

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Family Law Note

Modification of Support Orders Applying The Uniform Interstate Family Support Act

Most child support cases that involve military members and their families will eventually become an interstate issue. The rules on jurisdiction over child support modification actions changed dramatically with the Uniform Interstate Family Support Act (UIFSA).¹ As of 1 January 1998, the UIFSA controls subject-matter jurisdiction in support cases for all United States jurisdictions.² After forty-seven years of operating under the Uniform Reciprocal Enforcement of Support Act (URESAs),³ the UIFSA presents new challenges to family law practitioners. Because the military is a mobile society, understanding the jurisdictional rules for modifying support orders is essential.

Gentzel v. Williams,⁴ a recent Kansas case, illustrates not only the UIFSA's modification rules but also its interaction with the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).⁵ Valerie and Keith Gentzel were divorced in Ari-

zona in August 1994.⁶ An Arizona court ordered Keith to pay \$640 per month in child support.⁷ Shortly after the divorce, Valerie and the children moved to Texas, and Keith moved to Kansas.⁸ In accordance with the UIFSA, Valerie registered the Arizona decree with the Kansas IV-D agency⁹ for enforcement.¹⁰ Keith received notice of an income withholding order to enforce the Arizona decree and arrears. He then requested the Kansas court to modify the Arizona support order using the Kansas child support guidelines.¹¹ The Kansas trial court, finding it had continuing exclusive jurisdiction (CEJ),¹² modified the Arizona order to \$237 per month.¹³ The IV-D agency appealed this ruling on Valerie's behalf.

Continuing exclusive jurisdiction is an important status in modification issues under the UIFSA.¹⁴ The CEJ is definitional (a state either fits the definition or it does not). The Kansas trial court applied the definition improperly by reasoning that simple residence by one of the parties is sufficient to convey CEJ status. While the trial court was correct in finding that Arizona lost CEJ status when all the parties left Arizona, neither Texas nor Kansas gained CEJ status. When there is no state with CEJ, the petitioner must file for modification in the respondent's

1. 2 U.L.A. 229 (amended 1996).

2. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [hereinafter Welfare Reform Act] required states to adopt the UIFSA by 1 January 1998. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

3. 9B U.L.A. 567 (amended 1968). The URESA was extensively revised in 1968 and called the Revised Uniform Reciprocal Enforcement of Support Act (RURESAs). All 50 states eventually adopted some version of the URESA. When enacting the UIFSA, some states repealed their URESA statutes, others replaced their URESA statutes with the UIFSA.

4. 965 P.2d 855 (Kan. Ct. App. 1998)

5. 28 U.S.C.A. § 1738B (West 1998).

6. *Gentzel*, 965 P.2d at 856.

7. *Id.*

8. *Id.*

9. A IV-D agency refers to a child support enforcement agency established under section IV-D of the Social Security Act. 42 U.S.C.A. §§ 651-650 (West 1998).

10. *Gentzel*, 965 P.2d at 856.

11. *Id.*

12. Continuing exclusive jurisdiction is a term of art under section 205 of the UIFSA. It is a status afforded to a state that issued a support order and remained the residence of the obligor, the individual obligee, or the child for whose benefit the support order was issued. UNIF. INTERSTATE FAMILY SUPPORT ACT § 205, 2 U.L.A. 229 (amended 1996).

13. *Gentzel*, 965 P.2d at 857.

14. Only the state that issued the controlling order of support and maintains CEJ can modify the order. Under the UIFSA, the Arizona court order in *Gentzel* was controlling because it was the first and only order regarding support issued by any court. In older support cases, there are often multiple orders covering the same child(ren). Section 207 of the UIFSA sets out rules to determine which of the existing orders will control prospective support. If the state that issued the controlling order also has CEJ status, it is the only state that can modify the order.

Litigation is Not a “Legitimate Business Need” Under the Fair Credit Reporting Act

state of residence.¹⁵ Therefore, in this case, Keith must seek modification in Texas, where Valerie resides. Texas law controls whether a modification is allowed, and Texas child support guidelines control how much support is owed.¹⁶ After properly applying the UIFSA, the Kansas Court of Appeals reversed the trial court’s modification for lack of subject-matter jurisdiction.¹⁷

The Kansas Court of Appeals also analyzed this case under the FFCCSOA. Applying the FFCCSOA, the court reached the same conclusion.¹⁸ The FFCCSOA was passed by Congress in 1994. The structure and intent of the FFCCSOA is similar to the UIFSA.¹⁹

Legal assistance attorneys must understand the UIFSA rules. The UIFSA sets out subject-matter jurisdiction to establish, enforce, and modify support obligations. Determining which state has jurisdiction to act in support cases is a basic requirement of adequate advice. Legal assistance attorneys can call the National Conference of Commissioners on Uniform State Laws (NCCUL) (312) 915-0195 to request a copy of the UIFSA.²⁰ Major Fenton.

The Fair Credit Reporting Act (FCRA)²¹ governs the collection and release of credit information by credit reporting agencies. It seeks to balance the legitimate needs of businesses for this information with the consumer’s interest in maintaining privacy.²² Under the FCRA, credit-reporting agencies may release credit reports only in limited circumstances.²³ One of these situations is when the person requesting the report “otherwise has a legitimate business need for the information”²⁴ The exact contours of this permissible purpose for releasing credit reports were the subject of some debate prior to 1996.²⁵ In that year, Congress more specifically defined when credit-reporting agencies could release consumer reports for the business need purpose.²⁶ A recent decision by the Eighth Circuit, however, reminds practitioners that the exception was never as broad as some might have believed.

In 1996, Laura McKinnon, an attorney, represented several women suing Dr. Johnny Bakker, a dentist, for improperly touching them during dental treatment.²⁷ During litigation, Ms.

15. UNIF. INTERSTATE FAMILY SUPPORT ACT § 611, 9 U.L.A. 229 (amended 1996).

16. *Id.*

17. *Gentzel*, 965 P.2d 861.

18. *Id.* at 860.

