, the offer, payment, or acceptance of bribes or gratuities; making false statements; submitting false claims; using false weights or measures; evading or corrupting inspectors or other officials; deceit either by suppressing the truth or misrepresenting material fact; adulterating or substituting materials; falsifying records and books or accounts; arranging for secret profits, kickbacks, or commissions; and conspiring to use any of these devices. The term also includes conflict of interest cases, criminal irregularities, and the unauthorized disclosure of official information relating to procurement and disposal matters.

*Id.*

<sup>43</sup> Lieutenant Colonel Craig A. Meredith, *The Inspector General System*, ARMY LAW., July/Aug. 2003, at 20, 21.

<sup>44</sup> IG GUIDE 7050.6, *supra* note 11, para. 2.3.

<sup>45</sup> 10 U.S.C. § 1034(a)(2).

<sup>46</sup> National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 846(a)(2), 102 Stat. 1918 (1988).

for making or preparing to make a protected communication” to a member of Congress or an IG.<sup>47</sup> Although the MWPA fails to define the term “personnel action,” the DoD follows a broad interpretation of the term which includes “[a]ny action taken on a member of the armed forces that affects, or has the potential to affect, that military member’s current position or career.”<sup>48</sup> Personnel actions may include, among other things, a reduction in military grade, reassignment, disciplinary action or referral for a mental health evaluation, and “any other significant change in duties or responsibilities inconsistent with the military member’s grade.”<sup>49</sup>

### *Investigating Reprisal Allegations—Department of Defense Inspector General Responsibilities*

The DoDIG oversees all reprisal investigations and has the authority to delegate responsibility for the reprisal investigation to an appropriate IG within a military department.<sup>50</sup> The IG conducting the reprisal investigation must be neutral and outside the immediate chain of command of the complainant and the RMO alleged to have taken the retaliatory action.<sup>51</sup> If the IG conducting the preliminary investigation (PI) determines that the servicemember’s allegation meets the criteria for coverage under the MWPA, a whistleblower reprisal investigation will be initiated.<sup>52</sup> Regardless of whether the reprisal investigation itself is conducted by the DoDIG or by an appropriate delegated IG within a military department, the results of the investigation shall be determined or approved by the DoDIG.<sup>53</sup>

The IG is not required to consider allegations of reprisal when a servicemember submits a complaint more than sixty days after the date the servicemember became aware of the adverse personnel action.<sup>54</sup> The IG will submit a declination memorandum with the PI in cases that fail to meet the criteria for whistleblower reprisal.<sup>55</sup> For example, in the Army, the declination memorandum and PI will be forwarded through the Army Command/Army Service Component Command/Direct Reporting Unit and the DAIG Assistance Division to the DoDIG for approval.<sup>56</sup>

Allegations that warrant investigation will be addressed expeditiously.<sup>57</sup> The DoDIG will review and approve the results of the investigation.<sup>58</sup> If the review determines that the investigation was adequate, the DoDIG will issue a report of investigation (ROI) within 180 days of the receipt of the allegation of reprisal.<sup>59</sup> The DoDIG will notify the Deputy Undersecretary of Defense for Program Integration of the results of the investigation and forward a copy of the ROI to the complainant.<sup>60</sup> The servicemember will be advised of his right to have the matter reviewed by the Army Board of Corrections of Military Records (ABCMR).<sup>61</sup> This will conclude the DoDIG action on the reprisal allegation unless the

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<sup>47</sup> DoDD 7050.06, *supra* note 32, sec. E2.10.

<sup>48</sup> *Id.* sec. E2.8.

<sup>49</sup> *Id.*

<sup>50</sup> 10 U.S.C. § 1034(c)(3)(D).

<sup>51</sup> *Id.* § 1034(c)(3)(E)(5).

<sup>52</sup> See AR 20-1, *supra* note 28, para. 8-10(c)(4) (“[T]he DAIG Assistance Division will direct the IG receiving the complaint to forward the case to either the [Army Command/Army Service Component Command/Direct Reporting Unit] IG or to the DAIG Assistance Division for IG [action process] action or further tasking.”).

<sup>53</sup> 10 U.S.C. § 1034(c)(3)(E); see also AR 20-1, *supra* note 28, para. 8-10(c)(5).

<sup>54</sup> See 10 U.S.C. § 1034(c)(4) (“Neither an initial determination under paragraph (3)(A) nor an investigation under paragraph (3)(D) is required in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.”). See also AR 20-1, *supra* note 28, para. 8-10(c)(2).

<sup>55</sup> See AR 20-1, *supra* note 28, para. 8-10(c)(4). Examples of allegations that fail to meet the criteria for whistleblower reprisal include untimely allegations (more than sixty days after the servicemember became aware of the personnel action that is believed to have been taken in reprisal) or no unfavorable personnel action was taken.

<sup>56</sup> *Id.* para. 8-10(c)(5).

<sup>57</sup> DoDD 7050.06, *supra* note 32, subpara. 5.1.4.

<sup>58</sup> *Id.* subpara. 5.1.5.

<sup>59</sup> *Id.* subpara. 5.1.6.

<sup>60</sup> *Id.* subparas. 5.1.6, 5.1.7.

<sup>61</sup> *Id.* subpara. 5.1.8.

complainant requests review of the matter by the ABCMR. If the complainant seeks redress from the ABCMR, DoDIG will submit a copy of the ROI to the ABCMR and gather further evidence if necessary.<sup>62</sup>

### *What Questions Must an Investigator Examine Before Conducting a Reprisal Investigation?*

The primary challenge of investigating reprisal allegations is collecting the evidence required to answer four threshold questions found in the DoDIG guide covering reprisal investigations.<sup>63</sup> First, did the servicemember make or prepare a communication protected by the statute?<sup>64</sup> Second, was an adverse personnel action taken or threatened, or was the servicemember deprived of a favorable personnel action following the protected communication?<sup>65</sup> Third, did the RMO know about the protected communication before taking or threatening an unfavorable personnel action or withholding a favorable personnel action?<sup>66</sup> Fourth, is there sufficient evidence to establish that the RMO would have taken or threatened the unfavorable personnel action, or withheld a favorable personnel action, if the protected communication had not been made?<sup>67</sup> When the four questions are answered the investigation is complete.<sup>68</sup> If the answer to any of the four questions is “no,” the investigator will state in the report of investigation why the allegation of reprisal is unsubstantiated.<sup>69</sup> The investigator will recommend corrective action if the allegation of reprisal is substantiated.<sup>70</sup>

### *Administrative Remedies*

The provisions of the MWPA only provide servicemembers with administrative remedies and not private causes of action.<sup>71</sup> There are several possible administrative remedies that a servicemember may request.

A servicemember may submit a request to the ABCMR to correct his records. Based on the IG final report of investigation, it may be necessary to grant corrective action including providing assistance to servicemembers preparing an application to the ABCMR.<sup>72</sup> The ABCMR shall consider applications for corrections of military records at the request of a servicemember or former servicemember who alleged reprisal for making or preparing a protected communication.<sup>73</sup> If the

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<sup>62</sup> *Id.* subpara. 5.1.9.

<sup>63</sup> IG GUIDE 7050.6, *supra* note 11, paras. 2.3–2.6.

<sup>64</sup> *Id.* para. 2.3.

[A] communication made to a Member of Congress or an IG **does not necessarily have to disclose information that evidence wrongdoing**, it simply has to be a lawful communication. If the complainant contacted a Member of Congress or an IG, but did not disclose any specific wrongdoing, treat the contact as a protected communication and proceed with the investigation.

*Id.*

<sup>65</sup> *Id.* para. 2.4 (“A personnel action is: Any action taken on a member of the Armed Forces that affects or has the potential to affect that member’s current position or career.”).

<sup>66</sup> *Id.* para. 2.5. For example, a RMO knew that the servicemember filed an Article 138, Complaint of Wrongs, but was unaware that the member also made a protected communication to an IG.

<sup>67</sup> *Id.* para. 2.6. The burden is initially on the servicemember to establish that he made or prepared a protected communication and thereafter suffered a personnel action. *Id.* The burden then shifts to the RMO to establish that the same personnel action would have been taken, withheld or threatened if the protected communication had not been made. *Id.* In answering the fourth question, the IG investigator will analyze the actions of the RMOs, as well as their motive. *Id.* para. 2.1.

<sup>68</sup> *Id.* para. 2.7. At this point the investigator should have established the answers to the first three questions, yet will delay answering the fourth question until a review and analysis of the evidence is completed. *Id.* In addition to reviewing the evidence, the investigator will prepare a chronology of events and written summaries of all witness testimony. *Id.* para. 2.8.

<sup>69</sup> *Id.* para. 2.9. The investigator will base his conclusion on the administrative evidentiary standard of a “preponderance of the evidence,” i.e., give greater weight to the evidence found most credible and that which demonstrates that it is more probable than not that the facts and circumstances occurred as set forth in the report. *Id.*

<sup>70</sup> *Id.* (“The recommendation for corrective action may be general or specific, and may address disciplinary options. Corrective action should be sufficient to make the complainant ‘whole’ and restore the complainant to the same or equal status he or she would have attained if the reprisal had not occurred.”).

<sup>71</sup> *Alasevich v. USAF Reserve*, 1997 U.S. Dist. LEXIS 3861 (E.D. Pa. Mar. 26, 1997); *see Acquistio v. United States*, 70 F.3d 1010, 1011 (8th Cir. 1995).

<sup>72</sup> DoDD 7050.06, *supra* note 32, subpara. 5.3.3.

<sup>73</sup> *Id.* subpara. 5.3.4.1.

ABCMR finds that an adverse personnel action prohibited under the MWPA has occurred, the ABCMR may recommend that appropriate disciplinary action be taken against the RMO.<sup>74</sup>

Substantiated reprisal imposed by a military RMO is punishable under Article 92 (Failure to Obey Order or Regulation) of the Uniform Code of Military Justice.<sup>75</sup> Substantiated reprisal actions imposed by a civilian RMO are punishable under DoD regulations governing disciplinary or adverse actions for civilian employees.<sup>76</sup> The Heads of the DoD components shall ensure that any violation of a servicemembers right to lawful communicate with a member of Congress or IG, or reprisal against a servicemember for such communication by a civilian employee constitutes a basis of disciplinary action under regulations governing civilian employees.<sup>77</sup>

Further, if a servicemember's military record is corrected by the ABCMR, the Secretary of the Army may financially compensate the member's claim for the loss of pay, allowances, or other compensation.<sup>78</sup> In addition, if "necessary to correct an error or remove an injustice" for purposes of clemency, the Secretary of the Army may correct records of courts-martial and related administrative records for an Army servicemember related to an MWPA report.<sup>79</sup>

#### *No Private Cause of Action Authorized*

The MWPA does not provide any private cause of action, express or implied.<sup>80</sup> In *Acquisto v. United States*, the U.S. Court of Appeals for the Eighth Circuit vacated the summary judgment for the Government and remanded with directions to dismiss for lack of subject matter jurisdiction servicemember's action to correct his records, which alleged a conspiracy to tarnish his record in retaliation for his complaint against his commander.<sup>81</sup> The court reasoned that Congress designed the MWPA to provide military channels through which servicemembers could bring their grievances.<sup>82</sup> Therefore, the court concluded that the MWPA provides an administrative process for handling complaints of improper retaliatory personnel actions.<sup>83</sup> Accordingly, the court found that the MWPA provides strictly administrative remedies and therefore does not afford servicemembers a private cause of action.<sup>84</sup>

#### **Practical Guidance on the MWPA**

The IGs from all services investigate reprisal allegations under delegated authority from DoD. Judge Advocates should review the detailed guidance DoD has provided in its implementation directives and applicable Army regulations on the MWPA. The Army has recently issued an updated AR 600-20 that reflects its implementation of the MWPA.<sup>85</sup> Judge Advocates must be familiar with these documents in order to assist RMOs and clients in navigating the applicable provisions of the statute. The TDS attorney should review the USATDS policy which reflects how and under what circumstances its TDS attorneys will represent complainants and RMOs.<sup>86</sup> Legal assistance attorneys should be familiar with the requirements

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<sup>74</sup> 10 U.S.C. § 1034(f)(6) (2000).

<sup>75</sup> IG GUIDE 7050.6, *supra* note 11, para. 1.2(a)(2).

<sup>76</sup> *Id.* para. 1.2(a)(2).

<sup>77</sup> DoDD 7050.06, *supra* note 32, para. 4.6.

<sup>78</sup> 10 U.S.C. § 1552(c) ("The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record . . .").

<sup>79</sup> *See id.* § 1552(a). "The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." *Id.* § (a)(1). Such action may be extended to records of courts-martial and related administrative records pertaining to court-martial cases for purposes of clemency. *Id.* § 1552(f).

<sup>80</sup> *See Acquisto v. United States*, 70 F.3d 1010 (8th Cir. 1995).

<sup>81</sup> *Id.* at 1011.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; *see also Hernandez v. United States*, 38 Fed. Cl. 532 (1997).

<sup>84</sup> *Acquisto*, 70 F.3d at 1011; *see also Hernandez*, 38 Fed. Cl. 532.

<sup>85</sup> U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (18 Mar. 2008).

<sup>86</sup> *See Harris Telephone Interview*, *supra* note 15.

under Army Regulation 27-3, Army Legal Assistance Program, to provide clients representation in all other cases of reprisal actions.<sup>87</sup>

### Conclusion

This paper provides JAs with a comprehensive analysis of the MWPA by examining its history, purpose, and current law. The MWPA attempts to encourage servicemembers to blow the whistle on government fraud, waste, and abuse. In exchange, the statute attempts to protect whistleblowers from reprisal and provides an avenue of redress to servicemembers to correct a reprisal.

As evident from this article, the MWPA is a complicated statute. The MWPA demands that JAs be prepared to serve as legal advisors and advocates. Judge Advocates must be prepared to provide competent advice to commanders and other supervisory officials to ensure their compliance with the MWPA. In addition, attorneys in TDS and legal assistance must be ready to provide advice to clients who allege reprisal actions.

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<sup>87</sup> AR 27-3, *supra* note 16, para. 3-6g(4)(l).

## For All “Intensive” Purposes: A Primer on Malapropisms, Eggcorns, and Other Rogue Elements of the English Language

Major Ann B. Ching\*

[Interior shot, local restaurant, day.]

Diner One: Is that all you’re ordering for lunch? This new diet must really curve your appetite.

Diner Two: I certainly hope so—it’s costing me a nominal egg!

Diner One: Well, you’d better eat more at the office holiday party, or you’ll be a social leopard, for sure.

Ah, there is nothing like the satisfying *Schadenfreude* that washes over you when you overhear this little exchange one booth over at the local Applebee’s.<sup>1</sup> Not so satisfying is the feeling you get when you read a record of trial and realize that the court reporter accurately noted that you referred to your client as an *escape goat*.<sup>2</sup>

As members of the legal profession, words are the tools of our trade, our weapons of choice, our allies in battle. Unfortunately, the English language can be a fickle friend, quick to trip our tongues and tangle up our prose. Nothing is worse than that sinking feeling you get when you realize that you wrote in a memo that the accused should get his *just desserts*,<sup>3</sup> or that you just *appraised*<sup>4</sup> your boss of a pending legal issue.

An axiom of military strategy is that you must know your enemy to succeed in battle.<sup>5</sup> The same holds true for conquering the English language—you must identify and understand these rogue elements to avoid becoming their victim. This article will orientate<sup>6</sup> you to several categories of confusing words: malapropisms, eggcorns, and mondegreens. In addition to those scattered throughout this article, several commonly misused words and phrases appear in the appendices. By this article’s conclusion, you will be equipped to circumvent these pitfalls and avoid appearing more troglodyte than erudite.<sup>7</sup>

### Malapropisms

“She’s as headstrong as an allegory on the banks of the Nile.”

—Mrs. Malaprop, *The Rivals*<sup>8</sup>

Richard Sheridan’s 1775 play *The Rivals* provided not only a memorable character, but also the origin of a term to describe misused words. In *The Rivals*, Mrs. Malaprop litters her dialogue with humorous errors in usage, such as “He is the *pineapple* of politeness.”<sup>9</sup> Her name is derived from the French *mal à propos*, meaning “*mal*, ‘badly,’ *à*, ‘to,’ and *propos*,

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<sup>1</sup> *Schadenfreude* is German for “malicious joy at another’s misfortune.” LE MOT JUSTE: A DICTIONARY OF CLASSICAL AND FOREIGN WORDS AND PHRASES 105 (John Buchanan-Brown et al. eds., 2d ed. 1991) [hereinafter LE MOT JUSTE].

<sup>2</sup> Which of course should be *scapegoat*, unless your case involves a heist on a farm.

<sup>3</sup> *Just desserts* should actually be *just deserts*; “[i]t comes from the French for *deserve*.” BILL BRYSON, BRYSON’S DICTIONARY OF TROUBLESOME WORDS: A WRITER’S GUIDE TO GETTING IT RIGHT 113 (2002).

<sup>4</sup> The correct word is *apprise*, meaning “to inform”; *appraise* means “to assess or evaluate.” *Id.* at 16.

<sup>5</sup> See, e.g., SUN TZU, THE ART OF WAR bk. 3, at 52 (J.H. Huang trans., William Morrow & Co. 1993) (6th cent. B.C.) (“By perceiving the enemy and perceiving ourselves, there will be no unforeseen risk in any battle.”).

<sup>6</sup> Believe it or not, “orientate” is an actual word. See RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1366 (Sol Steinmetz et al. eds., 2d ed. 1998) [hereinafter WEBSTER’S] (defining orientate as “to orient”).

<sup>7</sup> Or avoid appearing deliberately ignorant versus well educated.

<sup>8</sup> RICHARD BRINSLEY SHERIDAN, THE RIVALS act 3, sc. 3 (1775).

<sup>9</sup> *Id.* (instead of *pinnacle*).