19. The FFCCSOA served as a stop-gap measure after the National Conference of Commissioners on Uniform State Laws (NCCUL) adopted the UIFSA and before all states enacted the UIFSA because the FFCCSOA set out the same rules. Additionally, the FFCCSOA is a federal statute. Therefore, federal preemption requires that all states, after the enactment of the FFCCSOA, treat interstate cases under its rules. The Welfare Reform Act included technical amendments to the FFCCSOA to ensure it mirrored the UIFSA’s provisions.

20. The NCCUL will provide anyone with a copy of the UIFSA and the comments to the UIFSA. The comments are extremely helpful in explaining the UIFSA provision and the differences between the old URESA practice and the new UIFSA practice. See John J. Sampson, *Uniform Interstate Family Support Act (1996)*, 32 FAM. L.Q. 385 (1998) (discussing the UIFSA).

21. 15 U.S.C.A. §§ 1681–1681u (West 1998).

22. *Id.* See NAT’L CONSUMER LAW CENTER, FAIR CREDIT REPORTING ACT § 1.3.1 (3d ed. 1994 & Supp. 1997) [hereinafter NCLC REPORTING].

23. 15 U.S.C.A. § 1681b. Generally, these purposes are for credit, insurance, employment, licensing, or other legitimate business transactions.

24. *Id.* § 1681b(a)(3)(F).

25. See generally NCLC REPORTING, *supra* note 22 §§ 2.3.5.9, 4.2.8.

26. Consumer Credit Reporting Reform Act of 1996, 104 Pub. L. 208, 110 Stat. 3009 (to be codified at 15 U.S.C.A. § 1681). These changes took effect on 30 September 1997. See Consumer Law Note, *Fair Credit Reporting Act Changes Take Effect in September*, ARMY LAW., Aug. 1997, at 19.

The changes to the “legitimate business need” purpose allow consumer reporting agencies to release consumer report only when the user “otherwise has a legitimate business need for the information . . . in connection with a business transaction that is initiated by the consumer; or to review an account to determine whether the consumer continues to meet the terms of the account.” 15 U.S.C.A. § 1681b(a)(3)(F). Even under this new provision, businesses are working to determine the limits of their access to credit reports. See Consumer Law Note, *Federal Trade Commission Staff Issues Informal Interpretation of FCRA Changes*, ARMY LAW., June 1998, at 9.

27. *Bakker v. McKinnon*, 152 F.3d 1007, 1009 (8th Cir. 1998). The court in *Bakker* decided the case under the pre-1996 act because the credit report access at issue occurred before the effective date of the changes.

McKinnon collected a variety of information about Dr. Bakker and his family. This information included the credit reports of Dr. Bakker and his two adult daughters.²⁸ Ms. McKinnon's rationale for collecting the information seemed logical for an attorney in the midst of litigation. "[S]he obtained the credit reports about Dr. Bakker and his daughters in order to determine whether he was judgment proof and whether he was transferring his assets to his daughters."²⁹ The Bakkers sued Ms. McKinnon for violating the FCRA.³⁰ The district court found for the Bakkers and awarded them damages and attorney's fees. Ms. McKinnon appealed the finding.³¹

At the Eighth Circuit, Ms. McKinnon asserted two errors by the district court. First, she claimed that she obtained the credit reports for "a commercial or professional purpose"; therefore, the FCRA did not govern the transaction.³² In the alternative, she argued that even if the FCRA applied, she had a "legitimate business need" for the information.³³

In deciding Ms. McKinnon's first claim, the Eighth Circuit focused on the purpose for collecting the information, not her intended use. It held that "regardless of appellant's intended use of the credit reports, these reports are consumer reports within the meaning of the FCRA because the information contained therein was collected for a consumer purpose."³⁴ The court reasoned, "whether a credit report is a consumer report . . . is governed by the purpose for which the information was originally collected in whole or in part by the consumer reporting agency."³⁵ This interpretation of the FCRA makes sense.³⁶ The statute is designed to protect consumers, not the users of the credit information. The protections should not depend on the status of the user, but on the status of the person about whom the user wants credit information.

The court's resolution of the appellant's second claim is more important. There is some logic to considering litigation a "business need" under the FCRA. In this case, Ms. McKinnon "testified that she obtained the credit report on Dr. Bakker seeking information about his ability to satisfy a judgment if the parties settled the underlying litigation."³⁷ She then "obtained a second credit report on Dr. Bakker and his two daughters . . . to see if Dr. Bakker was transferring assets to his daughters [in order to make himself judgment proof]."³⁸ On their face, these arguments seem compelling. Congress, however, did not pass the statute to aid litigation. Thus, courts and commentators have not viewed litigation as a permissible purpose to issue a consumer report.³⁹ The Eighth Circuit agreed with this view of the statute holding:

[An] appellant cannot be said to have a legitimate business need within the meaning of the Act unless and until she can prove or establish that she and appellees were involved in a *business* transaction involving a consumer. In order to be entitled to the business need exception found in § 1681b(3)(E), the business transaction must relate to 'a consumer relationship between the party requesting the report and the subject of the report' regarding credit, insurance eligibility, employment, or licensing.⁴⁰

This case is important to legal assistance practitioners for two reasons. First, for consumer clients, this case demonstrates the trend to limit access to credit reports. Legal assistance attorneys can use this case (and the logic behind it) to protect clients involved in litigation from "fishing expeditions" by the opposing counsel. Second, legal assistance attorneys also see clients on issues like separation agreements where a credit report on

28. *Id.*

29. *Id.* at 1010.

30. *Id.* at 1009.

31. *Id.*

32. *Id.* at 1010-11.

33. *Id.* at 1011.

34. *Id.* at 1012.

35. *Id.*

36. See NCLC REPORTING, *supra* note 22, § 2.3.4.

37. *Bakker*, 152 F.3d at 1011.

38. *Id.*

39. See NCLC REPORTING, *supra* note 22, § 4.3.3.

40. *Bakker*, 152 F.3d at 1012 (citing *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1149 (3d Cir. 1986)).

the client's spouse may seem relevant. Legal assistance attorneys must realize that they do not have a "permissible purpose" to obtain consumer reports in these contexts. Major Lescault.