‘purpose, subject,’ and means ‘inappropriate.’”<sup>10</sup> The popularity of *The Rivals* led to the eventual adoption of the term malapropism, defined today as “an act or habit of misusing words ridiculously, esp. by the confusion of words that are similar in sound.”<sup>11</sup> Although malapropisms can be amusing, it all depends on your point of view. It is one thing to chuckle when Johnny Soprano refers to the *albacore* around his neck;<sup>12</sup> it is another to find yourself *floundering* in a sea of your own mistakes.<sup>13</sup>

Nonetheless, the entertainment value of malapropisms has guaranteed their frequent occurrence in both classic literature and popular culture. In addition to Johnny Boy Soprano, several fictional characters have exhibited an endearing penchant for malapropisms over the years. William Shakespeare provided characters like the Nurse from *Romeo and Juliet* (“she will *indite* him to some supper”)<sup>14</sup> and Dogberry from *Much Ado About Nothing* (“O villain! Thou wilt be condemned into everlasting *redemption* for this.”).<sup>15</sup> Lovable bigot Archie Bunker of *All in the Family* also stumbled his way through the English language, resulting in memorable sayings like “he is making *suppository* remarks about our country.”<sup>16</sup> More recently, the titular characters of the popular Australian television show *Kath & Kim* scatter malapropisms about in their quest for middle-class *effluence*.<sup>17</sup>

### Eggcorns

Chazz: *Mind-bottling, isn't it?*

Jimmy: *Did you just say mind-bottling?*

Chazz: *Yeah, mind-bottling. You know, when things are so crazy it gets your thoughts all trapped, like in a bottle?*<sup>18</sup>

Like malapropisms, eggcorns involve the substitution of one word for a similar sounding word. Eggcorns, however, have two characteristics that set them apart from malapropisms. First, eggcorns usually involve homophones or near homophones,<sup>19</sup> compared to malapropisms, which usually involve similar (not identical) sounding words. Second, eggcorns—although technically incorrect—are logically correct in the universe of the speaker. As explained by *The Atlantic's* Ms. Grammar, eggcorns are “‘spontaneous reshapings of known expressions’ which seem to make sense.”<sup>20</sup> The *Blades of Glory* example above illustrates these principles. *Bottling* is only a near-homophone for *boggling*; the feature that distinguishes this eggcorn from a malapropism is that *mind-bottling* makes its own sense, as explained by Chazz.

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<sup>10</sup> WORD HISTORIES AND MYSTERIES: FROM ABRACADABRA TO ZEUS 170 (Patrick Taylor et al. eds., 2004) [hereinafter WORD HISTORIES].

<sup>11</sup> WEBSTER'S, *supra* note 6, at 1163; WORD HISTORIES, *supra* note 10, at 170–71.

<sup>12</sup> *The Sopranos: Down Neck* (HBO television broadcast Feb. 21, 1999). In this episode, Johnny Boy Soprano meant to refer to the *albatross* around his neck—an allusion from Samuel Taylor Coleridge's poem *The Rime of the Ancient Mariner*.

<sup>13</sup> Another fishy situation arises when you substitute *flounder* for *founder*. “To founder is to sink; to flounder is to struggle clumsily, like a fish out of water.” BILL WALSH, LAPSING INTO A COMMA: A CURMUDGEON'S GUIDE TO THE MANY THINGS THAT CAN GO WRONG IN PRINT—AND HOW TO AVOID THEM 139 (2000).

<sup>14</sup> WILLIAM SHAKESPEARE, ROMEO AND JULIET act 3, sc. 1 (emphasis added). The Nurse meant to say *invite*; *indite* means “to compose or write, as a poem.” WEBSTER'S, *supra* note 6, at 973.

<sup>15</sup> WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING act 4, sc. 2 (emphasis added). Here, Dogberry substitutes *redemption* for *damnation*.

<sup>16</sup> *All in the Family: Flashback: Mike Meets Archie* (CBS television broadcast Oct. 16, 1971) (meaning *derogatory*).

<sup>17</sup> This malapropism is often used by the series' regulars instead of *affluence*. See *Kath & Kim* (Austl. Broad. Co. television broadcast 2002–2005; Seven Network television broadcast 2007—). *Kath & Kim* was adapted for American audiences as part of NBC's fall 2008 lineup. See *Kath & Kim* on NBC, TVGUIDE.com, <http://www.tvguide.com/tvshows/kath-kim/293765> (last visited Nov. 3, 2008).

<sup>18</sup> BLADES OF GLORY (Dreamworks SKG 2007).

<sup>19</sup> *Homophone* means “a word pronounced the same as another but differing in meaning, whether spelled the same way or not, as *heir* and *air*.” WEBSTER'S, *supra* note 6, at 916. Compare *homonym*—“a word the same as another in sound and spelling but different in meaning.” *Id.* (emphasis added).

<sup>20</sup> Barbara Wallraff, *Word Court*, ATLANTIC, Sept. 2006, at 148. Wallraff's *Word Court* column appears monthly in the back pages of *The Atlantic*.

As you have probably noticed by now, the word *eggcorn* is also an eggcorn—for *acorn*. The term was developed by “[l]anguage geeks,”<sup>21</sup> namely, linguistics professors Mark Liberman and Geoffrey Pullum.<sup>22</sup> On his blog *Language Log*, Liberman explains why the eggcorn could not be properly defined by one of the existing categories of language errors:

It’s not a folk etymology, because this is the usage of one person rather than an entire speech community.

It’s not a malapropism, because “egg corn” and “acorn” are really homonyms (at least in casual pronunciation), while pairs like “allegory” for “alligator,” “oracular” for “vernacular” and “fortuitous” for “fortunate” are merely similar in sound . . . .

It’s not a mondegreen because the mis-construal is not part of a song or poem or similar performance.<sup>23</sup>

Since its coinage in 2003, the term eggcorn has *spread like wildflower* throughout the language geek community.<sup>24</sup> A search for “eggcorn” on Google turns up about 45,500 results,<sup>25</sup> including references in *Psychology Today*,<sup>26</sup> *The Boston Globe*,<sup>27</sup> and *The Chronicle of Higher Education*.<sup>28</sup> A brief look at some of these sites yields gems such as “far-gone conclusion,”<sup>29</sup> “antidotal evidence,”<sup>30</sup> “mute point,”<sup>31</sup> and “girdle one’s loins.”<sup>32</sup> Other examples are included in the appendices.

### Mondegreens

*Olive, the Other Reindeer, used to laugh and call him names . . . .*<sup>33</sup>

An entire generation may have grown up wondering why Olive was so cruel to poor Rudolph the Red-Nosed Reindeer. A mistake such as this is a mondegreen—a misheard lyric, phrase, or verse, resulting in the listener substituting words or phrases for similar-sounding words or phrases.<sup>34</sup> In other words, mondegreens are eggcorns in very specific contexts—musical lyrics, poems, and such.<sup>35</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> Mark Liberman is a linguistics professor at the University of Pennsylvania, and Geoffrey Pullman is a linguistics professor at the University of California-Santa Cruz. See *Language Log: About*, [http://languagelog.ldc.upenn.edu/nll?page\\_id=2](http://languagelog.ldc.upenn.edu/nll?page_id=2) (last visited Nov. 3, 2008). They started a blog called *Language Log* in 2003, to which twenty-three authors now contribute. *Id.*

<sup>23</sup> Posting of Mark Liberman to *Language Log*, <http://158.130.17.5/%7Emyl/languagelog/archives/000018.html> (Sept. 23, 2003, 12:33 EST) [hereinafter *Liberman Posting*].

<sup>24</sup> Versus *spread like wildfire*.

<sup>25</sup> *Eggcorn* – Google Search, <http://www.google.com/search?hl=en&q=eggcorn&start=0&sa=N> (last visited Nov. 3, 2008). Admittedly, some of these results appear to be recipes.

<sup>26</sup> Mark Peters, *Word Watch: The Eggcorn*, PSYCHOL. TODAY, Aug. 29, 2006, available at <http://www.psychologytoday.com/articles/pto-20060214-000002.html>.

<sup>27</sup> Jan Freeman, *Mr. Boffo Lays an Eggcorn*, BOSTONGLOBE.com, Aug. 15, 2007, [http://www.bpstpm/cp/news/globe/ideas/brainiac/2007/08/mr\\_boffo\\_lays\\_a\\_1.html](http://www.bpstpm/cp/news/globe/ideas/brainiac/2007/08/mr_boffo_lays_a_1.html).

<sup>28</sup> Mark Peters, *Like a Bowl in a China Shop*, CHRONICLE OF HIGHER EDUC., Aug. 9, 2006, available at <http://chronicle.com/jobs/news/2006/08/2006080901c.htm>.

<sup>29</sup> Peters, *supra* note 26 (*foregone conclusion*).

<sup>30</sup> Posting of Sharon Hurley Hall to *Daily Writing Tips*, <http://www.dailywritingtips.com/found-any-eggcorns-lately/> (Mar. 10, 2008) (*anecdotal evidence*).

<sup>31</sup> *Id.* (*moot point*).

<sup>32</sup> Peters, *supra* note 28 (*gird one’s loins*).

<sup>33</sup> Snopes.com, *Christmas Carol Mondegreens*, <http://www.snopes.com/holidays/christmas/humor/mondegreens.asp> (last visited Nov. 3, 2008) [hereinafter *Christmas Carol Mondegreens*].

<sup>34</sup> See Random House, *The Maven’s Word of the Day: Mondegreen*, Aug. 11, 1999, <http://www.randomhouse.com/wotd/index.pperl?date=19990811>.

<sup>35</sup> See, e.g., *Liberman Posting*, *supra* note 23. Like eggcorns, mondegreens tend to make their own sort of sense—compared to malapropisms, which are simply incorrect.



Author Sylvia Wright coined the term in a 1954 *Harper's Bazaar* article.<sup>36</sup> She wrote that “[a]s a child she had heard the Scottish ballad “The Bonny Earl of Murray” and she had believed that one stanza went like this:

*Ye Highlands and Ye Lowlands  
Oh where hae you been?  
They hae slay the Earl of Murray,  
And Lady Mondegreen.*<sup>37</sup>

Wright later discovered that what she heard as “Lady Mondegreen” was actually “laid him on the green.”<sup>38</sup> Thus was born the term mondegreen to describe this phenomenon.

Christmas carols (like the “Rudolph” example) seem especially prone to mondegreens, perhaps because they often have “seldom-heard words and phrasings and clever wordplay” and are usually sung by children.<sup>39</sup> For example, to the juvenile ear,

*See the blazing Yule before us  
Strike the harp and join the chorus*

can become

*See the blazing Yulbie forest  
Strike the heart, enjoy the florist.*<sup>40</sup>

Note, however, that mondegreens are unintentional misinterpretations of a song’s lyrics. Therefore, the classic “Jingle bells, Batman smells” ditty would be properly classified as a parody, not a mondegreen.<sup>41</sup>

### **Where to Go for Help, or How to Avoid Cutting Off Your Nose Despite Your Face<sup>42</sup>**

Malapropisms, eggcorns, mondegreens—it is enough to make the *heartiest of souls*<sup>43</sup> take to a *chaise lounge*<sup>44</sup> with the vapors.<sup>45</sup> Fortunately, there are myriad resources you can consult before you *wreck havoc*<sup>46</sup> upon the English language. *Bryson's Dictionary of Troublesome Words* provides an A to Z list of commonly confused words, as well as other advice on spelling, usage, and so forth.<sup>47</sup> It would benefit even the sharpest critic to consult *Bryson's Dictionary* before *honing in* on a perceived error in another’s writing.<sup>48</sup> Additionally, the Internet is a virtual *cachet* of blogs, lists, and rants concerning the

<sup>36</sup> E.g., Jan Freeman, *Mondegreens and Eggcorns*, BOSTONGLOBE.com, Apr. 8, 2007, [http://www.boston.com/bostonglobe/ideas/brainiac/2007/04/mondegreens\\_and.html](http://www.boston.com/bostonglobe/ideas/brainiac/2007/04/mondegreens_and.html).

<sup>37</sup> Jon Carroll, *Mondegreens*, SFGATE.com, <http://www.sfgate.com/columnists/carroll/mondegreens.shtml> (last visited Nov. 3, 2008). At this site, *San Francisco Gate* columnist Jon Carroll has a repository of columns discussing and cataloguing various mondegreens. *Id.*

<sup>38</sup> E.g., Freeman, *supra* note 36.

<sup>39</sup> Christmas Carol Mondegreens, *supra* note 33.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Another eggcorn (“cut off your nose to *spite* your face”).

<sup>43</sup> The correct term is *hardiest of souls*, but this eggcorn turns up with alarming frequency. See, e.g., Rachel Wimberly, *Chicago Hotel Strike Averted*, TRADESHOW WK., Sept. 18, 2006, available at <http://www.tradeshowweek.com/article/CA6371826.html> (“a possible strike by 7,000 hotel employees in the host city would test even the heartiest of souls”).

<sup>44</sup> The term *chaise lounge* is commonly used in American English to refer to a chair long enough to support the legs; however, it is technically an eggcorn. The actual French term is *chaise longue*, meaning “long chair.” See LE MOT JUSTE, *supra* note 1, at 64.

<sup>45</sup> Vapors: “a. mental depression or hypochondria. b. injurious exhalations formerly supposed to be produced within the body, esp. in the stomach.” WEBSTER’S, *supra* note 6, at 2105.

<sup>46</sup> The proper idiom is *wreck havoc*. “To ‘wreck’ is to inflict, to cause, to bring about. To ‘wreck’ is to ruin or destroy or dismantle.” Posting of Patricia T. O’Connor to The Grammarphobia Blog, <http://www.grammarphobia.com/blog/2008/10/old-hungarian-goulash.html> (Oct. 31, 2008).

<sup>47</sup> BRYSON, *supra* note 3. Bryson is also a prolific travel writer. See <http://www.randomhouse.com/features/billbryson/flat/about.php> (last visited Nov. 3, 2008).

<sup>48</sup> See BRYSON, *supra* note 3, at 97. “*Hone* means to sharpen . . . or, more rarely, to complain or yearn for.” *Id.* Thus, the proper idiom is *hone in on*. *Id.*

use and abuse of the English language.<sup>49</sup> For example, Professor Bruce W. Hauptli of Florida International University has compiled a list of over 200 malapropisms collected from students over the years.<sup>50</sup> Word enthusiasts who wish to *slack* their thirst for eggcorns can consult sites such as *The Eggcorn Database*, a virtual “eggcornucopia” with over 600 entries.<sup>51</sup> Yogi Berra quotes are also *ripe with* humorous eggcorns and malapropisms, such as “It’s not the heat, it’s the humility.”<sup>52</sup> Finally, the appendices further explain several commonly confused words and phrases.

### Conclusion

On a *whim and a prayer*, you have reached the conclusion, the veritable *coup d’état* of this article. Some of you have anticipated this moment with *baited breath*, while others are completely *disinterested* in the whole thing. *Irregardless* of the camp into which you fall, this article should have *spurned* you to take a new *tact* in your writing and to *insidiously* strive to avoid *desiccating* the English language. If anything, you have hopefully *gleamed* from this article some methods to *flesh out* errors in your writing and *reign* them in. I *command* to you one last bit of advice: Be *discrete* when choosing to *condone* the mistakes of those around you. Nothing is worse than a word snob with *illusions* of grandeur.<sup>53</sup>

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<sup>49</sup> The word *cache* is often mispronounced “ka shā” (as in *cachet*) instead of “kash.” *Cache* means “a hiding place, esp. one in the ground, for ammunition, food, treasures, etc.,” whereas *cachet* means “superior status; prestige.” WEBSTER’S, *supra* note 6, at 291.

<sup>50</sup> See Hauptli’s Collection of His Students’ Malapropisms, <http://www.fiu.edu/~hauptli/Malapropisms.html> (last visited Nov. 3, 2008).

<sup>51</sup> The Eggcorn Database, <http://eggcorns.lascribe.net/> (last visited Nov. 3, 2008). The proper idiom is *slake one’s thirst*. Posting of Arnold Zwicky to The Eggcorn Database, <http://eggcorns.lascribe.net/english/989/slack/> (Oct. 21, 2007).

<sup>52</sup> See, e.g., PHIL PEPE & WHITEY FORD, THE WIT AND WISDOM OF YOGI BERRA (2002). The proper idiom is *rife with*, meaning “full of, abounding in.” See Posting of Philip B. Corbett to The New York Times Topics Blog, <http://topics.blogs.nytimes.com/2008/08/31/is-it-ripe-or-rife/?pagemode=print> (Aug. 31, 2008, 19:34 EST).

<sup>53</sup> Or delusions of grammar! For an explanation of the sixteen errors in this paragraph, see Appendix B.

## Appendix A

**Attorney.** “A person with a law degree is a *lawyer*. A person who acts on behalf of another person is that person’s *attorney*.”<sup>54</sup> Thus, *attorney* is not an exact synonym for *lawyer*. A Judge Advocate might act as an *attorney* when representing an accused at a court-martial, but would not be described as an Army *attorney*. “When in doubt, use *lawyer*.”<sup>55</sup>

**Bemused.** “Martha watched the play with a *bemused* expression on her face.” This does not mean that Martha was amused or entertained; most likely, she was “confused or bewildered.”<sup>56</sup>

**Empathy, Sympathy.** *Empathy* is “the intellectual identification with or vicarious experiencing of the feelings, thoughts, or attitudes of another.”<sup>57</sup> *Sympathy* means “a general kinship with another’s feelings, no matter of what kind . . .”<sup>58</sup> The word *sympathy* is therefore broader; *empathy* implies “deep emotional understanding,” while “*sympathy* can apply to any small annoyance or setback.”<sup>59</sup>

**Enormity.** If the *enormity* of a task overwhelms you, it is not due to its size. Rather, *enormity* “refers to something that is wicked, monstrous, and outrageous . . .”<sup>60</sup> In other words, *enormity* is not a synonym for *enormousness*.

**Flout.** This word is often mistakenly replaced by *flaunt*, as in *flaunting authority*. To *flaunt* means to show off; to *flout* means to defy.<sup>61</sup>

**Imply, Infer.** “Something implied is suggested or indicated, though not expressed. Something inferred is something deduced from evidence at hand.”<sup>62</sup> In other words, a speaker might *imply* something, which the listener could then *infer* from the speaker’s words.

**Jury-rig.** Often confused as *jerry-rig*, *jury-rig* means “made in haste, with whatever materials are at hand, usually as a temporary or emergency measure . . .”<sup>63</sup>

**On tenterhooks.** This is the proper spelling of the idiom meaning “in a state of uneasy suspense or painful anxiety”;<sup>64</sup> often misspelled *on tenderhooks*.

**Torturous, tortuous.** Would a plaintiff drop a case to avoid *torturous* or *tortuous* legal proceedings? Either word may be appropriate, depending on the context. *Torturous*, derived from *torture*, primarily means “involving or causing torture or suffering.”<sup>65</sup> *Tortuous* can mean “full of twists, turns, or bends” but also may refer to something that is overly complex or devious: *a tortuous plot*.<sup>66</sup> In this example, a *torturous* legal proceeding would cause the plaintiff suffering, whereas a *tortuous* proceeding would be overly complex or circuitous.

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<sup>54</sup> WALSH, *supra* note 13, at 105.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 109. The second definition listed in *Webster’s* is “lost in thought; preoccupied.” WEBSTER’S, *supra* note 6, at 192.

<sup>57</sup> WEBSTER’S, *supra* note 6, at 638.

<sup>58</sup> *Id.* at 1927.

<sup>59</sup> BRYSON, *supra* note 3, at 68–69.