Criminal Law Note

The Hemp Product Defense

Introduction

On 23 December 1997, at Dover Air Force Base, Delaware, Air Force Master Sergeant Spencer Gaines was acquitted of marijuana use.⁴¹ His defense? He asserted that he tested positive for metabolized tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana,⁴² because he had ingested two legal and commercially available health products, (Hemp Liquid Gold and Hemp 1000 capsules).⁴³ A weight lifter with twenty-two years of Air Force service, Gaines stated that he used the hemp products to provide him needed fatty acids not otherwise found in his diet.⁴⁴

A variety of urinalysis defenses have developed since the military launched its urinalysis-testing program. Some, such as innocent ingestion (for example, pouring cocaine in one's drink or one's urine) are often used.⁴⁵ Others, such as passive inhalation (unwittingly inhaling marijuana fumes) are highly dubious.⁴⁶ This note focuses on the newest of these defenses (the

assertion that a legal hemp oil or hemp food product caused a service member to test positive on a urinalysis test). It provides a brief overview of hemp and hemp products, the effects these products can have on a urinalysis test for metabolized THC, the methodology the Armed Forces Institute of Pathology (AFIP) has developed for testing hemp products, and a brief review of long-range steps being considered to resolve the problem. A companion note, in *The Art of Trial Advocacy* section of this issue, focuses on courtroom strategies for both defense and government counsel litigating a hemp food product defense.⁴⁷

What are Hemp and Hemp-Based Products?

Hemp, botanically referred to as *Cannabis sativa* L, is a plant whose flowering tops and leaves are marijuana.⁴⁸ The hemp plant itself, apart from the tops and leaves, however, is non-psychoactive, and was originally cultivated for use in making ropes, fabrics, and paper products.⁴⁹ Early in this century, alarmed at the apparent rise in marijuana use, Congress enacted the Marijuana Tax Act of 1937, which heavily taxed the already declining hemp industry.⁵⁰ While World War II caused a brief resurgence,⁵¹ the hemp industry had all but vanished from the United States by the late 1950s.⁵² Following the ratification of the United Nations Single Convention on Narcotic Drugs in 1961⁵³ that listed marijuana as a Schedule I narcotic, and the Comprehensive Drug Abuse Prevention and Control Act of 1970,⁵⁴ hemp production for any purpose in this country was effectively outlawed.⁵⁵

41. Memorandum from COL William K. Atlee, Jr., Director, U.S. Air Force Judiciary, Air Force Legal Service Agency, to The Judge Advocate General, U.S. Air Force, subject: Urinalysis Testing Problem—Hemp Seed Products (6 Jan. 1998) (on file with author) [hereinafter Air Force Memo].

42. *Id.* When a person ingests marijuana, some of its psychoactive ingredient, called Delta - 9 THC, converts into a non-toxic compound (metabolite) called Delta - 9 tetrahydrocannabinol-9-carboxylic acid (THC). Until hemp-based products appeared on the market, this could metabolite only be found when the human body metabolizes marijuana. See R. FOLTZ, *ADVANCES IN ANALYTICAL TOXICOLOGY* 125, 130 (R. Baselt ed. 1984) (discussing the analysis of cannabinoids in physiological Specimens by GC/MS testing). The Department of Defense tests for the presence of 9 carboxylic THC in service members' urine.

43. Air Force Memo, *supra* note 41.

44. John Pulley, *AF Acquittal Prompts Review of Drug Testing*, *ARMY TIMES*, Jan. 26, 1998, at 6.

45. See David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, *ARMY LAW.*, Sept. 1988, at 17.

46. *Id.* at 16.

47. See *The Art of Trial Advocacy, Tips in Hemp Product Cases*, *ARMY LAW.*, Dec. 1998, at 30.

48. See Susan David Dwyer, Note, *The Hemp Controversy: Can Industrial Hemp Save Kentucky?*, 86 *KY. L.J.* 1144 (1997-98). See also Thomas J. Ballanco, Comment, *The Colorado Hemp Production Act of 1995: Farms and Forests Without Marijuana*, 66 *U. COLO. L. REV.* 1166 (1995).

49. Dwyer, *supra* note 48, at 1156-57.

50. *Id.* at 1159.

51. Due to the shortage of rope production, the government launched a "Hemp for Victory" campaign encouraging American farmers to grow hemp. Between 1942 and 1945, American farmers grew over 400,000 acres of hemp. Ballanco, *supra* note 48, at 1171.

52. Dwyer, *supra* note 48, at 1163.

53. Mar. 16, 1961, 18 U.S.T. 1408, 520 U.N.T.S. 204.

54. Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1236, 1292 (codified at 21 U.S.C.A. § 802 (West 1998)).

While modern materials and other synthetics have replaced the need for hemp in rope and fabric production, since the mid-1970s there has been a growing movement in America to promote the use of the hemp plant in a variety of ways.⁵⁶ Some states have looked at the feasibility of legalized hemp production, especially as a means to substitute for the shrinking tobacco markets.⁵⁷ At the same time, there has been a proliferation of hemp products: hemp clothing and shoes, hemp wines and beers, hemp skin care products, and hemp oil and food products, all sold and advertised widely on the internet and in such periodicals as *Hempworld* and *Hemptimes*.⁵⁸ Most of these products are imported from countries such as Canada, France, Germany, and Switzerland, which allow hemp growth as long as the THC concentration in the plants does not exceed maximum allowable limits.⁵⁹

Hemp Oil and Hemp Food Products and Urinalysis Testing for THC

Studies performed on hemp oil and hemp food products indicate that ingestion can trigger a THC positive urinalysis result. For example, the October 1997 issue of the *Journal of*

Analytical Toxicology published two separate studies regarding THC-positive urinalysis results from consumption of hemp seed foods or hemp oil products.⁶⁰ In the hemp seed food test, subjects consumed commercially available snack bars and cookies. While no subject had any psychoactive reaction to the food products, THC positive results above Department of Defense (DOD) cutoff levels were reported.⁶¹ In the hemp oil product test, subjects consumed a hemp oil product—Hemp Liquid Gold™ and subsequent urinalysis tests also indicated THC-positive results above DOD cutoff levels for some subjects.⁶²

The Methodology of Hemp Product Testing at the Armed Forces Institute of Pathology (AFIP)

Because of the scientific possibility that a hemp product can trigger a THC-positive result, the Department of Defense Drug Detection Quality Assurance Laboratory (DDQA), Division of Forensic Toxicology, AFIP will test a hemp-based product to determine whether it contains THC at levels that could register positive results on a urinalysis test.⁶³ The AFIP has tested twenty-seven products, and to date, only hemp oil products have caused positive test results.⁶⁴

55. Dwyer, *supra* note 48, at 1164-65. Marijuana as an illegal controlled substance is specifically defined in 21 U.S.C.A. § 802(15) as:

[A]ll parts of the plant *Cannabis sativa* L. whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C.A. § 802(15) (West 1998).

56. Jack Herer, the so-called “father of the modern hemp movement” began his “crusade” to promote the uses of the hemp plant for a variety of reasons in the mid-1970s. Herer asserts that the hemp plant has gigantic potential, not simply for marijuana, but as a biomass energy crop (used to balance the carbon dioxide level in the atmosphere), as a fuel-producing crop, and as an alternative to timber for paper production. See JACK HERER, *THE EMPEROR WEARS NO CLOTHES* 43-50 (10th ed. 1995).

57. See Dwyer, *supra* note 48; Ballanco, *supra* note 48.

58. The Fall 1998 issue of *Hempworld* lists 72 stores in the United States and Canada exclusively or primarily dedicated to selling hemp products. *Retail Map, North American Hemp Stores*, HEMPWORLD, Fall 1998, at 50-51.

59. Letter from LCDR Kenneth A. Cole, Armed Forces Institute of Pathology, to MAJ Walter Hudson (Nov. 19, 1998) (on file with author) [hereinafter Cole Letter]. Hemp seeds that have been sterilized can also be exported to the United States. *Id.*

60. Anthony Costantino et al., *Hemp Oil Ingestion Causes Positive Urine Tests for Delta -9 Tetrahydrocannabinol Carboxylic Acid*, 21 J. OF ANALYTICAL TOXICOLOGY 482 (1997) (discussing hemp oil products causing THC positive urinalysis results); Neil Fortner et al., *Marijuana-Positive Urine Test Results From Consumption of Hemp Seeds in Food Products*, 21 J. OF ANALYTICAL TOXICOLOGY 476 (1997) (discussing hemp seeds in food products causing THC-positive urinalysis results).

61. Specifically, commercially available snack bars (Seedy Sweeties snack bars) and cookies were given to 10 volunteers. The volunteers gave urine samples over the next 24 hours that were tested using the gas chromatography/mass spectroscopy (GC/MS) test (the same “gold standard” test the DOD performs on service members’ urine). Specimens from individuals who ate just one hemp seed bar showed little reactivity and only one specimen screened positive at a 20-ng/ml level (the DOD GC/MS cutoff is 15-ng/ml). Five specimens from individuals who ate two hemp seed bars screened positive at a 20-ng/ml cutoff level. The authors concluded: “[A] positive test result depends on the amount of hemp seeds consumed, the form in which they are ingested, and the testing cutoff value applied. Naturally the metabolism of the individual and the time of collection of the specimen after ingestion also affect the probability of testing positive.” Fortner et al., *supra* note 58, at 476-80.

62. Seven volunteers consumed 15 milliliters of Hemp Liquid Gold™. Urine samples were taken before ingestion and at 8, 24, and 48-hour intervals after the dosage. A total of 18 post-ingestion samples were taken, 14 of the samples screened above the 20 ng/ml cutoff, seven above the 50 ng/ml cutoff, and two screened above the 100 ng/ml cutoff using the GC/MS test. Costantino, et al., *supra* note 60, at 482.

Specimens that are submitted to the DDQA laboratory should be sent under a chain of custody along with a memorandum requesting testing for THC and a point of contact to receive the test results.⁶⁵ If the requester wants an opinion regarding the likelihood of the product inducing a positive test result, he must provide the following information: (1) the accused's/suspect's weight, (2) the amount of the product allegedly ingested, (3) how frequently the product was ingested (for example, twice weekly, weekly), (4) the duration of product ingestion (for example, one week, one month), and (5) the time elapsed between the last ingestion of the product and the urinalysis test.⁶⁶

The product is tested using the gas chromatography/mass spectroscopy (GC/MS) testing procedure (the so-called "gold standard" test also performed at DOD urinalysis laboratories).⁶⁷ Unlike the urinalysis testing, however, the DDQA laboratory tests for the presence of the THC itself, not its metabolized version.⁶⁸ The method of testing the products is forensically valid, and there have been no successful defense-based attacks on the DDQA laboratory's drug testing procedures.⁶⁹ The DDQA laboratory will issue a memorandum after testing indicating the microgram level of THC in the product. In addition, if the appropriate data from the suspect/accused has been submitted,⁷⁰ the memorandum will offer an opinion as to whether the inges-

tion of the hemp-based product at the stated levels is consistent with the urinary THC metabolite concentration.⁷¹

Long Range Strategies

The military services have proposed long-range strategies to deal with the hemp oil defense. The services are concerned that the defense could impair the military's ability to test soldiers for marijuana use. One Air Force proposal recommends that the services obtain samples of products nationwide and systematically test them to establish which products test positive and at what levels.⁷² The same proposal suggests the possibility of a "no-use" order banning hemp oil products either service-wide or at the local/installation level.⁷³

The AFIP has tested several products, as have the Drug Enforcement Administration (DEA), the Department of Health and Human Services, and private companies.⁷⁴ At this time, however, the Department of the Army is reluctant to issue a total ban on hemp oil and hemp food products.⁷⁵ This reluctance is partially based upon interagency actions between the Department of Justice and DEA. These agencies are currently considering whether to propose that Congress ban hemp oil/hemp food products or pressure manufacturers to remove these products.⁷⁶ As a result of these agencies' actions, some specu-

63. Telephone Interview with LCDR Kenneth A. Cole, Department of Defense, Defense Drug Detection Quality Assurance Laboratory, Armed Forces Institute of Pathology (Nov. 13, 1998) [hereinafter Cole Interview]. Lieutenant Commander Cole is the primary tester of the hemp oil products. He can be contacted at (301) 319-0048/0100/email address: cole@afip.osd.mil. Lieutenant Commander Cole has emphasized that, early contact with him is essential, if you are preparing or rebutting a hemp product defense.