<sup>60</sup> *Id.* at 69.

<sup>61</sup> *Id.* at 79.

<sup>62</sup> WILLIAM STRUNK JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 49 (4th ed. 2000).

<sup>63</sup> BRYSON, *supra* note 3, at 113.

<sup>64</sup> WEBSTER’S, *supra* note 6, at 1957.

<sup>65</sup> *Id.* at 1999.

<sup>66</sup> *Id.*

## Appendix B

1. *On a whim and a prayer* is an eggcorn for *on a wing and a prayer*.<sup>67</sup>
2. *Coup d'état* (violent overthrow of government) should be *coup de grâce* (“grace stroke, final stroke, finishing blow”).<sup>68</sup>
3. *Baited breath* should be *bated breath*, meaning “with breath drawn in or held because of anticipation or suspense . . . .”<sup>69</sup>
4. *Disinterested* should be *uninterested*. If you are *disinterested*, that means you are “unbiased by personal interest or advantage,” not “lacking interest.”<sup>70</sup>
5. *Irregardless* is an irregular word; should be *regardless*.
6. *Spurned* (rejected) should be *spurred*, meaning driven forward as if by spurs.<sup>71</sup>
7. *Take a new tact* is an eggcorn for *take a new tack*, derived from sailing terminology.<sup>72</sup>
8. *Insidiously* (operating in a “stealthily treacherous” way) should be *assiduously* (diligently).<sup>73</sup>
9. *Desiccating* (drying out) should be *deseccating* (treating with sacrilege or profanity).<sup>74</sup>
10. *Gleamed* (shone) should be *gleaned* (learned or discovered gradually).<sup>75</sup>
11. *Flesh out* (put flesh onto, beef up) is an eggcorn for *flush out* (drive something into the open).<sup>76</sup>
12. *Reign in* should be *rein in* (restrain).<sup>77</sup>
13. *Command* should be *commend*. *To command* means to direct someone to do something, while *to commend* means to recommend.<sup>78</sup>
14. *Discrete* (distinct, unrelated) should be *discreet* (circumspect, prudent).<sup>79</sup>
15. *Condone* (forgive, overlook) should be *condemn* (strongly disapprove).<sup>80</sup>
16. *Illusions*, in this example, is a malapropism for *delusions* (false beliefs).<sup>81</sup>

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<sup>67</sup> Posting of Ben Zimmer to The Eggcorn Database, <http://eggcorns.lascribe.net/english/95/whim/> (Feb. 16, 2005).

<sup>68</sup> LE MOT JUSTE, *supra* note 1, at 67.

<sup>69</sup> WEBSTER’S, *supra* note 6, at 176.

<sup>70</sup> *Id.* at 566.

<sup>71</sup> *Id.* at 1848.

<sup>72</sup> WALSH, *supra* note 13, at 212. One of several nautical definitions of *tack* is “the heading of a sailing vessel . . . with reference to wind direction.” WEBSTER’S, *supra* note 6, at 1934. Thus, to *take a new tack* is to head in a new direction (or to take a new course of action). *Id.*

<sup>73</sup> WEBSTER’S, *supra* note 6, at 986, 124.

<sup>74</sup> *Id.* at 538–39.

<sup>75</sup> *Id.* at 811.

<sup>76</sup> Flesh Out/Flush Out, <http://www.wsu.edu/~brians/errors/flesh.html> (last visited Nov. 3, 2008).

<sup>77</sup> WEBSTER’S, *supra* note 6, at 1625.

<sup>78</sup> *Id.* at 410–11.

<sup>79</sup> See BRYSON, *supra* note 3, at 61.

<sup>80</sup> See *id.* at 45; WEBSTER’S, *supra* note 6, at 425.

<sup>81</sup> See WEBSTER’S, *supra* note 6, at 528.

## TJAGLCS Practice Note

*Tax Law Note*

### **Tax Law Note: Update for 2008 Federal Income Tax Returns**

*Major Dana J. Chase\**

There were several pieces of legislation passed in the last six months that will have an impact on properly completing and filing tax returns for military taxpayers for the 2008 filing season. Among these statutes was one specifically for servicemembers called the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act)<sup>1</sup>, which contains several sections relating to taxable income and credits for both active duty and reserve servicemembers.

Other legislation passed includes the Housing and Economic Recovery Act of 2008 (Housing Act),<sup>2</sup> providing for additional deductions and credits for home buyers and home owners, and the Emergency Economic Stabilization Act of 2008,<sup>3</sup> better known as the Bailout Bill. The Bailout Bill, while providing economic assistance to financial institutions that own troubled assets also contains several pieces of tax legislation concerning extension of deductions that expired at the end of calendar year 2007,<sup>4</sup> alternative minimum tax relief,<sup>5</sup> and disaster relief.<sup>6</sup> This note will cover key sections of each act that legal assistance attorneys should be aware of when assisting military taxpayers with federal income tax returns.

#### **HEART Act**

##### *Recovery Rebate Provided to Military Families<sup>7</sup>*

Last tax season many taxpayers were eligible for stimulus payments depending on the taxpayer's filing status and adjusted gross income under the Economic Stimulus Act of 2008.<sup>8</sup> These payments were received by the taxpayer either through electronic funds transfer or the issuance of a check from the Department of Treasury.<sup>9</sup> Those taxpayers who did not meet the filing deadline of 15 October 2008 for the Economic Stimulus Act will not receive the payment prior to the beginning of the 2008 tax filing season.<sup>10</sup> Instead, those taxpayers will be eligible for the rebate as a refundable credit on the 2008 tax return, called the recovery rebate credit.<sup>11</sup>

Generally, taxpayers receive a credit of \$300 or \$600 if filing single and \$600 or \$1,200 if filing jointly.<sup>12</sup> The amount received is determined by the taxpayer's tax liability and the taxpayer's qualifying income<sup>13</sup> of at least \$3,000.<sup>14</sup> If a taxpayer

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<sup>1</sup> Pub. L. No. 110-245, 122 Stat. 1624 [hereinafter HEART Act].

<sup>2</sup> Pub. L. No. 110-289, 122 Stat. 2654 [hereinafter Housing Act].

<sup>3</sup> Pub. L. No. 110-343, 122 Stat. 3765 [hereinafter Bailout Bill].

<sup>4</sup> *Id.* These specific Code sections can be found in the Bailout Act in Division C, and can be cited as the Tax Extenders and Alternative Minimum Tax Relief Act of 2008.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* This specific section can also be found in the Bailout Act in Division C, Title VII Disaster Relief and be cited as the Heartland Disaster Tax Relief Act of 2008.

<sup>7</sup> HEART Act, *supra* note 1, § 101.

<sup>8</sup> Pub. L. No. 110-185, 122 Stat. 613 [hereinafter Economic Stimulus Act].

<sup>9</sup> IR-200-18, Feb. 13, 2008; IR-2008-44, Mar. 17, 2008.

<sup>10</sup> IR-200-18, Feb. 13, 2008; IR-2008-44, Mar. 17, 2008.

<sup>11</sup> IR-2008-109, Sept. 23, 2008; *see also* Internal Revenue Service 2008, Form 1040, line 70.

<sup>12</sup> Economic Stimulus Act, *supra* note 8.

<sup>13</sup> Qualifying income is earned income; Social Security benefits, and veteran's payments. *Id.*

<sup>14</sup> *Id.* In tax year 2008, the statute allows taxpayers to

does not have qualifying income due to service in a combat zone and qualified hazardous duty exclusion, the taxpayer can include the amount of excluded income for purposes of determining the rebate recovery credit.<sup>15</sup>

In order for a taxpayer to be eligible for the credit, he or she must have a Social Security number issued by the Social Security Administration.<sup>16</sup> While military members are eligible taxpayers for the credit, the military member's spouse would not be if he does not have a valid Social Security number.<sup>17</sup> As a result, the spouse cannot be included in the calculation for the credit. To alleviate this hardship for military members, section 101 of the HEART Act, changed the requirement for a valid Social Security number for military members with foreign national spouses and now allows military taxpayers to use an individual tax identification number (ITIN) as valid identification for purposes of the rebate recovery credit.<sup>18</sup> Consequently, military taxpayers that received the stimulus payment, absent the additional amount for his foreign national spouse due the requirement for a valid Social Security number, can now claim the additional amount as a credit on the 2008 tax return.

#### *Election to Treat Combat Pay as Earned Income for Purposes of the Earned Income Credit*

Military pay earned in the combat zone or qualified hazardous duty area is excluded from gross income.<sup>19</sup> However, in order to qualify for the Earned Income Tax Credit, the taxpayer must have earned income to include as part of the credit calculation.<sup>20</sup> This meant that military taxpayers who served in a combat zone for the entire tax year were not eligible for this credit. To remedy this issue for the military members who would have otherwise qualified for the Earned Income Tax Credit (EIC), but for the combat zone exclusion, section 104 of the Working Families Tax Relief Act of 2004 allowed military taxpayers to include the excluded combat pay as earned income for the purposes of calculating the EIC.<sup>21</sup> This section of the Working Families Tax Relief Act of 2004 which pertains to the EIC was to expire at the end of calendar year 2007, but it has now been made permanent under section 102 of the HEART Act.<sup>22</sup> Therefore, military members from tax year 2008 forward can include otherwise excludable combat pay as earned income for the purpose of qualifying for the EIC.

#### *Treatment of Differential Pay as Wages*

When a reservist is called to active duty, some employers voluntarily continue to pay the servicemember differential pay which is pay at the same level of compensation he would have had if the servicemember had not been called to active duty.<sup>23</sup> This differential pay was normally not treated as wages for the purposes of the employer's federal income tax withholding rules because the servicemember was treated as if employment was terminated thereby eliminating the requirement of the employer to comply with the wage withholding rules.<sup>24</sup> Section 105 of the HEART Act amends the definition of wages for the purposes of the federal income tax withholding rules to include differential pay paid by an employer to an employee

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receive a basic credit (for the first taxable year beginning) in 2008 equal to the greater of the following:

Net income tax liability not to exceed \$600 (\$1,200 in the case of a joint return).

\$300 (\$600 in the case of a joint return) if: (1) the eligible individual has qualifying income of at least \$3,000; or (2) the eligible individual has a net income tax liability of at least \$1 and gross income greater than the sum of the applicable basic standard deduction amount and one personal exemption (two personal exemptions for a joint return).

Joint Committee on Taxation, *Technical Explanation of H.R. 6081, The "Heroes Earnings Assistance and Relief Tax Act of 2008," as Scheduled for Consideration by the House of Representatives on May 20, 2008* (JCX-44-08), May 20, 2008, at 2.

<sup>15</sup> *Id.*; see also Internal Revenue Serv. 2008, Form 1040 Instructions, Rebate Recovery Credit worksheet.

<sup>16</sup> Economic Stimulus Act, *supra* note 8.

<sup>17</sup> *Id.*

<sup>18</sup> HEART Act, *supra* note 1.

<sup>19</sup> I.R.C. § 112 (LexisNexis 2008).

<sup>20</sup> *Id.* § 32.

<sup>21</sup> Pub. L. No. 108-311, 118 Stat. 1166.

<sup>22</sup> HEART Act, *supra* note 1.

<sup>23</sup> I.R.C. § 3401.

<sup>24</sup> Rev. Rul. 69-136, 1969-1 C.B. 252.

called to active duty.<sup>25</sup> Accordingly, military taxpayers who receive differential pay will receive a Form W-2, Wage and Tax Statement from the civilian employer showing the differential pay as gross income with withholdings for federal income tax, Social Security, Medicare, and deferred compensation plans such as a 401(k).<sup>26</sup>

### *Treatment of Distributions to Individuals Called to Active Duty for at Least 180 Days*

Under current law, a taxpayer who receives a distribution from a qualified retirement plan prior to age 59 ½ is taxed an additional 10% on the amount that is includable in gross income.<sup>27</sup> Section 107 of the HEART Act makes permanent the amendments made to section 72(t) of the internal revenue code by the Pension Protection Act of 2006.<sup>28</sup> The Pension Protection Act of 2006 eliminated the 10% early withdrawal penalty from qualified retirement plan, such as an Individual Retirement Arrangement (IRA), 401(k) or a 403(b), by a reservist called to active duty for at least 180 days for withdrawals made between 12 September 2001 and 31 December 2007.<sup>29</sup> The Pension Protection Act also allows reservists who received distributions under this statute to re-contribute up to the same amount within two years after leaving active duty the amount distributed without regard to contribution rule limitations.<sup>30</sup> The amount re-contributed may be more than the \$5000 contribution limit in the case of an IRA and more than the \$15,500 contribution limit in the case of a 401(k). However, when the reservist re-contributes to his qualified plan to make up for the distribution, he cannot take a deduction for the contribution made under this special repayment rule.<sup>31</sup> Therefore, a reservist called to active duty for 180 days or more may now permanently make withdrawals from their retirement plans without penalty from the time they receive their orders to report up until the day they are released from active duty.<sup>32</sup>

### *Exclusion of Certain State Payments to Military Personnel*

Section 112 of the HEART Act codifies an Internal Revenue Service (IRS) Ruling and a recent memorandum of advice from the Office of Chief Counsel for the IRS (Chief Counsel Advice) concerning state payments to service members.<sup>33</sup> The IRS Ruling specifically states that bonuses paid by states to military personnel who served in enumerated armed conflicts are gifts and therefore not included in gross income.<sup>34</sup> The Chief Counsel Advice further states that refundable income tax credits from states to military members for months served in a combat zone or qualified hazardous duty area are also non-taxable gifts.<sup>35</sup> These payments are considered gifts because a gift “proceeds from a detached and disinterested generosity, and is made out of affection, respect, admiration, charity or like impulses” and not “from any moral or legal duty or from the incentive of anticipated benefit of an economic nature.”<sup>36</sup> Therefore, payments to a servicemember or surviving family member in the form of a death gratuity, tax credits, or other bonuses are gifts and not taxable gross income.

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<sup>25</sup> HEART Act, *supra* note 1. Practice note: Be aware of the Social Security withholding limit. For 2008, Social Security Taxes are withheld at a rate of 6.2% of gross income up to \$102,000. Anything over that amount is not withheld from gross income. For reserve members receiving differential pay, add up both amounts of gross income to determine if they should receive a credit for Social Security taxes withheld. See INTERNAL REVENUE SERV. PUB. 505, TAX WITHHOLDING AND ESTIMATED TAX (Feb. 2008).

<sup>26</sup> HEART Act, *supra* note 1.

<sup>27</sup> I.R.C. § 72(t).

<sup>28</sup> HEART Act, *supra* note 1.

<sup>29</sup> Pub. L. No. 109-280, § 827, 120 Stat. 780.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Pension Protection Act of 2006, Pub. L. No. 109-280, § 1201, 120 Stat. 780 [hereinafter Pension Protection Act].

<sup>33</sup> HEART Act, *supra* note 1, § 112.

<sup>34</sup> Rev. Rul. 68-158, 1968-1 C.B. 47; Chief Counsel Advice 200708003 (Feb. 23, 2007).

<sup>35</sup> Chief Counsel Advice 200708003.

<sup>36</sup> *Id.* (citing *Duberstein v. Comm’r*, 363 U.S. 278 (1960)).

## Housing Act

### *First-Time Homebuyer Credit*

Section 3011 of the Housing Act creates a new credit for first-time homebuyers applying to a purchase of a principal residence by a taxpayer on or after 9 April 2008 and before 1 July 2009.<sup>37</sup> The first-time homebuyer credit allows for a credit of an amount equal to 10% of the purchase price of the principal residence not to exceed \$7,500 for all taxpayers except those married filing separately whose credit may not exceed \$3,750.<sup>38</sup> The amount of the credit will be reduced by the percentage the modified adjusted gross income exceeds \$75,000 for single filers or \$150,000 for married filing jointly when divided by \$20,000, multiplied by the maximum credit the taxpayer could receive.<sup>39</sup> For example, if a single taxpayer purchases a home to use as his principal residence for \$200,000 and the taxpayer has a modified adjusted gross income of \$80,000, the taxpayer's credit would be \$5,625 ( $\$80,000 - \$75,000 = \$5,000$ .  $\$5,000/\$20,000 = 0.25$ .  $0.25 \times$  the maximum credit of  $\$7,500 = \$1,875$ .  $\$7,500 - \$1,875 = \$5,625$ ).<sup>40</sup>

Not every homebuyer is eligible for the credit. The first-time homebuyer credit is not allowed for taxpayer's that were allowed a credit under the District of Columbia first-time homebuyer credit;<sup>41</sup> home purchases financed by qualified mortgages that are exempt from interest under Internal Revenue Code (IRC) section 103; taxpayers who are non-resident aliens; or taxpayers who dispose of the home or the home otherwise ceases to be the principal residence before the end of the tax year.<sup>42</sup>

There are also recapture rules and other rules to be aware of. Under the recapture rules, if a first-time homebuyer credit is allowed, the taxpayer's income is increased by 6 2/3% of the amount of the credit for fifteen taxable years beginning with the second taxable year following the year the purchase is made.<sup>43</sup> For example, if a taxpayer takes the entire \$7,500 credit in 2008, beginning in 2010, and for the next fifteen years, the taxpayer must add \$500 to his tax liability by recapturing the credit ( $6 \frac{2}{3}\% \times$  the credit amount of  $\$7,500$ ).<sup>44</sup> If the taxpayer disposes of the principal residence or the home ceases to be the principal residence before the end of the fifteen year recapture period, the recapture is accelerated in that the taxpayer's income tax will be increased in the taxable year of disposition by the excess amount of the credit allowed over the recapture amounts taken in the preceding years.<sup>45</sup> This accelerated recapture, however, is not applicable if the taxpayer dies or if the home is involuntarily converted.<sup>46</sup> In the case of transfers between spouses or transfers incident to divorce, the recapture of the credit also is not accelerated, but the spouse that receives the home is then responsible for the recapture amount.<sup>47</sup>

### *Additional Standard Deduction for Real Property Taxes for Non-Itemizers*

Section 3012 of the Housing Act allows an additional standard deduction for real property taxes paid by those taxpayers who do not itemize.<sup>48</sup> The amount of the real property tax deduction is the lesser of the amount of the tax paid as an allowable deduction or \$500 for single taxpayers or \$1,000 for joint filers.<sup>49</sup> The additional deduction is taken by checking

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<sup>37</sup> Housing Act, *supra* note 2, § 3011. In the case of a taxpayer purchasing a home after 31 December 2008 and before 1 July 2009, the taxpayer may elect to treat that purchase as made on 31 December 2008 for purposes of new IRC section 36, created by the Housing Act. *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Housing Act, *supra* note 2, § 3011.

<sup>41</sup> I.R.C. § 1400C (LexisNexis 2008).