64. Cole Letter, *supra* note 59. Lieutenant Commander Cole previously tested several hemp oils and hemp food products. Some of the food products include Hempten Ale, a German soft drink called HEMP, and an unnamed German beer of which the only indicator it is a hemp product is a hemp leaf on the label. None of these beverages produced a positive urinalysis result for THC. The Drug Enforcement Administration and the Department of Health and Human Services also tested a variety of products, including: hemp cookies, hemp coffees, lip balm, hemp seed burgers, hemp cheese, and hemp bread. None of these products has been used in a hemp defense. *Id.*

65. Memorandum from LCDR Kenneth A. Cole to MAJ Walter Hudson (undated) (on file with author).

66. *Id.*

67. See Fitzkee, *supra* note 45, at 13-15 (containing an analysis of the DOD GC/MS testing).

68. Cole Letter, *supra* note 59. Oils submitted to the DOD DDQA laboratory are extracted and deuterated, THC is added to the specimen as an internal standard. The method of adding deuterated THC is also used with the measurement of the THC metabolite at the drug testing laboratories. The deuterated THC, however, has different mass spectrometric characteristics. The two THCs, therefore, cannot be "confused." *Id.*

69. *Id.*

70. See *supra* note 65 and accompanying text.

71. Redacted Memorandum from LCDR Kenneth A. Cole to CPT David Bizar, Trial Defense Service, 4th Infantry Division, Fort Hood, subject: Results of Testing of Spectrum Essentials Hemp Seed Oil Products (19 Nov. 1998) (on file with author).

72. Air Force Memo, *supra* note 41

73. *Id.*

74. Cole Letter, *supra* note 57. According to Lieutenant Commander Cole, because of the failure of several hemp product manufacturers to have accurate lot numbers on their products, it is difficult to get an accurate count of how many products on the market have already been tested. Cole Interview, *supra* note 63.

75. Letter from LTC William M. Mayes, Office of The Judge Advocate General, Criminal Law Division to MAJ Walter Hudson (5 Oct. 1998) (on file with author).

late that by spring 1999, nearly all hemp oil and hemp food product manufacturers will have eliminated THC concentrations entirely from their products.⁷⁷ Until the products are banned or altered, the hemp oil defense will continue to be used in courts-martial and other adverse actions. A companion note in this issue's *The Art of Trial Advocacy* contains some suggestions for both sides in either using or rebutting this defense. Major Hudson.

Reserve Component Practice Note

Do Officer Reservists Separated for Serious Misconduct with Twenty "Good" Years Still Get Their Reserve Retirement?⁷⁸

Congress passed the Reserve Officer Personnel Management Act (ROPMA) in 1994.⁷⁹ The ROPMA, however, did not change the basic rules of reserve component retirement pay eligibility for reserve officers. The rules are that an officer reservist, upon being notified by his service secretary, is entitled to retirement pay if he: (1) completes twenty or more years of "qualifying service,"⁸⁰ (2) performs his last eight years of military service in a reserve component status, and (3) reaches age sixty.⁸¹ The service secretary notification is commonly known as the "twenty-year letter." Unlike a private pension contract, reserve military retirement pay is not a "vested" or contractual right, but a statutory entitlement.⁸²

What happens if a reserve officer (commissioned or warrant) is involuntarily discharged for misconduct after receiving his "twenty-year letter"?⁸³ Does the award of a general or other than honorable discharge adversely impact upon his retirement pay eligibility? The answer is no. Only when a reservist is convicted of a capital offense under the Uniform Code of Military Justice, or receives a court-martial sentence that includes a dismissal, bad conduct discharge, or dishonorable discharge, is he denied reserve retirement pay.⁸⁴ If an enlisted soldier receives an other than honorable discharge from an involuntary separation board, he is reduced automatically to the pay grade of Private E-1, which has a detrimental effect on his retirement income.⁸⁵

76. *Id.*

77. Cole Interview, *supra* note 63. One unresolved question is whether the THC found in the hemp products comes from contaminants or is within the seed itself. Some studies suggest the former, which would mean better methods to clean the seeds might prove effective. Electronic Information Paper from COL Brian X. Bush, Office of the Judge Advocate General, Criminal Law Division, subject: Impact of Hemp Oil Products on the Military Drug Testing Program (19 Feb. 1998) (on file with author).

78. Major John K. Harms, USAR, 94th Regional Support Command, helped research this topic.

79. Pub. L. No. 103-337, 108 Stat. 2957 (1994) (codified in scattered sections of 10 U.S.C.A., 32 U.S.C.A.). The ROPMA refers to involuntary officer separation boards as "boards of inquiry" (BOI). *Army Regulation (AR) 135-175* governs reserve component officer separation actions. U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS (22 Feb. 1994). *Army Regulation 135-178* governs involuntary separation boards of enlisted soldiers. U.S. DEP'T OF ARMY, REG. 135-178, SEPARATION OF ENLISTED PERSONNEL (1 Sept. 1994) [hereinafter AR 135-178]. This article addresses only non-Active Guard Reserve (AGR) Reserve officer members ("drilling" or "M-day" reservists).

80. "Qualifying service" consists of reserve service that meets the requirements of AR 140-185. U.S. DEP'T OF ARMY, REG. 140-185, TRAINING AND RETIREMENT POINT CREDITS AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS (15 Sept. 1979). Reserve members must earn at least 50 retirement points a year by attending drill, military education, active duty tours, or any combination thereof, in order to have a "qualifying year" for reserve retirement purposes. *Id.*

81. 10 U.S.C.A. § 12731 (West 1998).

82. *Godley v. United States*, 441 F.2d 1175, 1178-79 (1971).

83. The notification letter is sent by order of the service secretary. It indicates that the reserve member has twenty years of service and enough retirement points to qualify for reserve component retirement pay. This is commonly referred to as a "twenty year letter." See 10 U.S.C.A. § 1223; U.S. DEP'T OF ARMY, REG. 135-180, QUALIFYING SERVICE FOR RETIRED PAY NON-REGULAR SERVICE, para. 2-3 (22 Aug. 1974) [hereinafter AR 135-180].

At least one case has held that a reservist who completed twenty qualifying years of service, but who was under the age of sixty, was subject to “defeasance”⁸⁶ for breach of good conduct while awaiting reserve retirement payments.⁸⁷ Current legislation and regulation, however, presume that most reservists who reach retirement eligibility, and are facing involuntary separation for serious misconduct, should be given the option to retire in lieu of facing involuntary separation.⁸⁸

Does this mean a reserve officer who committed serious misconduct (but is not court-martialed), but has his “twenty-year letter,” may retire without any adverse impact on his reserve retirement? The answer is yes, if the command takes the officer to a separation board and he does not receive an other than honorable discharge.⁸⁹

The only administrative option available to the reserve commander is to request that the Personnel Actions and Services Directorate (PASD) at Army Reserve Personnel Command

(AR-PERSCOM) review the retiring reservist’s personnel records and forward them to the Army Grade Determination Review Board (AGDRB). The AGDRB will then determine the officer’s proper retirement grade.⁹⁰ The AGDRB may reduce the officer’s final grade for retirement pay purposes if it finds “there is information in the officer’s service record to indicate clearly that the highest grade was not served satisfactorily.”⁹¹ This information might consist of separation board findings of misconduct, a general officer memorandum of reprimand for misconduct filed in the officer’s Official Military Personnel File (OMPF), or a referred officer evaluation report (OER) for misconduct/relief for cause.

*Army Regulation 15-80*⁹² establishes the AGDRB and empowers it to review cases referred by Active, Guard, and Reserve components.⁹³ In enlisted cases, the AGDRB makes a final grade determination on behalf of the Secretary of the Army.⁹⁴ In officer cases, the AGDRB makes a recommendation to the Deputy Assistant Secretary of the Army (Army Review

84. 10 U.S.C.A. § 12740. The statute entitled “Eligibility: denial upon certain punitive discharges or dismissals,” states:

A person who--

- (1) is convicted of an offense under the Uniform Code of Military Justice (chapter 47 of this title) and whose sentence includes death; or
- (2) is separated pursuant to a sentence of a court-martial with a dishonorable discharge, a bad conduct discharge, or (in the case of an officer) a dismissal, is not eligible for retired pay under this chapter.

Id.

The legislative history of this section sheds no light on whether the secretary may deny “nonregular” reserve retirement to a soldier who has a “twenty year letter,” but has been subjected to a board of inquiry or involuntary separation board, has been found guilty of serious misconduct and recommended to receive a general discharge, or other than honorable discharge. See H.R. CONF. REP. NO. 104-450, at 808 (1996), *reprinted in* 1996 U.S.C.C.A.N. 334.

85. If the separation board approval authority approves a discharge recommendation for an other than honorable discharge (OTH), the soldier’s pay grade is immediately reduced to Private (E-1). U.S. DEP’T OF ARMY, REG. 140-158, ENLISTED PERSONNEL CLASSIFICATION, PROMOTION, AND REDUCTION, para. 7-12a (1 Oct. 1994); NAT’L GUARD REG., 600-200, para. 6-44c; AR 135-178, *supra* note 79, para. 2-20. A grade reduction has a major impact upon the reserve retirement income received by a soldier discharged with an OTH discharge. Less than 15% of the United States Army Reserve Command (USARC) enlisted drug boards conducted for the period 1993-1996 resulted in an approved recommendation for an OTH. Similar small percentages of OTH discharges are found for Army National Guard drug boards for the same period. Most (64%) USARC separation boards for the period 1993-1996 resulted in either an honorable or general discharge when a soldier is not retained. Reserve officers are not subject to the OTH grade reduction provision.

86. “Defeasance” means “a rendering null or void.” WEBSTER’S NEW COLLEGIATE DICTIONARY 296 (1976 ed.)

87. *Ex Parte Burson*, 615 S.W.2d 192, 196 (Tex. 1981). No regulation discusses whether serious misconduct, other than that disposed of under the UCMJ, bars a reservist from retirement pay.

88. See 10 U.S.C.A. § 14905 (West 1998) (dealing with reserve officers facing an involuntary BOI). Qualified officers, pending a BOI for misconduct, may request the service secretary to approve voluntary retirement or transfer to the retired reserve. The provision further provides that if an officer is removed from active reserve status as the result of a BOI, he may retire in the eligible grade under normal retirement provisions. *Id.* See also U.S. DEP’T OF DEFENSE, INSTR. 1332.40, SEPARATION PROCEDURES FOR REGULAR AND RESERVE OFFICERS, para. 6, encl. 3 (16 Sept. 1997) (discussing procedures for non-probationary officers).

89. AR 135-178, *supra* note 77, para. 2-20 and accompanying text.

90. AR 135-180, *supra* note 81, para. 2-11c. Reserve commands need to notify AR-PERSCOM PASD of those retiring officers whose misconduct would warrant referral to the AGDRB. Questions on the reserve retirement screening process may be answered by calling PASD at 1-800-318-5298, or referring to their web site, <www.army.mil/usar/ar-perscom>. In the author’s opinion, AR-PERSCOM should consider screening retirement packets for indications of serious misconduct in the soldier’s retirement grade, at least where such misconduct is documented in the officer’s OMPF.

91. *Id.* Statutory authority for such a retirement grade reduction can be found at 10 U.S.C.A. § 1374(b).

92. U.S. DEP’T OF ARMY, REG. 15-80, ARMY GRADE DETERMINATION REVIEW BOARD (28 Oct. 1986) [hereinafter AR 15-80].

93. AR 15-80, *supra* note 90, para. 5.

94. *Id.* para. 6a.