<sup>42</sup> Housing Act, *supra* note 2.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; see I.R.C. § 1033(a) (LexisNexis 2008) (regarding involuntary conversions).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



block 39a, on Internal Revenue Service Form 1040 and adding the applicable amount of real estate tax deduction to the taxpayer's standard deduction.<sup>50</sup>

### *Gain from Sale of Principal Residence Allocated to Nonqualified Use Not Excluded from Income*

The Housing Act amends section 121(b) of the IRC by not allowing the exclusion of the gain on a sale under IRC section 121(a) during periods of nonqualified use, meaning any time that the home was not used as the taxpayer's principal residence beginning for sales after 31 December 2008.<sup>51</sup> Nonqualified use does not include any portion of the five-year period that applies in IRC section 121(a); any time period, not to exceed a total of ten years, that the taxpayer or taxpayer's spouse serves on extended duty; and any other time period, not exceeding two years that the taxpayer is away from the home.<sup>52</sup> That gain during the period of nonqualified use will be allocated to those periods based under the ratio of the aggregate periods of nonqualified use during the ownership of the taxpayer over the total period of time the taxpayer owned the property.<sup>53</sup> Therefore, if a taxpayer sold a home that was their principal residence and later used the home as a rental property, the amount of the capital gain on the sale excluded could be reduced if none of the exceptions to nonqualified use apply. For example, a taxpayer bought a home in 2008 for \$200,000 and lived in it for one year and subsequently rented it out for the next six years. If the taxpayer then sold the home for \$400,000 in 2014 the taxpayer may not be able to exclude all the capital gain on the sale. Normally, taxpayers are able to exclude capital gain on the sale of a home up to \$250,000, if filing single, or \$500,000, if married filing jointly, but because the taxpayer in this example did not live in the home for two of the last five years, the taxpayer had nonqualified time. The nonqualified time reduces the exclusion by \$142,857 (5/7 multiplied by the amount of gain \$200,000 = \$142,857). Therefore, the taxpayer can only exclude \$107,143 of the amount of capital gain on the sale. This addition to IRC section 121 will not affect servicemembers as long as they meet the exceptions for nonqualified use in IRC section 121(a).

### **Mortgage Forgiveness Debt Relief Act of 2007<sup>54</sup>**

Last year on 20 December, President Bush signed the Mortgage Forgiveness Debt Relief Act of 2007, amending IRC section 108(a) allowing taxpayers to exclude from gross income discharge of indebtedness on the taxpayer's principal residence.<sup>55</sup> The act was to expire 1 January 2010, but it has been extended by the Bailout Bill to discharges of indebtedness on principal residences until 1 January 2013.<sup>56</sup> Even with the exclusion of discharge of indebtedness from gross income, taxpayers need to be aware that the discharge of indebtedness still reduces the basis the taxpayer has in the principal residence by the amount of the discharge and will affect the taxpayer at the time the principal residence is sold.<sup>57</sup>

### **Expired Provisions Extended by the Emergency Economic Stabilization Act of 2008**

Division C of the Bailout Bill, also known as the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (Extension Act), provides for the extension of tax deductions that expired on 31 December 2007.<sup>58</sup> Among those affecting military taxpayers are the deduction of state and local sales taxes,<sup>59</sup> qualified tuition and fees,<sup>60</sup> expenses for elementary and secondary school teachers,<sup>61</sup> and tax-free distributions from individual retirement arrangements.<sup>62</sup>

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<sup>50</sup> Internal Revenue Serv., Form 1040, Lines 39a and 40 (2008).

<sup>51</sup> Housing Act, *supra* note 2, § 3092 (amending I.R.C. § 121(b) by adding a new subparagraph 5).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Pub. L. No. 110-142, 121 Stat. 1809 [hereinafter Mortgage Forgiveness Act].

<sup>55</sup> *Id.*

<sup>56</sup> Emergency Economic Stabilization Act, *supra* note 8, div. A, tit. III, § 303 (Tax Provisions).

<sup>57</sup> Mortgage Forgiveness Act, *supra* note 54, § 2(h)(1).

<sup>58</sup> Pub. L. No. 110-343, 122 Stat. 3765 [hereinafter Extension Act].

<sup>59</sup> I.R.C. § 164(b)(5) (LexisNexis 2008).

<sup>60</sup> *Id.* § 222.

<sup>61</sup> *Id.* § 62(a)(2).

### *State and Local Sales Tax Deduction*

Once again in 2008, taxpayers who itemize can choose between taking a deduction for state and local sales taxes paid or state income taxes withheld.<sup>63</sup> Taxpayers can either use a standard deduction table by state or tally sales taxes paid for the year.<sup>64</sup> For those taxpayers who live in states that do not have an income tax, this would allow for an additional itemized deduction for this year's tax return. Under the Extension Act, the state and local sales tax deduction does not expire until 1 January 2010.<sup>65</sup>

### *Tuition and Fees Deduction*

The tuition and fees deduction has also been extended for tax year 2008.<sup>66</sup> A maximum deduction of \$4,000 is available to single taxpayers with an adjusted gross income of \$65,000 or less and taxpayers who are married filing jointly with adjusted gross incomes of \$130,000 or less.<sup>67</sup> Single taxpayers with an adjusted gross income of \$80,000 or less and married filing jointly taxpayers with an adjusted gross income of less than \$160,000 may take a deduction of \$2,000.<sup>68</sup> Legal assistance attorneys will need to determine whether the tuition and fees deduction or the education credit deduction are more advantageous to the taxpayer by completing the tax return twice and comparing results of the deduction versus the credit.

### *Deduction for Certain Expenses of Elementary and Secondary School Teachers*

The Extension Act also continued the \$250 deduction allowed for elementary and secondary school teachers, counselors, principals and classroom aides for expenses for the classroom for tax year 2008.<sup>69</sup> In order for the teacher, counselor, principal or classroom aide to take the \$250 deduction, the employee must work at least 900 hours and have out-of-pocket classroom expenses for items such as pens, paper, books and computer software.<sup>70</sup> For educator expenses above the \$250 deduction amount, the taxpayer should take a business deduction on IRS Form Schedule A.<sup>71</sup>

### *Tax Free Distributions from Individual Retirement Plans for Charitable Purposes*

Taxpayers can continue to exclude from gross income distributions from a traditional or Roth IRA of up to \$100,000 to a tax exempt charitable organization until 31 December 2009.<sup>72</sup> In order to take advantage of the tax free distribution, the taxpayer must have the IRA distribute the money directly to the charitable organization.<sup>73</sup> Prior to this change in the Internal Revenue Code by the Pension Protection Act of 2006, taxpayers would have to withdraw the distribution from the IRA, claim the amount withdrawn in gross income and then take the deduction for the charitable contribution on Internal Revenue

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<sup>62</sup> *Id.* § 408.

<sup>63</sup> Extension Act, *supra* note 58, div. C, § 201.

<sup>64</sup> See INTERNAL REVENUE SERV., FORM 1040 INSTRUCTIONS (2008) [hereinafter IRS FORM 1040 INSTR.].

<sup>65</sup> *Id.*

<sup>66</sup> Extension Act, *supra* note 58, div. C, § 202.

<sup>67</sup> INTERNAL REVENUE SERV., PUB. 970, TAX BENEFITS OF EDUC. (2008).

<sup>68</sup> *Id.*

<sup>69</sup> Extension Act, *supra* note 58, div. C, § 203.

<sup>70</sup> I.R.C. § 63 (LexisNexis 2008).

<sup>71</sup> See IRS FORM 1040 INSTR., *supra* note 67.

<sup>72</sup> Extension Act, *supra* note 58, § 205 (extending Pension Protection Act, *supra* note 32, § 1201, which expired 31 December 2007). Tax exempt organizations include religious organizations, federal, state and local governments, non-profit school and hospitals, Salvation Army, Red Cross, Goodwill Industries and Veteran's Groups. I.R.C. § 170. Non-deductible charitable contributions include social and sports clubs, civic leagues, labor unions, for profit organizations, foreign organizations, lobbying groups, individuals, and political organizations. *Id.*

<sup>73</sup> Pension Protection Act, *supra* note 32, § 1201.

Service Form Schedule A.<sup>74</sup> Under section 1201 of the Pension Protection Act of 2006, the direct transfer of the money from the IRA to the charitable organization there is no reporting of the money in gross income or a deduction on the Schedule A.<sup>75</sup>

### Alternative Minimum Tax Relief

#### *Extension of Alternative Minimum Tax Relief for Nonrefundable Personal Credits, Increased Alternative Minimum Tax Exemption Amount, and Increase of Refundable Credit Amount*

The Tax Increase and Prevention Act of 2007 increased the exemption amount taxpayers could have before a taxpayer would be liable for the Alternative Minimum Tax (AMT).<sup>76</sup> The Extension Act sustained the relief for nonrefundable credits and increased the AMT exemption amount for tax year 2008.<sup>77</sup> The exemption amount for tax year 2008 has increased to \$46,200 for single taxpayers and \$69,950 for married filing jointly taxpayers.<sup>78</sup> This is an increase from the tax year 2007 amounts of \$44,350 for single taxpayers and \$66,250 for married filing jointly taxpayers.<sup>79</sup> Normally, once a taxpayer comes under the exemption amounts for the alternative minimum tax, the taxpayer is no longer allowed to take nonrefundable credits such as the Child Tax Credit,<sup>80</sup> any Education Credits,<sup>81</sup> or the Child and Dependent Care Credit.<sup>82</sup> However, with the increase in the exemption amount and extension of the allowance of personal nonrefundable credits, many taxpayers who would fall under the AMT will be able to take those nonrefundable personal credits.

Finally, the amount of refundable credits for tax year 2008 for taxpayers who fall under the AMT has also increased. A refundable credit is a credit a taxpayer can receive in excess of taxes owed.<sup>83</sup> For tax year 2008, a taxpayer who is subject to the limitations of the AMT is allowed to take a refundable credit in an amount equal to the greater of 50% of the long-term unused minimum tax credit for that tax year or the amount of refundable credit amount determined for the taxpayer's prior tax year.<sup>84</sup>

### Disaster Relief

#### *Heartland Disaster Tax Relief Act of 2008*<sup>85</sup>

Congress resurrected the expired provisions of the Katrina Emergency Tax Relief Act of 2005<sup>86</sup> and the Gulf Opportunity Zone Act of 2005<sup>87</sup> for those taxpayers who were victims of the tornados, floods and storms that occurred in the Midwest this spring. The additional tax relief that is available to those taxpayers within the declared Midwestern disaster area<sup>88</sup> include: increased tax deductions for tuition and related expenses; tax-free withdrawals from retirement accounts; suspension of limitations on tax deductions for charitable contributions and personal casualty losses; tax exemptions for cancellations of indebtedness; additional tax exemption for housing displaced persons from the Midwestern disaster area; and

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Pub. L. No. 110-166, 121 Stat. 2461 [hereinafter Tax Increase and Prevention Act].

<sup>77</sup> Bailout Bill, *supra* note 3.

<sup>78</sup> *Id.* div. C, § 102.

<sup>79</sup> Tax Increase and Prevention Act, *supra* note 76.

<sup>80</sup> I.R.C. § 24 (LexisNexis 2008).

<sup>81</sup> *Id.* § 25A.

<sup>82</sup> *Id.* § 21.

<sup>83</sup> INTERNAL REVENUE SERV., PUB. 17, YOUR FEDERAL INCOME TAX (2008).

<sup>84</sup> Bailout Bill, *supra* note 3, div. C, § 103.

<sup>85</sup> *Id.* div. C, tit. VII, § 701 (Disaster Relief).

<sup>86</sup> Pub. L. No. 109-73, 119 Stat. 2016 [hereinafter Katrina Emergency Tax Relief Act].

<sup>87</sup> Pub. L. No. 109-135, 119 Stat. 2577 [hereinafter Gulf Opportunity Zone Act].

<sup>88</sup> The Midwestern disaster area is the presidentially-declared natural disaster areas in the states of Arkansas, Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, and Wisconsin on or after 20 May 2008, and before 1 August 2008. Bailout Bill, *supra* note 3, § 702(b).

an increase in the standard mileage rate for the charitable use of personal vehicles for volunteer use in the Midwestern disaster area.<sup>89</sup>

Taxpayers who attended a qualified educational institution in the Midwestern disaster area for taxable years 2008 and 2009 will be able to take twice the amount in effect currently for the Hope Education and Lifetime Learning credits.<sup>90</sup> Therefore, a student in the Midwestern disaster area could receive a maximum of \$4,800 in Hope Education credit and 40% or \$4,000 for the Lifetime Learning credit.

Victims of the Midwestern disaster area will also be able to take a distribution of up to \$100,000 from their retirement plans without incurring the 10% penalty with withdrawal before age 59 1/2.<sup>91</sup> A qualified Disaster Recovery Assistance distribution is one taken by a person who sustained economic loss by reason of the Midwestern flooding and storm damage and whose principal residence is located in the Midwestern disaster area.<sup>92</sup> The distribution from the retirement plan must be taken on or after the applicable disaster date and five months after the enactment of the Heartland Disaster Tax Relief Act of 2008 which was included in the Bailout Bill.<sup>93</sup> Any amount taken as a qualified Disaster Recovery Assistance distribution requiring inclusion in gross income will be included ratably over the three-taxable-year period beginning with the taxable year of the distribution.<sup>94</sup> Furthermore, taxpayers who receive a qualified Disaster Recovery Assistance distribution may re-contribute all or part of the distribution amount to his or her retirement plan at any time during a three-year period after the date of distribution.<sup>95</sup>

Next, the limitations on charitable contribution tax deductions have been suspended to those taxpayers that contribute to charitable organizations that provided relief to the Midwestern disaster area.<sup>96</sup> Generally, charitable contributions for taxpayers are limited to a maximum of 50% of a taxpayer's adjusted gross income.<sup>97</sup> Under the Heartland Disaster Tax Relief Act of 2008, taxpayers can take 100% of qualified charitable deductions up to the amount of the taxpayer's adjusted gross income over the amount of all other charitable contributions allowed under IRC section 170(b)(1).<sup>98</sup>

Along with the suspended limitations on charitable contributions, the limits on personal casualty losses have also been suspended for those individuals who are part of the Midwestern disaster area.<sup>99</sup> Personal casualty losses are normally reduced by \$100 for each casualty loss, with the total amount of casualty losses again reduced by 10% of the taxpayer's adjusted gross income for that tax year.<sup>100</sup> These reductions to casualty losses can be disregarded for victims in the Midwestern disaster area.<sup>101</sup>

Taxpayer's in the Midwestern disaster area also have exclusions on cancellations of indebtedness.<sup>102</sup> Gross income includes debts that the taxpayer is absolved from paying and must be accounted for.<sup>103</sup> The Heartland Disaster Tax Relief Act of 2008 states that gross income will not include any amount of income which would normally be includable in gross income by reason of the discharge of indebtedness of a person whose principal place of abode was in the Midwestern disaster

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<sup>89</sup> *Id.* § 702, 122 Stat. 3765.

<sup>90</sup> *Id.* (citing Gulf Opportunity Zone Act, *supra* note 87, § 1400O).

<sup>91</sup> *Id.* (referring to I.R.C. § 72(t) (LexisNexis 2008)).

<sup>92</sup> *Id.* (citing Gulf Opportunity Zone Act, *supra* note 87, § 1400Q).

<sup>93</sup> *Id.* The Bailout Bill was signed by the President on 3 October 2008, consequently, the last date distributions can be taken is 3 March 2009.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (citing Gulf Opportunity Zone Act, *supra* note 87, § 1400S).

<sup>97</sup> I.R.C. § 170(b) (LexisNexis 2008).

<sup>98</sup> Bailout Bill, *supra* note 3, § 702 (citing Gulf Opportunity Zone Act, *supra* note 87, § 1400S).

<sup>99</sup> *Id.*

<sup>100</sup> I.R.C. § 165(h).

<sup>101</sup> Bailout Bill, *supra* note 3, § 702 (citing Gulf Opportunity Zone Act, *supra* note 87, § 1400S).

<sup>102</sup> *Id.* (citing Katrina Emergency Tax Relief Act, *supra* note 86, § 401).

<sup>103</sup> I.R.C. § 61(a)(12).

area.<sup>104</sup> The exclusion of discharges of indebtedness for these individuals will apply from the applicable disaster date until 1 January 2010.<sup>105</sup>

For 2008 and 2009, those taxpayers who house a Midwestern disaster area displaced person may claim an additional exemption of \$500 for each displaced person.<sup>106</sup> A displaced person is a natural person whose principal place of abode on the applicable disaster date was in the Midwestern disaster area, and the person was displaced from that home because of evacuation or damage to the residence.<sup>107</sup> The taxpayer claiming the exemption must have provided the displaced person with housing free of charge in the taxpayer's principal residence for a period of sixty consecutive days within the tax year.<sup>108</sup> The total amount of the exemptions claimed under this section cannot exceed \$2,000, and the taxpayer may not have used the displaced person as an exemption in any prior tax year.<sup>109</sup>

Finally, for purposes of computing charitable deductions of mileage for the charitable use of vehicles, the Heartland Disaster Relief Tax Act of 2008, the standard mileage rate for vehicles used for Midwestern disaster area relief will be 70% of the standard mileage rate in effect under IRC section 162(a) at the time of use.<sup>110</sup> The valid dates for this amount of charitable deduction are from the applicable disaster date to 31 December 2008.<sup>111</sup> For tax year 2008, the standard mileage rate from 1 January 2008 to 30 June 2008 is 50.5 cents a mile, with an increase to 58.5 cents a mile from 1 July 2008 to 31 December 2008.<sup>112</sup>

#### *Rules for All Declared Disaster Areas*

Section 706 of the Heartland Disaster Tax Relief Act of 2008 applies to all federally declared disaster areas, which would include the area concerning Hurricane Ike.<sup>113</sup> This section allows for the waiver of adjusted gross income limitations for losses in federally declared disaster areas, as well as an increase in the standard deduction by the amount of disaster casualty loss.<sup>114</sup> The waiver of adjusted gross income limitations for losses allow the taxpayer to claim the sum of an individual's net disaster loss (total personal casualty losses over personal casualty gains) plus any excess net disaster losses that exceed 10% of the taxpayer's adjusted gross income, rather than being limited by the normal casualty loss rules.<sup>115</sup> The additional standard deduction allows the taxpayer to add to his or her normal standard deduction the amount of the net disaster loss.<sup>116</sup>

### **Other Changes in Income, Deductions and Credits for 2008**

#### *Income—Unearned Income for Minors*

Income earned by investments and interest on bank accounts by children is unearned income and unearned income by children under the age of nineteen or twenty-four, if a full-time student, is subject to the "kiddie tax" starting in tax year 2008.<sup>117</sup> As of 1 January 2008 children under the age of nineteen or twenty-four, if a full-time student, receive the first \$900

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<sup>104</sup> Bailout Bill, *supra* note 3, § 702 (citing Katrina Emergency Tax Relief Act, *supra* note 86, § 401).