Boards) for a final determination in alleged unsatisfactory service cases.⁹⁵

Generally, service in a grade is presumed satisfactory for reserve component officers except when “[t]here is sufficient unfavorable information to establish that the officer’s service in the grade in question was not satisfactory.”⁹⁶ The regulation further states:

One specific act of misconduct may form the basis for a determination that the over-all service in that grade was not satisfactory, regardless of the period of time served in the grade. However, service retirement in lieu of or as the result of elimination action will not, by itself, preclude retirement in the highest grade.⁹⁷

Individuals are not entitled to appear before the AGDRB.⁹⁸ The AGDRB may consider any documentary evidence relevant to the grade determination regardless of whether it is part of the officer’s OMPF.⁹⁹ When the information is not part of the officer’s OMPF, the AGDRB will advise the officer of the information and give him a reasonable period for comment or rebuttal.¹⁰⁰ According to AGDRB legal advisors, very few reserve component cases have been referred to the AGDRB.¹⁰¹ Generally, the AGDRB has not found that a single documented incident of drug or alcohol abuse constitutes unsatisfactory service in the officer’s final grade.¹⁰² Despite this limited impact in the past, Reserve and National Guard commanders and their legal advisors should still consider referring serious misconduct by officers to the AGDRB. Commanders should point out any aggravating factors that would justify a board determination of

unsatisfactory service in the officer’s current grade.¹⁰³ Lieutenant Colonel Conrad.

International and Operational Law Note

Antipersonnel Land Mines Law and Policy

Introduction

The global movement to ban all antipersonnel land mines (APL) has focused attention on the use of these mines by United States forces.¹⁰⁴ Judge advocates must be aware of the following policies and laws when advising commanders on the use of APL.

United States Policy on the Use of Anti-Personnel Land Mines

On 16 May 1996, the President announced that United States forces may no longer employ non-self-destructing APL, except for training purposes and on the Korean Peninsula to defend against an armed attack across the de-militarized zone.¹⁰⁵ These APL do not self-destruct, self-neutralize, or have a deactivating capability.¹⁰⁶ This policy applies in international armed conflict and Operations Other Than War. The law that applies in international armed conflict, however, is not as restrictive as this policy.

Protocol II of the 1980 Conventional Weapons Convention

The 1980 United Nations Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons

95. *Id.* para. 6b. The AGDRB can only retain or upgrade a reserve enlisted soldier’s retirement rank. *Id.*

96. *Id.* para. 7c.

97. *Id.*

98. *Id.* para. 11.

99. *Id.*

100. *Id.*

101. Telephone Interview with Colonel Joel Miller, Legal Advisor, Military Review Boards Agency (28 Aug. 1998). The Military Review Boards Agency, which includes the AGDRB, is establishing a World Wide Web Site at <http://arba.army.pentagon.mil>.

102. *Id.* The author finds this trend disturbing. If a single incident of illegal drug use can result in an OTH for a reserve component officer, it seems there is a sufficient basis for the AGDRB to find the officer’s service in his final grade unsatisfactory. While a per se rule either way would not be fair to officers, cases where aggravating factors are presented should be considered by the AGDRB.

103. Examples of aggravating factors are: conviction of a civilian felony offense; awareness of the reserve component policy on use of illegal drugs or regulations prohibiting the serious misconduct, previous counseling about the misconduct, use of illegal drugs with enlisted soldiers; or the officer had distributed or used illegal drugs while on active reserve (drill) status.

104. An antipersonnel land mine (APL) is a mine primarily designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure, or kill one or more persons. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *amended* May 3, 1996, art. 2, U.S. TREATY DOC. NO. 105-1, at 37, 35 I.L.M. 1206 [hereinafter *Amended Protocol II*]

(UNCCW)¹⁰⁷ limits the use of certain weapons that may cause unnecessary suffering or have indiscriminate effects.

Protocol II of the convention covers land mines (including APL), booby traps, and “other devices” such as command detonated mines.¹⁰⁸ The United States is a party to the UNCCW and ratified Protocol II to the convention.¹⁰⁹ The Protocol prohibits the use of land mines against civilians,¹¹⁰ either directly or through indiscriminate placement.¹¹¹ The Protocol also requires that forces take all feasible precautions to protect civilians from the effects of land mines.¹¹² Articles 4 and 5 restrict placement of mines and booby traps in populated areas. Under Article 4, non-remotely delivered mines, booby traps, and other devices cannot be used in towns or cities, or other populated areas where combat between ground forces is not taking place or is not imminent. Article 4 creates limited exceptions, however, if the devices are placed in the vicinity of a military objective under the control of an “adverse party” (combatant) or measures are in place to protect civilians from their effects (for

example, posting of signs, sentries). Under Article 5 forces may only use remotely delivered mines¹¹³ against military objectives. In addition, they may be used only if their location can be accurately recorded or if they are self-neutralizing.¹¹⁴ Article 6 prohibits the use of booby traps on ten categories of objects including the dead, wounded, children’s toys, medical supplies, and religious objects. Protocol II of the UNCCW addresses land mines generally; the United States is now considering ratifying the amended Protocol II that will further regulate the use of APL.

Amended Protocol II

On 3 May 1996, the Review Conference of the State Parties to the UNCCW proposed amendments to Protocol II.¹¹⁵ The United States participated in this conference and the President transmitted the ratification package on the amended Protocol II to the Senate on 7 January 1997.¹¹⁶ The Senate is currently con-

105. President William Jefferson Clinton, Statement at the White House (16 May 1996) (*available at* LEXIS, News Library, ARCNWS File); The White House, Office of the Press Secretary, Fact Sheet, subject: U.S. Announces Anti-Personnel Landmine Policy (May 16, 1996), *available at* <<http://www.pub.whitehouse.gov/uri-res/I2R?:pdi://oma.eop.gov.us/1996/5/16/7.text.1>>; U.S. DEP’T OF ARMY, FIELD MANUAL 20-32, MINE/COUNTERMINE OPERATIONS xvii (29 May 1998); *see generally* Presidential Decision Directive 48 (on file with Chairman Joint Chiefs of Staff Legal Counsel). On 17 January 1997, the United States imposed a unilateral APL stockpile cap and banned the export and transfer of all APL. The United States also initiated action to pursue negotiations on a worldwide treaty banning the use, production, stockpiling and transfer of APL in the United Nations Conference on disarmament. This policy was codified by Presidential Decision Directive 54 (on file with Chairman Joint Chiefs of Staff Legal Counsel). Information Paper, LTC John Spinelli, Policy Analyst, Department of the Army Deputy Chief of Staff Operations and Plans (DCSOPS), DAMO-SSP, subject: Anti-Personnel Landmine (APL) Studies and Initiatives (L-1-00) (16 Nov. 1998) (copy on file with the author). *See infra* text accompanying notes 135-40 (discussing U.S. policy initiatives).