<sup>105</sup> *Id.*; see *supra* note 88 (providing the applicable disaster dates).

<sup>106</sup> *Id.* (citing Katrina Emergency Tax Relief Act, *supra* note 86, § 302).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (citing Katrina Emergency Tax Relief Act, *supra* note 86, § 303).

<sup>111</sup> *Id.*

<sup>112</sup> I.R.C. § 162(a) (LexisNexis 2008).

<sup>113</sup> Bailout Bill, *supra* note 3, § 706.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> I.R.C. § 1(g); Rev. Proc. 2007-66.

of unearned income tax free.<sup>118</sup> The second \$900 is taxed at the “kiddie tax” rate of 15% and anything over \$1,800 is taxed at the parent’s marginal rate.<sup>119</sup>

### *Deductions*

The adjusted gross income phase out amounts for the maximum student loan interest deduction of \$2,500 of interest paid on qualified student loans has increased for 2008. For single taxpayers the maximum deduction begins to phase out at \$55,000 and is completely phased out at an adjusted gross income of \$70,000.<sup>120</sup> The maximum deduction phase out amounts for those filing married filing jointly start at \$115,000 and the deduction is completely phased out at more than \$145,000.<sup>121</sup>

### *Credits*

For tax year 2008 there are several changes to credits. First, the adoption credit for tax year 2008 has increased and the maximum amount allowed for an adoption credit is \$11,650.<sup>122</sup> The available adoption credit begins to phase out for taxpayers with an adjusted gross income in excess of \$174,730 and is completely phased out for taxpayers with an adjusted gross income of \$214,730 or more.<sup>123</sup> Taxpayers would be eligible for this credit for unreimbursed expenses in adopting a child in the current tax year for expenses incurred the previous tax year or in the current tax year if the adoption was completed before the end of the current year.<sup>124</sup>

Next, the additional child tax credit has also increased. Taxpayer’s are eligible for the additional child tax credit if the taxpayer is unable to claim the full amount of the child tax credit.<sup>125</sup> For taxable years beginning in 2008, the value used to determine the amount of credit that may be refundable is \$12,050.<sup>126</sup> However, the Extension Act reduced this value to \$8,500.<sup>127</sup>

Third, the Hope Education and Lifetime Learning credits are two separate education credits available to taxpayers and their dependents.<sup>128</sup> The Hope Scholarship Credit is authorized for money spent on qualified tuition and related expenses during the first two years of a student’s post-secondary education.<sup>129</sup> For tax year 2008, the maximum amount of the credit is \$1,800; this is an amount equal to 100% of qualified expenses in excess of \$1,200 and 50% of qualified expenses in excess of \$1,200, but not more than \$2,400.<sup>130</sup> The Lifetime Learning Credit is a credit of 20% of qualified education costs up to \$10,000 for a maximum of \$2,000.<sup>131</sup> These credits begin to phase out at adjusted gross income of \$48,000 for single taxpayers and \$96,000 for married filing jointly taxpayers.<sup>132</sup>

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<sup>118</sup> Rev. Proc. 2007-66.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> INTERNAL REVENUE SERV., PUB. 17, YOUR FEDERAL INCOME TAX (2008).

<sup>125</sup> INTERNAL REVENUE SERV., PUB. 979, CHILD TAX CREDIT (2008).

<sup>126</sup> *Id.*

<sup>127</sup> Bailout Bill, *supra* note 3, div. C, § 706.

<sup>128</sup> I.R.C. § 25A (LexisNexis 2008).

<sup>129</sup> *Id.* § 25A(f).

<sup>130</sup> Rev. Proc. 2007-66.

<sup>131</sup> I.R.C. § 25A.

<sup>132</sup> Rev. Proc. 2007-66.

Finally, the maximum amount a taxpayer can earn before being phased out of the EIC for 2008 is \$38,646 if the taxpayer has more than one qualifying child and is a head of household filer and \$41,646 if the taxpayer is married filing jointly.<sup>133</sup> If the taxpayer has one qualifying child the taxpayer must earn less than \$33,995 if filing head of household and \$36,995 if filing married filing jointly.<sup>134</sup> Finally, if the taxpayer does not have a qualifying child, the taxpayer must earn less than \$12,880 if filing single and \$15,880 if married filing jointly.<sup>135</sup> For 2008, the amount of the earned income credit has increased to \$4,824 if the taxpayer has more than one qualifying child, \$2,917 if the taxpayer has one qualifying child and \$438 if the taxpayer does not have a qualifying child.<sup>136</sup>

### **Conclusion**

The legislative changes to the tax code for the year 2008 are wide ranging. The portions of recent acts referred to in this update are those that will most likely have an effect on the proper completion of military tax returns. This should help ensure the best results for our clients. Hope you have a good tax season.

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

## Appendix

The tax rates for 2008 are: 10%, 15%, 25%, 28%, 33%, and 35%.<sup>137</sup>

### Tax Tables

#### 1. Married Individuals Filing Joint Returns and Surviving Spouses:

<u>Taxable Income Is</u>	<u>The Tax Is</u>
Not over \$16,050	10% of the taxable income
Over \$16,050 but not more than \$65,100	\$1,605 + 15% of the excess over \$16,050
Over \$65,100 but not more than \$131,450	\$8,962.50 + 25% of the excess over \$65,100
Over \$131,450 but not more than \$200,300	\$25,550 + 28% of the excess over \$131,450
Over \$200,300 but not more than \$357,700	\$44,828 + 33% of the excess over \$200,300
Over 357,700	\$96,770 + 35% of the excess over \$357,700

#### 2. Unmarried Individuals (Other than Surviving Spouses and Heads of Households):

<u>Taxable Income Is</u>	<u>The Tax Is</u>
Not over \$8,025	10% of the taxable income
Over \$8,025 but not more than \$32,550	\$802.50 + 15% of the excess over \$8,025
Over \$32,550 but not more than \$78,850	\$4,481.25 + 25% of the excess over \$32,550
Over \$78,850 but not more than \$164,550	\$16,056.25 + 28% of the excess over \$78,850
Over \$164,550 but not more than \$357,700	\$40,052.25 + 33% of the excess over \$164,550
Over 357,700	\$103,791.75 + 35% of the excess over \$357,700

#### 3. Heads of Households:

<u>Taxable Income Is</u>	<u>The Tax Is</u>
Not over \$11,450	10% of the taxable income
Over \$11,450 but not more than \$43,650	\$1,145 + 15% of the excess over \$11,450
Over \$43,650 but not more than \$112,650	\$5,975 + 25% of the excess over \$43,650
Over \$112,650 but not more than \$182,400	\$23,225 + 28% of the excess over \$112,650
Over \$182,400 but not more than \$357,700	\$42,755 + 33% of the excess over \$182,400
Over \$357,700	\$103,791.25 + 35% of the excess over \$357,700

#### 4. Married Individuals Filing Separate Returns:

<u>Taxable Income Is</u>	<u>The Tax Is</u>
Not over \$8,025	10% of the taxable income
Over \$8,025 but not more than \$32,550	\$802.50 + 15% of the excess over \$8,025
Over \$32,550 but not more than \$65,725	\$4,481.25 + 25% of the excess over \$32,550
Over \$65,725 but not more than \$100,150	\$12,775 + 28% of the excess over \$65,725
Over \$100,150 but not more than \$178,850	\$22,414 + 33% of the excess over \$100,150
Over \$178,850	\$48,385 + 35% of the excess over \$178,850

The 2008 Standard Deduction amounts are:

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<sup>137</sup> *Id.*



1. Married filing jointly or qualifying widow(er) — \$10,900
2. Single — \$5,450
3. Head of household — \$8,000
4. Married filing separately — \$5,450<sup>138</sup>

Reduction of Itemized Deductions. (IRC § 68) Otherwise allowable deductions are reduced if the AGI in 2008 exceeds:

1. Married filing separately — \$79,975
2. All other returns — \$159,950.<sup>139</sup>

The amount of the 2008 Personal Exemption is \$3,500.

2008 Phase Out Amounts for personal exemptions under IRC § 151(d)(3) are:

<u>Taxpayer</u>	<u>Begins After</u>	<u>Fully Phased Out*</u>
Married filing jointly	\$239,950	\$362,450
Single	\$159,950	\$282,450
Heads of household	\$199,950	\$322,450
Married filing separately	\$119,975	\$181,225

\* Phase out occurs at a rate of 2% for each \$2,500 or part of \$2,500 (\$1,250 in both cases for married filing separately) by which the taxpayer's adjusted gross income exceeds the "Begins After" amount. The exemption amount for taxpayers which adjusted gross income in excess of the maximum phase out amount is \$2,333.

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

# GREEN WARRIORS: ARMY ENVIRONMENTAL CONSIDERATIONS FOR CONTINGENCY OPERATIONS FROM PLANNING THROUGH POST-CONFLICT<sup>1</sup>

REVIEWED BY MAJOR JAMES A. BARKEI<sup>2</sup>

“We are in the desert. What does it matter?”<sup>3</sup> We are just passing through and don’t have the time.”<sup>4</sup> “The locals don’t care, so why should we?”<sup>5</sup> We are “replenishing the oil wells.”<sup>6</sup> These phrases, uttered by U.S. Soldiers in Iraq referring to dumping both solid and hazardous waste without following appropriate disposal procedures, demonstrate that the Army has not fully embraced an environmental ethic in its contingency operations. In 1992, the Army committed itself to a twenty-first century strategy regarding the environment—to instill an environmental ethic across the Army’s operational spectrum.<sup>7</sup> According to the RAND study in *Green Warriors*, sixteen years later the Army still has not effectively infused environmental considerations into the planning and execution of contingency operations.<sup>8</sup>

A summary of the analysis within the RAND study would look eerily similar to the 1970 Earth Day poster with the quote “[w]e have met the enemy and it is us.”<sup>9</sup> A reference to the enemy not only refers to both the adverse effects of military operations upon the environment and the ineffectiveness of the armed forces to promote environmentally beneficial projects, but it also refers to the Army as individuals because of the willingness to “reinvent the wheel” and a failure to apply the lessons learned from past operations. Unfortunately, the Army continues marching toward the philosophic axiom of “[t]hose who cannot remember the past are condemned to repeat it”<sup>10</sup> with respect to environmental issues during deployments.<sup>11</sup>

While *Green Warriors* covers environmental considerations from planning through post-conflict, one primary purpose for the timing of this article is that a failure to address environmental matters now during this period within Iraq and Afghanistan will result in an even longer term presence necessitated by both the environmental remediation projects as well as the slow building support of the local populace when they suffer from poor environmental stewardship on the part of the foreign military presence within those nations. The other primary approach of this article focuses on informing and invigorating Judge Advocates (JA) as they develop a key role in environmental contingency planning, execution, risk alleviation, and issue resolution during every phase of the operation. Judge Advocates and Army leaders can easily glean the primary lesson from *Green Warriors*—to achieve mission success, the Army must address both the environmental effects of military operations as well as improve the existing poor environmental quality and infrastructure of the developing nations in which we conduct operations. Beyond the useful operational analysis of *Green Warriors*, JAs, particularly those comprising the operational law section, brigade legal counsel, claims attorneys, and contract specialists, should use this book to develop

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<sup>1</sup> DAVID E. MOSHER ET AL., *GREEN WARRIORS: ARMY ENVIRONMENTAL CONSIDERATIONS FOR CONTINGENCY OPERATIONS FROM PLANNING THROUGH POST-CONFLICT* (2008). The Army Environmental Policy Institute requested the RAND Corporation to examine environmental issues during Army operations, resulting in this publication by the RAND Arroyo Center. *Id.*

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<sup>3</sup> MOSHER ET AL., *supra* note 1, at 103.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 202 (referencing U.S. Soldiers dumping petroleum, oil, and lubricants (POL) in an uncontrolled and environmentally unsafe manner).

<sup>7</sup> U.S. DEP’T OF ARMY, *UNITED STATES ARMY ENVIRONMENTAL STRATEGY INTO THE 21ST CENTURY* (1992). The Army has since issued another strategy for the environment, “Sustain the Mission – Secure the Future” on 1 October 2004.

<sup>8</sup> MOSHER ET AL., *supra* note 1, at 121. The study states:

Although environmental considerations are integral to the Army’s ability to meet national objectives and desired end states in contingency operations, they are often underrepresented in the competition for attention, investments, and manpower. Balancing environmental considerations with other factors that contribute to mission success is a constant undertaking and requires better awareness, training, information, doctrine, and guidelines.

*Id.*

<sup>9</sup> MRS. WALT KELLY, *THE BEST OF POGO* 224 (Selby Kelly & Bill Crouch Jr. eds., 1982) (containing Walt Kelly’s comic strip “Pogo”).

<sup>10</sup> 1 GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 284 (Scribner’s ed. 1905–1906).

<sup>11</sup> See MOSHER ET AL., *supra* note 1, at 113 (expressing Army staff and engineers dismay that the Army continues to experience the same environmental mistakes in Iraq and Afghanistan that it had in the Balkans).

their legal acumen prior to deployment. In fact, the study calls upon JAs as contributors to environmental considerations specifically in issue spotting, training, and contract formation and review.<sup>12</sup> The bottom line remains that environmental law is part of the core discipline of JA legal practice.<sup>13</sup>

Owners of keen insight into the legal basis for action coupled with application and problem-solving skills, commanders utilize JAs as the trusted advisors to provide the full spectrum of options and outcomes of a mission along with its likelihood of success. This is essentially the skill and value of a lawyer. Yet, imperative in the approach of sage advisor during a contingency operation exists an all-too-often overlooked mission analysis of environmental considerations. Judge Advocates possess unique access to influence and inject environmental considerations into contingency operations, from development and review of an operations plan or order, to direct participation as a member of the special staff, Fires and Effects Coordination Cell, Information Operations Working Group, Targeting Cell, contract reviewers, claims processors, and the invaluable reputation as the commander's honest broker.<sup>14</sup> *Green Warriors* highlights the challenge to JAs to eliminate the apathetic approach of commanders and Soldiers toward the environment during deployments, and to cultivate the environmental ethic demanded by the Army's own enumerated strategy.<sup>15</sup>

Neither the RAND study nor this short discussion intends to remold JAs as engineers, civil affairs officers,<sup>16</sup> or environmental program specialists. However, our core value to the Army and its mission to wage the nation's wars and protect its interests abroad requires us to bear a more prominent role in resolving the mission impairing results of environmental contamination and destruction that continually arise despite the Army's own experiences. Emphasizing that environmental challenges and JA responsibilities did not originate in Afghanistan and Iraq, more than a decade ago then-Major Richard M. Whitaker wrote in this very publication that JAs bring a unique skill set with five imperatives to a contingency operation with respect to environmental considerations: determine the applicable sources of law; master those sources of law; provide counsel to commanders instilling an understanding of that law; execute the commander's decision, and maintain awareness of the environmental issues throughout the operation.<sup>17</sup> These five imperatives for a JA form an inextricable link to the findings, recommendations, and insights of the RAND study in *Green Warriors*.

Completely void of any "shock and awe," the RAND study's seven major findings are: environmental issues can have a significant impact on operations; environmental considerations can be important for post-conflict success; contingency environmental operations differ from domestic issues; environmental effects have far-reaching impacts across operations, Army organizations, and the world; inadequate attention equals increases to cost, health risks, liabilities, and diplomatic relations; the Army needs to improve its understanding and incorporation of environmental considerations into plans and operations, and the Army has no comprehensive approach to environmental considerations, particularly post-conflict.<sup>18</sup> Six recommendations follow the seven principles: improve policy and guidance; encourage an environmental ethic; incorporate

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<sup>12</sup> *Id.* at 137–40.

<sup>13</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS viii (1 Mar. 2000) (containing the extensive list of JA responsibilities in chapter 3).

<sup>14</sup> *See id.*

<sup>15</sup> *See* U.S. DEP'T OF ARMY, SUSTAIN THE MISSION. SECURE THE FUTURE. THE ARMY STRATEGY FOR THE ENVIRONMENT (2004).

<sup>16</sup> Civil affairs operations form a link between the commander's objectives and civilian populace, and according to the RAND study, environmental considerations will form a critical piece of the commander-civilian populace interaction. The civil affairs mission is defined as:

Civil-military operations involve the interaction of military forces with the civilian populace to facilitate military operations and consolidate operational objectives. A supportive civilian population can provide resources and information that facilitate friendly operations. It can also provide a positive climate for the military and diplomatic activity a nation pursues to achieve foreign policy objectives. A hostile civilian population threatens the immediate operations of deployed friendly forces and can often undermine public support at home for the policy objectives of the United States and its allies. When executed properly, civil-military operations can reduce friction between the civilian population and the military force.

U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40 (FM 41-10), CIVIL AFFAIRS OPERATIONS 1-1 (Sept. 2006).

<sup>17</sup> Major Richard M. Whitaker, *Environmental Aspects of Overseas Operations: An Update*, ARMY LAW., July 1997, at 17, 17–18. "The critical job for deployed judge advocates is determining which international laws, domestic statutes, Department of Defense directives, service regulations, and host nation laws and policies and which do not." Major Karen V. Fair, *Environmental Compliance in Contingency Operations: In Search of a Standard?*, 157 MIL. L. REV. 112, 116 (1998). "[There is a] discretionary environmental stewardship program where the level of environmental planning and execution is often driven by the military mission and the accompanying public affairs threat level." *Id.* at 142. Some of this still holds true today, but added to the public affairs threat level are the counterinsurgency planning considerations.

<sup>18</sup> MOSHER ET AL., *supra* note 1, at xvii.

environmental considerations into planning; improve pre-deployment training; invest in resources and good field operations, and follow a “sustainability” model for operations.<sup>19</sup> The final summarized piece of the RAND study results in nine insights from its analysis: environmental considerations have a broad range of far-reaching impacts; the Army is involved in many diverse reconstruction activities with environmental components; insufficient resources are available to fully address environmental issues; contractors must be carefully selected and managed; collaboration with stakeholders is beneficial and critical; proactive environmental practices and lessons in some parts of the Army are not being transferred to other parts; country-specific conditions and needs should be considered; short-and long-term considerations need to be balanced, and environmental problems may contribute to problems of insurgency.<sup>20</sup> Utilizing a synthesis of the study’s findings, recommendations, and insights, a review of some of the common environmental challenges in a contingency operation will show that a JA has the ability to directly impact the planning, application, and potential resolution of environmental issues in many of these areas.

Although the health of the fighting force is a priority environmental consideration from the beginning and throughout any contingency operation,<sup>21</sup> neither *Green Warriors* nor this review posit that the environment stands perched atop of the mission priority ladder, particularly in light of force protection, security,<sup>22</sup> kinetic missions, and overall strategic objectives. Legal analysis rooted in both international law and domestic policies may support this prioritization.<sup>23</sup> Nevertheless, environmental considerations have a place in all of these mission analyses, and should climb significantly higher on the ladder as the operation matures toward the post-conflict phase.<sup>24</sup> The precept for the rising priority extends beyond the standard eco interests of social good and the welfare of the planet—those should be embedded in our inherent morality and global duties—more so for the Army, environmental considerations are coded within our operational imperatives to protect the health of Soldiers, enhance mission accomplishment, and promote national policy objectives through improvement, or at least maintenance, of environmental quality within the host nation.<sup>25</sup> Significant environmental standards, safeguards, and initiatives permeate the post-conflict stability reconstruction and nation building phases, and part of winning hearts and minds of a host nation populace certainly involves environmental quality.<sup>26</sup>

Critical information necessary to capture hearts and minds, the RAND study polled Iraqi citizens regarding their environmental concerns. Rebuilding the nation’s infrastructure took second only to security.<sup>27</sup> Within the category of infrastructure, provision of electricity, safe drinking water, and disposal of sewage and waste formed the three major pillars of Iraqi priorities.<sup>28</sup> Evidence of the importance of environmental considerations during post-conflict phases could not be

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<sup>19</sup> *Id.* at 131.

<sup>20</sup> *Id.* at 95.

<sup>21</sup> Environmental Health Site Assessments are conducted to determine whether contaminants exist on site of an area such as a base camp or within the resources used by Soldiers, but this only targets Soldiers’ health, and not the environmental quality of the host nation. *See id.* at 5, 73; JOINT CHIEFS OF STAFF, JOINT PUB. 3-0 III-29, JOINT OPERATIONS (3 Feb. 2008) [hereinafter JOINT PUB. 3-0]. Additionally, the DoD has an obligation to protect the occupational health of its employees. *See* U.S. DEP’T OF DEFENSE, INSTR. 6055.1, DOD SAFETY AND OCCUPATIONAL HEALTH (SOH) PROGRAM (19 Aug. 1998).

<sup>22</sup> Storing hazardous waste at FOBs creates an environmental force protection/security risk. *See* MOSHER ET AL., *supra* note 1, at 200.

<sup>23</sup> *See generally* INT’L AND OPERATIONAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2008) [hereinafter OPERATIONAL LAW HANDBOOK].

<sup>24</sup> *See generally* JOINT PUB. 3-0, *supra* note 21, at III-32-33, IV-15 (force protection).

<sup>25</sup> *See* MOSHER ET AL., *supra* note 1, at 5. Neither Iraq nor Afghanistan has the infrastructure or financial stability necessary to address the environmental quality programs of a modern, developed nation; therefore, the United States will be expected to provide the expertise, materials, and funding through its federal agencies and Armed Forces to bring these environmental quality programs to fruition. This translates into “diplomatic liabilities” as we think of issues such as human rights and global climate change. The Army becomes the guarantor of some fundamental human rights by participating in the establishment of environmental quality infrastructure and ethic. Additionally, potential sources of pollution and contamination that originate in states in which we operate garner attention of the international community because of the potential to affect international water sources and air quality involving things like greenhouse gas emissions. The quality of infrastructure and programs the Army helps install are subject to the scrutiny of other nations, thereby creating the “diplomatic liability.” *See id.* at 7, 23.

<sup>26</sup> *Id.* at 2; *see also* U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 5-20 (15 Dec. 2006). There is also an argument that environmental consciousness permeates members of the U.S. military as well: U.S. Soldiers in Albania believed dumping waste in a local river was a violation of U.S. policies and environmental ethics. MOSHER ET AL., *supra* note 1, at 96.

<sup>27</sup> MOSHER ET AL., *supra* note 1, at 174.

<sup>28</sup> *Id.* The RAND study also polled Iraqis specifically within the category of environmental concerns, and clean water is a priority, followed by sewage and wastewater treatment and disposal, and clean air. *Id.* at 63.

more clear and convincing.<sup>29</sup> Without the benefit of a poll of local residents either during the pre-conflict planning phase or the initial operations, JAs and Army leaders face the challenge of anticipating the environmental conditions they will eventually encounter in the post-conflict stage. Three factors generally contribute to degraded environmental conditions within a nation enveloped in armed conflict: a lack of host nation laws and regulations; natural resources pressures to include over population, deforestation, industry, resource extraction, and unsustainable agriculture, and war and political instability both at present and in the past.<sup>30</sup> Armed with solid assumptions, JAs can first influence environmental considerations in the development of operational plans.<sup>31</sup>

One of the Army's environmental objectives during post-conflict contingency operations is to return base camps to the host nation or appropriate authority in the same condition as when we first utilized them.<sup>32</sup> Unfortunately, structural, infrastructure, and landscape changes make this difficult or impossible.<sup>33</sup> Compounding the obstacle of irreversible changes to the environmental condition of a base camp, the Army often fails to conduct an adequate, if any, environmental baseline survey (EBS) of the area before use to determine its environmental condition prior to occupation.<sup>34</sup> A lack of planning prior to envision the eventual return of the property to its owner amid the hectic conditions under which the Army may establish a base camp results from an absence of either a standard operating procedure or curriculum at an Army school on how to conduct an EBS.<sup>35</sup> This highlighted deficiency within *Green Warriors* underscores the recommendation for incorporation of environmental considerations in guidance and training during the planning phase in order to affect the post-conflict phase.<sup>36</sup> Judge Advocates should take a professional interest in EBS results in considering our potential for liabilities and claims, not only within the Army, but on behalf of the Government of the United States.

Liabilities may arise from host nation residents filing claims for damage to natural resources, water resources, contamination, and possibly the long-term health or medical effects of our use of a base camp or other property supporting noncombat activities.<sup>37</sup> The Foreign Claims Act opens the financial liability vault to compensate foreign citizens for personal injury, death, or property damage caused by the Army's noncombat operations.<sup>38</sup> For example, contamination from a fuel spill at a base camp's makeshift motorpool would be compensable for the landowner if it was not otherwise contained and remediated to a satisfactory condition. Another potential liability percolates when Soldiers are exposed to environmental hazards at the base camp or even during operations "outside the wire."<sup>39</sup> Open burn pit fumes, encamping in the vicinity of an industry that emits toxins, exposure to and handling of hazardous munitions and waste, and contaminated drinking and bathing water all threaten not only the current mission, but germinate long-term liability exposure considering medical treatment and the welfare of the fighting force.<sup>40</sup> One solution proposed by the RAND study is a change to funding for

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<sup>29</sup> Appendix B is structured to identify the most important issues facing the Iraqi population and the results are security followed by infrastructure, which contains two elements of what may be considered environmental issues: electricity and clean water. *See id.* at 174, 189. Waste treatment and disposal along with air quality also made the list. *Id.* This appendix targets the "hearts and minds" aspect of counterinsurgency operations, and it is evident that the environment is a priority. *Id.* One example cited is a unit had removed several date palm trees to conduct an ambush, thereby upsetting the local populace because of the removal of a valued natural resource. It is possible that the unit could have developed an alternative to successfully conduct the ambush without removing the trees. *Id.* at 199.

<sup>30</sup> *Id.* at 59–60. Host nation laws are generally non-existent or degraded to the point of not being able to enforce the requirements. *Id.* at 4.

<sup>31</sup> For example, Annex L of a standard operational plan. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-34, JOINT ENGINEER OPERATIONS (12 Feb. 2007) [hereinafter JOINT PUB. 3-34]; *see also* MOSHER ET AL., *supra* note 1, at 68–69.

<sup>32</sup> MOSHER ET AL., *supra* note 1, at 74.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 72. Joint Pub. 3-34 advises to conduct EBS whenever possible. JOINT PUB. 3-34, *supra* note 31. One operational experience that would have benefitted from a complete EBS exists in Afghanistan where U.S. troops occupied an airplane hangar built and used by the Soviet Union. After using space heaters, POL in the cracks and beams began to vaporize and the noxious fumes caused numerous respiratory illnesses. MOSHER ET AL., *supra* note 1, at 104.

<sup>35</sup> MOSHER ET AL., *supra* note 1, at 19, 72 (but some doctrinal guidance does exist).

<sup>36</sup> *Id.* at 131. There is a lack of emphasis in doctrine on training and leadership when it comes to environmental stewardship, and this results in a lack of success. *Id.* at 4.

<sup>37</sup> *Id.* at 8.

<sup>38</sup> Foreign Claims Act, 10 U.S.C. §§ 2734–2736 (2000).

<sup>39</sup> MOSHER ET AL., *supra* note 1, at 8.

<sup>40</sup> *Id.* A look at historical Soldier exposure would include Agent Orange during the Vietnam War and Gulf War illness contracted as a result of the first Gulf War in 1990-91. *Id.*; *see also* DINA RASOR, & ROBERT BAUMAN, BETRAYING OUR TROOPS: THE DESTRUCTIVE RESULTS OF PRIVATIZING WAR 145–56

temporary and enduring base camps.<sup>41</sup> Enduring base camps receive more funding and can incorporate better environmental infrastructure and management practices; however, temporary bases are the first to close and return to the property owner.<sup>42</sup> Clean up of the temporary sites will take a greater priority due to the immediacy factor, and if these sites endure greater environmental degradation, potential liabilities and costs will increase. Providing fiscal advice to commanders, influencing the operational priorities of expenditures, and forecasting liabilities signify a crucial avenue of JA involvement in limiting the Army's environmental liabilities.

Outside base camps, additional liabilities manifest themselves through both Soldier and contractor negligence along with straightforward criminal conduct. The RAND study documented Soldiers dumping hazardous waste and failing to contain or clean up releases of pollutants.<sup>43</sup> The RAND study collected evidence of contractors dumping hazardous waste on the side of the road and selling the empty drums on the open market, extending potential liability beyond the Army's own actions.<sup>44</sup> Contractor environmental degradation equals clean up costs borne by the Army coupled with the likelihood of paying another contractor to do it.<sup>45</sup> Dating back to the conflict in Bosnia, the Army did not have a good handle on contractor operations with respect to environmental quality.<sup>46</sup> The Balkans experiences underscore the finding of the RAND study that the Army failed to incorporate its lessons learned into its operations in Iraq and Afghanistan regarding contractor oversight.<sup>47</sup> The RAND study states quite clearly that "research indicates that environmental considerations are not being addressed sufficiently at any step in the contracting process."<sup>48</sup> Herein lies another area for JAs, as contract reviewers, to ensure that both the contents of the contract delineate appropriate environmental considerations as well as adequate oversight and management procedures to ensure that the Army does not undertake or become exposed to unnecessary additional liabilities.<sup>49</sup>

Another foundational cause for the lack of environmental consideration during operations is that civilian employees occupy the vast majority of installation environmental management positions.<sup>50</sup> Civilian employees generally do not participate in contingency operation planning,<sup>51</sup> and correspondingly the civilian employees do not participate in the operation itself. Therefore, the Army must make up for this lack of input, leading to the U.S. military reliance on contractors for environmental operations.<sup>52</sup> Potential liabilities abound in this practice due to security risks, lack of input, inadequate control, unreliability, deficient oversight, and cost.<sup>53</sup> The Army's inability to utilize or rely upon an installation support

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(2007). The authors highlight that a contractor in Iraq failed to chlorinate the water used by Marines at a base camp thereby exposing them to a serious risk of illness. *Id.*

<sup>41</sup> MOSHER ET AL., *supra* note 1, at 117.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 74, 193 (stating that U.S. troops purged tankers to save travel time, letting them drip during travel by removing the plug).

<sup>44</sup> *Id.* at 7–8, 193, 202.

<sup>45</sup> Additional resources may also be required to recoup the costs from the offending contractor, if that contractor could be located or collected from, both precursors being difficult within states engaged in a conflict within its borders.

<sup>46</sup> U.S. GEN. ACCOUNTING OFFICE, CONTINGENCY OPERATIONS: OPPORTUNITIES TO IMPROVE THE LOGISTICS CIVIL AUGMENTATION PROGRAM, REP. NO. GAO/NSIAD-97-63 (1997).

<sup>47</sup> MOSHER ET AL., *supra* note 1, at 95. Some of the lack of incorporating past lessons learned is the result of minimal funding and focus on research and development, in addition to a failure to review our history. *Id.* at 13.

<sup>48</sup> *Id.* at 107 (the reasons are: issues are not spelled out in the contract (need a better Statement of Work); there is a lack of oversight, and reuse/recycling is rarely implemented). Applying personal experience, JAs who have deployed can think about single use water bottles and the recycling of those items. If the Army implemented an effective recycling program or changed the logistical supply system to a multiple use water bottle, what would the waste reduction be?

<sup>49</sup> See Fair, *supra* note 17, at 158–59 (“[T]he legal advisor must have sufficient training and experience to assess environmental contract performance and associated costs . . .”).

<sup>50</sup> MOSHER ET AL., *supra* note 1, at 66.

<sup>51</sup> Reasons for rejecting civilian participation include security classification, job description, and a lack of participation in the operation.

<sup>52</sup> Environmental officer appointment is often an extra duty, or a junior officer or noncommissioned officer with a lack of formal training, or at least only a partial focus due to other mission requirements. MOSHER ET AL., *supra* note 1, at 104.

<sup>53</sup> See generally RASOR & BAUMAN, *supra* note 40 (examining the pitfalls of using contractors in a deployed environment).

structure in a deployed setting jeopardizes the environment.<sup>54</sup> This manifests itself as a judge advocate challenge because much of the Army Judge Advocate General's (JAG) Corps expertise in environmental law emanates from its civilian attorneys. Judge Advocates should adopt the practice of soliciting civilian counsel input regarding environmental considerations, and familiarizing themselves with environmental issues through consultation with this critically important resource. The JAG Corps may be well served by assigning some environmental counsel duties to JAs to develop the appropriate knowledge base to be applied during an operation.

While environmental degradation stories may sell for the popular media, positive and beneficial environmental examples exist throughout current operations. First, Army engineers are restoring the wetlands of the Mesopotamian Marshland in Iraq to improve water quality, species continuation, and promote sustainable irrigation practices.<sup>55</sup> The marshlands project promotes the RAND study's insights of incorporating stakeholders' interests and chipping away at the foundation of an insurgency. Environmentally beneficial projects alter the perception of a disgruntled population who are at risk of forming or supporting an insurgency. The marshlands project also reduces the risk of diplomatic liabilities because the geographic importance of the marshlands includes waterflow to neighboring states and wildlife diversity and migration.<sup>56</sup> Other environmentally supportive projects in Iraq and Afghanistan include: recycling wood from pallets and other items resulting in less waste and the potential of conducting sales since it is a valuable commodity in developing nations; recycling blackwater into greywater; converting waste to energy by incineration, and washrack water recycling.<sup>57</sup> All of these technologies exist, they are just not implemented across the Army because more research and development is required and there is a lack of presence in doctrine and training.<sup>58</sup>

Returning to *Green Warriors* and JA practice, Appendix A appears dedicated to the counsel of a JA under the title of "Domestic and International Law in Army Contingency Operations."<sup>59</sup> Regrettably, the appendix accomplishes little more than restating the contents of Chapter 20, Environmental Law, of the *Operational Law Handbook*.<sup>60</sup> Two areas upon which the appendix does touch that JA should take note of are its curt explanations of potential Military Extraterritorial Jurisdiction Act (MEJA) application and jurisdiction of the International Criminal Court and the Rome Statute.<sup>61</sup> These two criminal jurisdiction schemes generally do not associate well with Army environmental operations during a contingency; however, a JA must integrate these potential exposures into any complete legal analysis should serious environmental consequences result from Army activities.

*Green Warriors'* stated goal is to "assess whether existing policy, doctrine, and guidance adequately address environmental considerations in post-conflict military operations and, increasingly, in reconstruction,"<sup>62</sup> and the bottom line finding is that it does not. The resulting recommendations and insights demonstrate that the ad hoc approach to environmental considerations exposes Army failures from start to finish.<sup>63</sup> Considering the signed pact between the United

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<sup>54</sup> The Army needs to integrate environmental doctrine and training into field exercises. Training for field operations faces several challenges: there is a lack of appreciation for environmental stewardship while conducting field training exercises because the Army is focused on the military operation mission; field training is unrealistic because the National Training Center and Joint Readiness Training Center provide environmental support infrastructure such as waste collection and treatment as well as water so that units can focus on the battle missions rather than an environmental distraction (things that the unit will have to provide for themselves in a deployed setting); units do not face the pre-existing environmental challenges within the host nation such as a lack of infrastructure or potable water, and units don't take ownership of environmental issues—it's accomplish the task at hand and move on. MOSHER ET AL., *supra* note 1, at 76.

<sup>55</sup> *Id.* at 9, 88.

<sup>56</sup> *Id.* at 100.

<sup>57</sup> *Id.* at 113. The study reveals other positive examples: establishing water filtration systems for communities, a one-stop waste area for disposal, treatment and recycling making it easier for users; runway repair to alleviate dust contamination and mission disruption from brownouts, and oil well protection and repair thereby reducing both ground and air pollution. *Id.* at 193–214.

<sup>58</sup> *Id.* at 113–14.

<sup>59</sup> *Id.* app. A.

<sup>60</sup> OPERATIONAL LAW HANDBOOK, *supra* note 23.

<sup>61</sup> MOSHER ET AL., *supra* note 1, at 151–52, 162. While the United States is not a party to the Rome Statute, this does not necessarily create an impenetrable bar to a foreign state or the court itself from attempting to assert its jurisdiction regarding the conduct of a U.S. Soldier.

<sup>62</sup> *Id.* at 13.

<sup>63</sup> *Id.* at 25.

States and Iraq stating that all troops will be withdrawn by the end of 2011,<sup>64</sup> the Army's focus on the environmental conditions to support transition and withdrawal must come center stage.<sup>65</sup> Failure to address the military's impacts upon Iraq's resources and the citizens' concerns may jeopardize the security situation and withdrawal, invite international criticism, and expose the United States to exponential liabilities. Judge Advocates play a crucial role in formulating plans and responses to environmental challenges throughout an operation,<sup>66</sup> with emphasis on the post-conflict phase. The opportunity for the United States as a whole, and JAs in particular, to establish a foundation for environmental resource enhancement and sustainability within Iraq (and Afghanistan) is at hand. This soon-to-be-written success story only requires that the Army embrace an environmental ethic and implement an environmental consciousness throughout its spectrum of operations.

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<sup>64</sup> Peter Graff, *Iraq, US Sign Pact on Troops Withdrawal Deadline*, REUTERS, Nov. 17, 2008, <http://www.reuters.com/article/vcCandidateFeed7/idUSLH492272>.

<sup>65</sup> The same may be true of Afghanistan, although no date certain for an end to operations has been established, and Afghanistan has a less developed infrastructure than Iraq.

<sup>66</sup> Additional challenges presented within the study that JA will encounter include the effects of the Basel Convention that will restrict the movement of hazardous waste (Afghanistan is a signatory, Kuwait has ratified, and Iraq and the United States are not a parties to the Convention). MOSHER ET AL., *supra* note 1, at 22. A past, current, and future challenge is the effectiveness of cleaning equipment to the point of preventing invasive species from entering the United States or other countries pursuant to Executive Order 13112. *Id.* at 30, 33. Reversing the invasive species protection mechanisms, the Army should adopt a strategy to prevent Soldiers from introducing invasive species into the operational environment to prevent future liabilities (e.g., a Soldier plants seeds either sent through the mail or upon return from leave). *Id.* at 204.



## CLE News

### 1. Resident Course Quotas

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

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

### 2. TJAGLCS CLE Course Schedule (2008 - September 2008) (<http://www.jagcnet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
<b>GENERAL</b>		
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	177th JAOBC/BOLC III (Ph 2)	7 Nov 08 – 4 Feb 09
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	205th Senior Officer Legal Orientation Course	26 – 30 Jan 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F3	15th RC General Officer Legal Orientation	11 – 13 Mar 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09

5F-F55	2009 JAOAC (Ph 2)	5 – 16 Jan 09
5F-F58	27D Command Paralegal Course	2 – 6 Feb 09
600-BNCOC	2d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	3d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	12 – 29 May 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 30 Sep 09
<b>WARRANT OFFICER COURSES</b>		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
7A-270A3	9th Senior Warrant Officer Symposium	2 – 6 Feb 09
<b>ENLISTED COURSES</b>		
512-27D/20/30	20th Law for Paralegal NCO Course	23 – 27 Mar 09
512-27D-BCT	11th BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	15 – 19 Jun 09
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	10th Redictation Course	5 – 16 Jan 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09
<b>ADMINISTRATIVE AND CIVIL LAW</b>		
5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09

5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F28P	2009 PACOM Tax CLE	6 – 9 Jan 09
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
<b>CONTRACT AND FISCAL LAW</b>		
5F-F10	161st Contract Attorneys Course	23 Feb – 3 Mar 09
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-F13	5th Operational Contracting Course	4 – 6 Mar 09
5F-F14	27th Comptrollers Accreditation Fiscal Law Course	13 – 16 Jan 09
5F-F15E	2009 USAREUR Contract/Fiscal Law Course	2 – 6 Feb 09
5F-DL12	3rd Distance Learning Fiscal Law Course	19 – 22 May 09
<b>CRIMINAL LAW</b>		
5F-F301	12th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	31st Criminal Law Advocacy Course	2 – 13 Feb 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F35E	2009 USAREUR Criminal Law CLE	12 – 16 Jan 09
<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F47	51st Operational Law of War Course	23 Feb – 6 Mar 09
5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	27 Apr – 1 May 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

### 3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

<b>Naval Justice School Newport, RI</b>		
<b>CDP</b>	<b>Course Title</b>	<b>Dates</b>
0257	Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	26 Jan – 27 Mar 09 26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (020) (Newport) Senior Officer (030) (Newport) Senior Officer (040) (Newport) Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	26 – 30 Jan 09 (Newport) 9 – 13 Mar 09 (Newport) 4 – 8 May 09 (Newport) 15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Office (Fleet) (020) Senior Office (Fleet) (030) Senior Office (Fleet) (040) Senior Office (Fleet) (050) Senior Office (Fleet) (060) Senior Office (Fleet) (070) Senior Office (Fleet) (080) Senior Office (Fleet) (090) Senior Office (Fleet) (100) Senior Office (Fleet) (110)	12 – 16 Jan 09 (Pensacola) 2 – 6 Mar 09 (Pensacola) 23 – 27 Mar 09 (Pensacola) 27 Apr – 1 May 09 (Pensacola) 27 Apr – 1 May 09 (Naples, Italy) 8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico) 22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (030) BOLT (030) BOLT (040) BOLT (040)	30 Mar – 3 Apr 09 (USMC) 30 Mar – 3 Apr 09 (USN) 27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	14 – 15 Feb 09 (Yokosuka) 27 – 28 Apr 09 (Naples, Italy)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (010) SJA Legalman (020)	23 Feb – 6 Mar 09 (San Diego) 11 – 22 May 09 (Norfolk)
627S	Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080)	12 – 14 Jan 09 (Mayport) 2 – 4 Feb 09 (Okinawa) 9 – 11 Feb 09 (Yokosuka) 17 – 19 Feb 09 (Norfolk) 17 – 19 Mar 09 (San Diego) 23 – 25 Mar 09 (Norfolk)

	Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	13 – 15 Apr 09 (Bremerton) 27 – 29 Apr 09 (Naples) 26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	11 – 15 May 09 (Okinawa, Japan) 18 – 22 May 09 (Pearl Harbor) 14 – 18 Sep 09 (San Diego)
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	23 – 27 Mar 09 20 – 24 Apr 09
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
961J	Defending Complex Cases (010)	11 – 15 May 09
961M	Effective Courtroom Communications (020)	6 – 10 Apr 09 (San Diego)
525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (020) Legalman Accession Course (030)	12 Jan – 27 Mar 09 11 May – 24 Jul 09
049N	Reserve Legalman Course (Ph I) (010)	6 – 17 Apr 09
056L	Reserve Legalman Course (Ph II) (010)	20 Apr – 1 May 09
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)
5764	LN/Legal Specialist Mid-Career Course (020)	4 – 15 May 09
7485	Classified Info Litigation Course (010)	5 – 7 May 09 (Andrews AFB)
7487	Family Law/Consumer Law (010)	6 – 10 Apr 09
7878	Legal Assistance Paralegal Course (010)	6 – 11 Apr 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09

NA	Legal Specialist Course (020) Legal Specialist Course (030) Legal Specialist Course (040)	5 Jan – 5 Mar 09 30 Mar – 29 May 09 26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (020) Speech Recognition Court Reporter (030)	5 Jan – 3 Apr 09 25 Aug – 31 Oct 09
<b>Naval Justice School Detachment Norfolk, VA</b>		
0376	Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	26 Jan – 13 Feb 09 2 – 20 Mar 09 30 Mar – 17 Apr 09 27 Apr – 15 May 09 1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070))	26 Jan – 6 Feb 09 2 – 13 Mar 09 20 Apr – 1 May 09 13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	12 – 16 Jan 09 23 – 27 Feb 09 23 – 27 Mar 09 18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09
<b>Naval Justice School Detachment San Diego, CA</b>		
947H	Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	5 – 23 Jan 09 23 Feb – 13 Mar 09 4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	5 – 16 Jan 09 30 Mar – 10 Apr 09 4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	2 – 6 Feb 09 (Okinawa) 9 – 13 Feb 09 (Yokosuka) 30 Mar – 3 Apr 09 (San Diego) 13 – 17 Apr 09 (Bremerton) 27 Apr – 1 May 09 (San Diego) 1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)

#### 4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

<b>Air Force Judge Advocate General School, Maxwell AFB, AL</b>	
<b>Course Title</b>	<b>Dates</b>
Trial & Defense Advocacy Course, Class 09-A	5 – 16 Jan 09
Paralegal Apprentice Course, Class 09-02	6 Jan – 19 Feb 09
Air National Guard Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Air Force Reserve Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Advanced Trial Advocacy Course, Class 09-A	26 – 30 Jan 09
Interservice Military Judges Seminar, Class 09-A	27 – 30 Jan 09
Pacific Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	2 – 5 Feb 09
Homeland Defense/Homeland Security Course, Class 09-A	2 – 6 Feb 09
Legal & Administrative Investigations Course, Class 09-A	9 – 13 Feb 09
European Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	17 – 20 Feb 09
Judge Advocate Staff Officer Course, Class 09-B	17 Feb – 17 Apr 09
Paralegal Craftsman Course, Class 09-02	24 Feb – 1 Apr 09
Paralegal Apprentice Course, Class 09-03	3 Mar – 14 Apr 09
Area Defense Counsel Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Defense Paralegal Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Environmental Law Course, Class 09-A	20 – 24 Apr 09
Military Justice Administration Course, Class 09-A	27 Apr – 1 May 09
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Reserve Forces Judge Advocate Course, Class 09-B	2 – 3 May 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09
Operations Law Course, Class 09-A	11 – 21 May 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09

Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

## 5. Civilian-Sponsored CLE Courses

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

- AAJE: American Academy of Judicial Education  
P.O. Box 728  
University, MS 38677-0728  
(662) 915-1225
- ABA: American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611  
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation  
Arizona Attorney General's Office  
ATTN: Jan Dyer  
1275 West Washington  
Phoenix, AZ 85007  
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association  
Committee on Continuing Professional Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS or (215) 243-1600
- APRI: American Prosecutors Research Institute  
99 Canal Center Plaza, Suite 510  
Alexandria, VA 22313  
(703) 549-9222
- ASLM: American Society of Law and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990



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

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

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

ESI: Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3202  
(703) 379-2900

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

FB: Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(850) 561-5600

GICLE: The Institute of Continuing Legal Education  
P.O. Box 1885  
Athens, GA 30603  
(706) 369-5664

GII: Government Institutes, Inc.  
966 Hungerford Drive, Suite 24  
Rockville, MD 20850  
(301) 251-9250

GWU: Government Contracts Program  
The George Washington University  
National Law Center  
2020 K Street, NW, Room 2107  
Washington, DC 20052  
(202) 994-5272

IICLE: Illinois Institute for CLE  
2395 W. Jefferson Street  
Springfield, IL 62702  
(217) 787-2080

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

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

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

NCDA: National College of District Attorneys  
University of South Carolina  
1600 Hampton Street, Suite 414  
Columbia, SC 29208  
(803) 705-5095

NDAA: National District Attorneys Association  
National Advocacy Center  
1620 Pendleton Street  
Columbia, SC 29201  
(703) 549-9222

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

NJC: National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557

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

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

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

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

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

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

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

**VCLE:** University of Virginia School of Law  
Trial Advocacy Institute  
P.O. Box 4468  
Charlottesville, VA 22905

## **6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2010**

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) requirements is ***NLT 2400, 1 November 2009***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2010. This requirement includes submission of all writing exercises

This requirement is particularly critical for some officers. The 2010 JAOAC will be held in January 2010, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2009). If the student receives notice of the need to re-do any examination or exercise after 1 October 2009, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2009 will not be cleared to attend the 2010 JAOAC resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail [jeffrey.sexton@hqda.army.mil](mailto:jeffrey.sexton@hqda.army.mil)

## **7. Mandatory Continuing Legal Education**

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at [www.clereg.org](http://www.clereg.org) (formerly [www.cleusa.org](http://www.cleusa.org)) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General’s Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students.

Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

## Current Materials of Interest

### 1. The Judge Advocate General's Fiscal Year 2009 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATRRS Number	POC
24-25 Jan 09	Northwest	Piggott Aud., Seattle U. School of Law, 901 12th Ave. Seattle, WA 98122-1090	6th LSO 87th LSO	Course: JAO-1 Class: 001	LTC Roger Cartwright roger.c.cartwright@us.army.mil, roger.c.cartwright@gmail.com
6-8 Feb 09	Southeast	Westin Hotel, Atlanta Airport 4736 Best Road Atlanta, Georgia 30337	213th LSO 12th LSO 174th LSO	Course: JAO-1 Class: 002	SFC Renee Herndon (404) 286 - 3283 renee.angel.herndon@us.army.mil
20-22 Feb 09	Northeast	John Jay College 445 W 59th Street NY, NY 10019	4th LSO 7th LSO 3d LSO	Course: JAO-1 Class: 004	SFC Tammy Shiffer 718-324-1625 tammy.shiffer@usar.army.mil
6-8 Mar 09	NCR	Ft. Belvoir Officer's Club (Bldg. 20) 5500 Schulz Rd. Ft. Belvoir, VA 22060	151st LSO 10th LSO 153d LSO	Course: JAO-1 Class: 005	MAJ Mark Vetter (703) 870-1024 mark.vetter@yahoo.com SSG Waskewich (703) 960-7393, ext. 7420 michael.waskewich@usar.army.mil
13-15 Mar 09	Western	Sheraton Carlsbad Resort & Spa 5480 Grand Pacific Drive Carlsbad, CA 92008	78th LSO 75th LSO 87th LSO	Course: JAO-1 Class: 003	Ms. Antonia Roman, 714 229 3701; antonia.roman@usar.army.mil SFC Willie Watkins 714 229 3703; willie.watkins@usar.army.mil
3-5 Apr 09	Midwest	Cincinnati, OH	9th LSO 91LSO 139th LSO	Course: JAO-1 Class: 006	CPT Steve Goodin (910) 396-7014 (office) Steven.Goodin@us.army.mil SSG Williams 614-692-7593 adrian.m.williams@usar.army.mil
17-19 Apr 09	Heartland	New Orleans, LA	8th LSO 1st LSO 2d LSO 214th LSO	Course: JAO-1 Class: 007	MSG Larry Barker larry.r.barker@us.army.mil SSG Dale Herman 816.836.0005 x2156 dale.herman@usar.army.mil
19-25 Apr 09	Southeast Functional Exercise	Ft. Jackson, SC	7th LSO (Lead) 12th LSO 174th LSO (Support)	TBD	TBD
15-19 Jun 09	Midwest Functional Exercise	Ft. McCoy, WI	7th LSO	TBD	TBD

## 2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available Through the Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to Judge Advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the DTIC. An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to [reghelp@dtic.mil](mailto:reghelp@dtic.mil).

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at [www.dtic.mil/dtic/current.html](http://www.dtic.mil/dtic/current.html).

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to [bcorders@dtic.mil](mailto:bcorders@dtic.mil).

<b>Contract Law</b>		<b>Legal Assistance</b>	
AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.	A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95.	AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A265777	Fiscal Law Course Deskbook, JA-506-93.	AD A326002	Wills Guide, JA-262 (1997).
		AD A346757	Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

#### **Administrative and Civil Law**

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

#### **Labor Law**

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

#### **Criminal Law**

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

#### **International and Operational Law**

AD A377522 Operational Law Handbook, JA-422 (2005).

\* Indicates new publication or revised edition.

\*\* Indicates new publication or revised edition pending inclusion in the DTIC database.

### **3. The Legal Automation Army-Wide Systems XXI—JAGCNet**

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

#### **b. Access to the JAGCNet:**

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army

JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at [LAAWSXXI@jagc-smtp.army.mil](mailto:LAAWSXXI@jagc-smtp.army.mil).

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

#### 4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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**Author Index**

**-A-**

Asael, Captain Gal, *The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada*, July 2008, at 1.

Ayers, Major Robert W., *Clarifying the Article 138 Complaint Process*, Apr. 2008, at 25.

**-B-**

Bagwell, Lieutenant Colonel Randall, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, Apr. 2008, at 5.

Bradley, Major (U.S. Army Retired) Patricia C. Bradley, *Affirmative Action or Passive Participation in Perpetuating Discrimination? The Future of Race-Based Preferences in Government Contracting*, Feb. 2008, at 24.

Brown, Major Christopher R., *Been There, Doing That in a Tile 32 Status: As It Relates to Today's Military*, May 2008, at 23.

Brown, Major William E., *Whistleblower Protection for Military Members*, Dec. 2008, at 58.

**-C-**

Chase, Major Dana J. & Major Daniel J. Sennott, *State Survivor Benefits: An Overview*, Dec. 2008, at 25.

Chase, Major Dana J., *Survivor Benefits Update*, Dec. 2008, at 26.

Ching, Major Anne B., *For All "Intensive" Purposes: A Primer on Malapropisms, Eggcorns, and Other Rogue Elements of the English Language*, Dec. 2008, at 66.

Clemens, Commander Peter J., *Sharing the Wealth—Coast Guard Law Enforcement Information Valuable to the National Intelligence Effort or How the Coast Guard Defeats the Wall*, July 2008, at 59.

Connally, Major Rebecca K., *"Out of the Mouth[s] of Babes": Can Young Children Even Bear Testimony?*, Mar. 2008, at 1.

Coombs, Major David Edward, *Pass Go, Collect \$200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military Justice and the Defense's Right to a Government-Funded Expert*, June 2008, at 28.

Cummings, Honorable Anthony W., *The Mixed-Case Dilemma in Federal Sector Employment Appeals*, Apr. 2008, at 17.

**-D-**

DiMeglio, Major Richard, *In Memoriam: Corporal Coty James Phelps*, Apr. 2008, at 1.

Doucetperry, Major Maria, *To Be Continued: A Look at Posthumous Reproduction As It Relates to Today's Military*, May 2008, at 1.

Dowdy, Major Kirsten M., *Article 119a: Does It Protect Pregnant Women or Target Them?*, Sept. 2008, at 1.

**-E-**

Edell, Major Lawrence A., *A Reasonable Expectation of Privacy: Is a Government E-mail Account the Equivalent of a Wall Locker in a Barracks Rooms?*, Nov. 2008, at 1.

**-F-**

Faculty, Contract and Fiscal Law Department, TJAGSA, *Contract and Fiscal Law Developments of 2007—The Year in Review*, Jan. 2008, at 1.

Frost, Major John S., *New Developments in Child Support: Enforcement of Foreign Orders Under the 2001 Amendments in the Uniform Interstate Family Support Act*, Dec. 2008, at 15.

Furin, Major Timothy Austin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, Oct. 2008, at 1.

**-G-**

Gohl, Lieutenant Colonel John, *Acquisition Planning in the United States Army Reserve*, Feb. 2008, at 1.

Gordon, Captain Jason M., *Legal Assistance: The John Warner National Defense Authorization Act for Fiscal Year 2007 and Protecting Soldiers Against Predatory Lending*, Apr. 2008, at 30.

Grant, Captain Patrick B., *Extraordinary Relief: A Primer for Trial Practitioners*, Nov. 2008, at 30.

**-H-**

Harvey, Major Elizabeth A., *Sentencing Credit for Pretrial Restriction*, Oct. 2008, at 27.

Hawks, Lieutenant Colonel Kwasi L., *Professional Responsibility on the Edge*, June 2008, at 93.

Hoege, Major Howard H. III, *Flying Without a Net: United States v. Medina & Its Implications for Article 134 Practice*, June 2008, at 37.

**-J-**

Jackson, Dick, *Cultural Property Protection in Stability Operations*, Oct. 2008, at 47.

Johnson, Major John C., USAF, *The Iraqi High Tribunal and the Regime Crimes Liaison's Office*, July 2008, at 36.

Johnson, Lieutenant Colonel Mark L., *Unlawful Command Influence—Still with Us; Perspectives of the Chair in the Continuing Struggle Against the “Mortal Enemy” of Military Justice*, June 2008, at 104.

Johnson, Lieutenant Colonel Mark L., *Foreword*, June 2008, at 1.

**-K-**

Kanabrocki, Major Michael L., *Revising United States v. Allen: Applying Civilian Pretrial Confinement Credit for Unrelated Offenses Against Court-Martial Sentences to Post-Trial Confinement Under 18 U.S.C. § 3585(b)(2)*, Aug. 2008, at 1.

Kohn, Major Maureen A., *Military Sentencing 101—Back to the Basics*, June 2008, at 70.

Korsak, Lieutenant Commander Theron R., *The Service-Disabled Veteran-Owned Small Business in the Federal Marketplace*, July 2008, at 45.

Krul, Captain Katherine A., *The Sexual Assault Prevention and Response (SAPR) Program—in Need of More Prevention*, Nov. 2008, at 41.

**-L-**

Lancaster, Lieutenant Colonel Nicholas F., *If It Walks Like a Duck, and Talks Like a Duck, and Looks Like a Duck, then It's Probably Testimonial: Recent Developments in Sixth Amendment Confrontation Law*, June 2008, at 16.

**-M-**

Mackey, Major Joseph B., *Reclaiming the In-Service Conscientious Objection Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection*, Aug. 2008, at 31.

McGovern, Major Kelly L., *Military Members Posing in Sexually Explicit Pictures*, Mar. 2008, at 22.

Merutka, Lieutenant Colonel Craig E., *Street FOIA 101: Nuts, Bolts, and Loose Change*, Dec. 2008, at 49.

Mitchem, Lieutenant Colonel Suzanne, *Foreword: Administrative Law Is Not for Sissies!*, Dec. 2008, at 1.

**-N-**

Newman, Major Michael, Major Jack Jakubiak, & Major Blaine Markuson, *Successful Criminal Prosecution of a Landlord Under the Servicemembers Civil Relief Act*, Sept. 2008, at 45.

**-O-**

O'Brien, Lieutenant Colonel Edward J. & Lieutenant Colonel Timothy Grammel *Annual Review of Developments in Instructions—2007*, June 2008, at 113.

**-P-**

Pflaum, Major Patrick D., *More Than Just Implied Bias . . . : The Year in Pleas and Pretrial Agreements, Article 32, and Voir Dire and Challenges*, June 2008, at 50.

Puleo, Colonel Louis J., USMC, *Bulletproof Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal*, Aug. 2008, at 53.

Puleo, Colonel Louis J., USMC, *Implied Bias: A Suggested Disciplined Methodology*, Mar. 2008, at 34.

**-R-**

Ranieri, Major Steven M., *“If at First You Don't Succeed . . .”: An Argument Giving Federal Agencies the Ability to Challenge Adverse Equal Employment Opportunity Commission Decisions in Federal Court*, Sept. 2008, at 23.

-S-

Sennott, Major Daniel J., *Families First and the Personnel Claims Act*, Dec. 2008, at 44.

Sexton, Lieutenant Colonel Jeffrey P. & Jonathan Brent, *Child Custody and Deployments: The States Step in to Fill the SCRA Gap*, Dec. 2008, at 9.

Sexton, Lieutenant Colonel Jeffrey P., *Limitations on the Wearing of the Uniform by Members of the Armed Services at Non-Military Events*, Mar. 2008, at 28.

Stewart, Lieutenant Colonel Stephen R., USMC, *Practicing What the Court Preaches—2007 New Developments in Fourth Amendment Search and Seizure Law*, June 2008, at 2.

-T-

Thurnher, Major Jeffrey S., *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, July 2008, at 64.

-V-

Varley, Lieutenant Colonel James L., *The Lion Who Squeaked: How the Moreno Decision Hasn't Changed the World and Other Post-Trial News*, June 2008, at 80.

Vitaris, Richard W., *Navigating an Enforced Leave Appeal*, Feb. 2008, at 42.

## Subject Index

### ARTICLE 46

*Pass Go, Collect \$200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military Justice and the Defense's Right to a Government-Funded Expert*, Major David Edward Coombs, June 2008, at 28.

### ARTICLE 119A

*Article 119a: Does It Protect Pregnant Women or Target Them?*, Major Kirsten M. Dowdy, Sept. 2008, at 1.

### ARTICLE 138

Ayers, Major Robert W., *Clarifying the Article 138 Complaint Process*, Apr. 2008, at 35.

-C-

### CHILD SUPPORT

*New Developments in Child Support: Enforcement of Foreign Orders under the 2001 Amendments in the Uniform Interstate Family Support Act*, Major John S. Frost, Dec. 2008, at 15.

### CLAIMS

*Families First and the Personnel Claims Act*, Major Daniel J. Sennott, Dec. 2008, at 44.

### CONTRACT AND FISCAL LAW

*Acquisition Planning in the United States Army Reserve*, Lieutenant Colonel John Gohl, Feb. 2008, at 1.

*Affirmative Action or Passive Participation in Perpetuating Discrimination? The Future of Race-Based Preferences in Government Contracting*, Major (U.S. Army Retired) Patricia C. Bradley, Feb. 2008, at 24.

*Contract and Fiscal Law Developments of 2007—The Year in Review*, Faculty, Contract and Fiscal Law Department, Jan. 2008, at 1.

### CRIMINAL LAW

*Annual Review of Developments in Instructions—2007*, Lieutenant Colonel Edward J. O'Brien & Lieutenant Colonel Timothy Grammel, June 2008, at 113.

*Bulletproof Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal*, Colonel Louis J. Puelo, USMC, Aug. 2008, at 53.

*Extraordinary Relief: A Primer for Trial Practitioners*, Captain Patrick B. Grant, Nov. 2008, at 30.

*Flying Without a Net: United States v. Medina & Its Implications for Article 134 Practice*, Major Howard H. Hoege III, June 2008, at 37.

*Foreword*, Lieutenant Colonel Mark L. Johnson, June 2008, at 1.

*If It Walks Like a Duck, and Talks Like a Duck, and Looks Like a Duck, then It's Probably Testimonial: Recent Developments in Sixth Amendment Confrontation Law*, Lieutenant Colonel Nicholas F. Lancaster, June 2008, at 16.

*The Lion Who Squeaked: How the Moreno Decision Hasn't Changed the World and Other Post-Trial News*, Lieutenant Colonel James L. Varley, June 2008, at 80.

*Military Sentencing 101—Back to the Basics*, Major Maureen A. Kohn, June 2008, at 70.

*More Than Just Implied Bias . . . : The Year in Pleas and Pretrial Agreements, Article 32, and Voir Dire and Challenges*, Major Patrick D. Pflaum, June 2008, at 50.

*Pass Go, Collect \$200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military Justice and the Defense's Right to a Government-Funded Expert*, Major David Edward Coombs, June 2008, at 28.

*Practicing What the Court Preaches—2007 New Developments in Fourth Amendment Search and Seizure Law*, Lieutenant Colonel Stephen R. Stewart, USMC, June 2008, at 2.

*Professional Responsibility on the Edge*, Lieutenant Colonel Kwasi L. Hawks, June 2008, at 93.

*Revising United States v. Allen: Applying Civilian Pretrial Confinement Credit for Unrelated Offenses Against Court-Martial Sentences to Post-Trial Confinement Under 18 U.S.C. § 3585(b)(2)*, Major Michael L. Kanabrocki, Aug. 2008, at 1.

*Sentencing Credit for Pretrial Restriction*, Major Elizabeth A. Harvey, Oct. 2008, at 27.

*Unlawful Command Influence—Still with Us; Perspective of the Chair in Continuing Struggle Against the "Mortal Enemy" of Military Justice*, Lieutenant Colonel Mark L. Johnson, June 2008, at 104.

## **FREEDOM OF INFORMATION ACT**

*Street FOIA 101: Nuts, Bolts, and Loose Change*, Lieutenant Colonel Craig E. Merutka, Dec. 2008, at 49.

### **-I-**

## **INSTRUCTIONS**

*Annual Review of Developments in Instructions—2007*, Lieutenant Colonel Edward J. O'Brien & Lieutenant Colonel Timothy Grammel June 2008, at 113.

## **INTERNATIONAL & OPERATIONAL LAW**

*Cultural Property Protection in Stability Operations*, Dick Jackson, Oct. 2008, at 47.

*The Iraqi High Tribunal and the Regime Crimes Liaison's Office*, Major John C. Johnson, USAF, July 2008, at 36.

*The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada*, Captain Gal Asael, July 2008, at 1.

*Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, Major Timothy Austin Furin, Oct. 2008, at 1.

### **-M-**

## **MISCELLANEOUS**

*Been There, Doing That in a Title 32 Status: As It Relates to Today's Military*, Major Christopher R. Brown, May 2008, at 23.

*Bulletproof Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal*, Colonel Louis J. Puleo, USMC, Aug. 2008, at 53.

*Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, Major Jeffrey S. Thurnher, July 2008, at 64.

*Extraordinary Relief: A Primer for Trial Practitioners*, Captain Patrick B. Grant, Nov. 2008, at 30.

*Families First and the Personnel Claims Act*, Major Daniel J. Sennott, Dec. 2008, at 44.

*For All "Intensive" Purposes: A Primer on Malapropisms, Eggcorns, and Other Rogue Elements of the English Language*, Major Anne B. Ching, Dec. 2008, at 66.

*Foreword: Administrative Law Is Not for Sissies!*, Lieutenant Colonel Suzanne Mitchem, Dec. 2008, at 1.

*"If at First You Don't Succeed . . .": An Argument Giving Federal Agencies the Ability to Challenge Adverse Equal Employment Opportunity Commission Decisions in Federal Court*, Major Steven M. Ranieri, Sept. 2008, at 43.

*If It Walks Like a Duck, and Talks Like a Duck, and Looks Like a Duck, then It's Probably Testimonial: Recent Developments in Sixth Amendment Confrontation Law*, Lieutenant Colonel Nicholas F. Lancaster, June 2008, at 16.

*Implied Bias: A Suggested Disciplined Methodology*, Colonel Louis J. Puleo, USMC, Mar. 2008, at 34.

*Limitations on the Wearing of the Uniform by Members of the Armed Services at Non-Military Events*, Lieutenant Colonel Jeffrey P. Sexton, Mar. 2008, at 28.

*Military Members Posing in Sexually Explicit Pictures*, Major Kelly L. McGovern, Apr. 2008, 22.

*The Mixed-Case Dilemma in Federal Sector Employment Appeals*, Honorable Anthony W. Cummings, Apr. 2008, at 17.

*Navigating an Enforced Leave Appeal*, Richard W. Vitaris, Feb. 2008, at 42.

*"Out of the Mouth[s] of Babes": Can Young Children Even Bear Testimony*, Major Rebecca K. Connally, Mar. 2008, at 1.

*A Reasonable Expectation of Privacy: Is a Government E-mail Account the Equivalent of a Wall Locker in a Barracks Rooms?*, Major Lawrence A. Edell, Nov. 2008, at 1.

*Reclaiming the In-Service Conscientious Objection Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection*, Major Joseph B. Mackey, Aug. 2008, at 31.

*The Service-Disabled Veteran-Owned Small Business in the Federal Marketplace*, Lieutenant Commander Theron R. Korsak, July 2008, at 45.

*The Sexual Assault Prevention and Response (SAPR) Program—in Need of More Prevention*, Captain Katherine A. Krul, Nov. 2008, at 41.

*Sharing the Wealth—Coast Guard Law Enforcement Information Valuable to the National Intelligence Effort or How the Coast Guard Defeats the Wall*, Commander Peter J. Clemens, July 2008, at 59.

*To Be Continued: A Look at Posthumous Reproduction As It Relates to Today's Military*, Major Maria Doucettperry, May 2008, at 1.

*Whistleblower Protection for Military Members*, Major William E. Brown, Dec. 2008, at 58.

**-P-**

**PLEAS**

*More Than Just Implied Bias . . . : The Year in Pleas and Pretrial Agreements, Article 32, and Voir Dire and Challenges*, Major Patrick D. Pflaum, June 2008, at 50.

**PROFESSIONAL RESPONSIBILITY**

*Professional Responsibility on the Edge*, Lieutenant Kwasi L. Hawks, June 2008, at 93.

**-S-**

**SEARCH AND SEIZURE**

*Practicing What the Court Preaches—2007 New Developments in Fourth Amendment Search and Seizure Law*, Lieutenant Colonel Stephen R. Stewart, USMC, June 2008, at 2.

**SENTENCING AND POST-TRIAL**

*Military Sentencing 101—Back to the Basics*, Major Maureen A. Kohn, June 2008, at 70.

**SERVICEMEMBERS CIVIL RELIEF ACT**

*Child Custody and Deployments: The States Step in to Fill the SCRA Gap*, Lieutenant Colonel Jeffrey P. Sexton & Jonathan Brent, Dec. 2008, at 9.

*Successful Criminal Prosecution of a Landlord Under the Servicemembers Civil Relief Act*, Major Michael Newman, Major Jack Jakubiak, & Major Blaine Markuson, *Successful Criminal Prosecution of a*

*Landlord Under the Servicemembers Civil Relief Act*, Sept. 2008, at 45.

**SURVIVOR BENEFITS**

*Survivor Benefits Update*, Major Dana J. Chase, Dec. 2008, at 20.

*State Survivor Benefits: An Overview*, Major Dana J. Chase & Major Daniel J. Sennott, Dec. 2008, at 25.

**SIXTH AMENDMENT**

*If It Walks Like a Duck, and Talks Like a Duck, and Looks Like a Duck, then It's Probably Testimonial: Recent Developments in Sixth Amendment Confrontation Law*, Lieutenant Colonel Nicholas F. Lancaster, June 2008, at 16.

**-U-**

**UNLAWFUL COMMAND INFLUENCE**

*Unlawful Command Influence—Still with Us; Perspective of the Chair in Continuing Struggle Against the "Mortal Enemy" of Military Justice*, Lieutenant Colonel Mark L. Johnson, June 2008, at 104.

**Office of the Judge Advocate General  
Practice Note Index**

**INTERNATIONAL AND OPERATIONAL LAW  
PRACTICE NOTE**

*Exercising Passive Personality Jurisdiction over Combatants*, Lieutenant Colonel Eric T. Jensen, Oct. 2008, at 58.

**TJAGLCS Practice Notes Index**

**ADMINISTRATIVE AND CIVIL LAW NOTE**

*Noncitizen Servicemembers: Do They Really Have to Die to Become U.S. citizens?*, Lieutenant Colonel Jeffrey P. Sexton, Sept. 2008, at 50.

**TAX LAW NOTE**

*Update for 2008 Federal Income Tax Returns*, Major Dana J. Chase, Dec. 2008, at 73.

## USALSA Report Index

Trial Judiciary Note, *A View from the Bench: Apply the Golden Rule, But Don't Argue It*, May 2008, at 36.

Trial Judiciary Note, *A View from the Bench: The Guilty Pleas—Traps for New Counsel*, Lieutenant Colonel Edye U. Moran, Nov. 2008, at 61.

Trial Judiciary Note, *A View from the Bench: Preparing Your Client for Providency*, Lieutenant Colonel John Siemietkowski, Apr. 2008, at 44.

## Book Reviews Index

*Band of Sisters: American Women at War in Iraq*, Major Tyesha E. Lowery, Mar. 2008, at 46.

*Blood Money: Wasted Billions, Lost Lives, and Corporate Greed in Iraq*, Major Timothy Austin Furin, Feb. 2008, at 50.

*Green Warriors: Army Environmental Considerations for Contingency Operations from Planning Through Post-Conflict*, Dec. 2008, at 86.

*Lincoln the Lawyer*, Major Tonya L. Jankunis, Apr. 2008, at 51.

*Nuclear Sphinx of Tehran*, Major Tom F. Jasper Jr., USMC, May 2008, at 43.

*Palestine: Peace Not Apartheid*, Major Marc B. Washburn, Nov. 2008, at 67.

*The Price of Liberty: Paying for America's Wars*, Major S. Charles Neill, Mar. 2008, at 51.

*State of Denial: Bush at War, Part III*, Major Daniel A. Woolverton, Aug. 2008, at 72.

*This Mighty Scourge: Perspectives on the Civil War*, Major William E. Mullee, Feb. 2008, at 56.





# Statement of Ownership, Management, and Circulation

1. Publication Title  The Army Lawyer	2. Publication Number  0 3 6 4 - 1 2 8 7	3. Filing Date  October 1, 2008
4. Issue Frequency  Monthly	5. Number of Issues Published Annually  Twelve	6. Annual Subscription Price Domestic: \$50.00 Foreign: \$70.00
7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4)  The Judge Advocate General's School, U.S. Army  600 Massie Road, Charlottesville, VA 22903-1781		Contact Person Charles J. Strong  Telephone (434) 971-3396

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer)  
Office of The Judge Advocate General, U.S. Army  
2200 Army Pentagon, Washington, DC 20310-2200

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)

Publisher (Name and complete mailing address)  
Colonel Robert A. Burrell  
The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

Editor (Name and complete mailing address)  
Captain Alison M. Tulud  
The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

Managing Editor (Name and complete mailing address)  
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Full Name	Complete Mailing Address
Office of The Judge Advocate General, U.S. Army	2200 Army Pentagon, Washington, DC 20310-2200

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box  None

Full Name	Complete Mailing Address

12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)  
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes.  
 Has Not Changed During Preceding 12 Months  
 Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

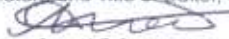
13. Publication Title The Army Lawyer		14. Issue Date for Circulation Data Below December 2008	
15. Extent and Nature of Circulation		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)		5,281	5,311
b. Paid and/or Requested Circulation	(1) Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. (Include advertiser's proof and exchange copies)	2,903	3,109
	(2) Paid In-County Subscriptions Stated on Form 3541 (Include advertiser's proof and exchange copies)	0	0
	(3) Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	2,378	2,202
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c. Total Paid and/or Requested Circulation [Sum of 15b. (1), (2),(3),and (4)]		5,281	5,311
d. Free Distribution by Mail (Samples, complimentary, and other free)	(1) Outside-County as Stated on Form 3541	0	0
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f. Total Free Distribution (Sum of 15d. and 15e.)		0	0
g. Total Distribution (Sum of 15c. and 15f.)		5,281	5,311
h. Copies not Distributed		0	0
i. Total (Sum of 15g. and h.)		5,281	5,311
j. Percent Paid and/or Requested Circulation (15c. divided by 15g. times 100)		100	100

## 16. Publication of Statement of Ownership

 Publication required. Will be printed in the December 2008, The Army Lawyer

 Publication not required.

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