106. “Self-destruction mechanism means an incorporated or externally attached automatically-functioning mechanism that secures the destruction of the munitions into which it is incorporated or attached.” Amended Protocol II, *supra* note 104, art. 2, para. 10. “Self-neutralization mechanism means an incorporated automatically-functioning mechanism that renders inoperable the munitions into which it is incorporated.” *Id.* art. 2, para. 11. “Self-deactivating means automatically rendering munitions inoperable by the irreversible exhaustion of a component, for example, a battery that is essential for the operation of the munitions.” *Id.* art. 2, para. 12. An example is the claymore, which is not a mine if it is in command-detonated mode.

107. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, U.S. TREATY DOC. NO. 103-25, at 6, 1342 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter UNCCW].

108. Protocol On Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 Oct. 1980, 19 I.L.M. 1529 [hereinafter Protocol II]. “Mine means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle” *Id.* art. 2, para. 1. “Booby-trap means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches and apparently harmless object or performs an apparently safe act.” *Id.* art. 2, para. 2. “Other devices means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.” *Id.* art. 2, para. 3.

109. A state is considered a party to the UNCCW if it has ratified two or more of the Protocols at the time it deposits its instrument of ratification. The United States ratified Protocols I and II. The United States ratified the UNCCW on 24 March 1995, with a reservation to article 7, paragraph 4. That article applies the UNCCW in wars of self-determination as described in article 1, paragraph 4 of Protocol I Additional to the Geneva Conventions of 1949. Geneva Protocol I expands the definition of international armed conflict to include so called wars against “colonial domination,” “alien occupation,” and “racist regimes.” Protocol I Additional to the Geneva Convention of 1949, Dec. 12, 1977, 16 I.L.M. 1391. The United States objects to the expansion of the scope of international armed conflict under the UNCCW. The United States believes this expansion politicizes the law of war by injecting a political cause consideration.

110. Protocol II, *supra* note 108, art. 3, para. 2.

111. *Id.* art. 3, para. 3.

112. *Id.* art. 3, para. 4.

113. “Remotely delivered mine means any mine delivered by artillery, mortar or similar means or dropped by aircraft.” *Id.* art. 2(1).

114. A self-neutralizing mechanism can be a self-actuating or remotely controlled mechanism that renders the mine harmless or destroys the mine when the mines no longer serve a military purpose. *Id.* art. 5(1)(b).

115. Amended Protocol II, *supra* note 104.

sidering whether to give its advice and consent on ratification. The amendments expand the scope of the original Protocol to include internal armed conflicts.¹¹⁷ They require that all *remotely delivered* APL be equipped with self-destruct devices and backup self-deactivation features.¹¹⁸ Furthermore, the amendments require that all *remotely delivered* mines other than APL have the same features “to the extent feasible.”¹¹⁹ The self-destructing and self-deactivating features must comply with specifications in the technical annex to the amendments.¹²⁰ The amendments require that all *non-remotely delivered* APL be self-destructing or self-neutralizing unless they are employed within controlled, marked, and monitored minefields that are protected by fencing or other means to keep out civilians.¹²¹ These areas must also be cleared before they are abandoned.¹²² These restrictions, however, do not apply to claymore weapons if they are: (1) employed in a non-command detonated (tripwire) mode for a maximum period of seventy-two hours, (2) located in the immediate proximity of the military unit that emplaced them, and (3) the area is monitored by military personnel to ensure civilians stay out of the area.¹²³

If a claymore weapon is employed in a tripwire mode that does not comply with these restrictions, it will be regarded as an APL and must meet the restrictions for an APL. The Amended Protocol II also requires that all APL be detectable using available technology.¹²⁴ All APL must contain the equivalent of eight grams of iron to ensure detectability.¹²⁵ The amendments require that the party laying mines preclude their

irresponsible or indiscriminate use.¹²⁶ At the end of hostilities, the party must immediately clear, remove, destroy, or maintain the mines in a marked and monitored area.¹²⁷ The amendments provide for means to enforce compliance.¹²⁸ The ability of United States forces to lawfully use APL recently faced a challenge by domestic legislation that would have rendered these laws essentially irrelevant for most of 1999.

APL Moratorium

Section 580 of the Foreign Operations Authorization Act of 1996¹²⁹ would have established a moratorium on the use of anti-personnel land mines for one year beginning 12 February 1999, “except along internationally recognized borders or in demilitarized zones with a perimeter marked area that is monitored by military personnel and protected by means to exclude civilians.”¹³⁰ The moratorium would not have applied to command detonated claymore mines. Section 1236 of the Fiscal Year (FY) 1999 Department of Defense Authorization Act¹³¹ repealed Section 580 of the 1996 Act.

Ottawa Convention

Judge advocates should be aware of another international APL agreement (the Ottawa Convention). The Convention on the Prohibition of the Use, Stockpiling, Production, and Trans-

116. Message from the President of the United States Transmitting Protocols to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: The Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II); the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III or the Incendiary Weapons Protocol); and the Protocol IV on Blinding Laser Weapons (Protocol IV), Jan. 7, 1997, U.S. TREATY DOC. NO. 105-1 (1997).

117. The Protocol applies to situations referred to in Article 3 common to the Geneva Conventions of 1949. *Id.* art 1(2).

118. Amended Protocol II, *supra* note 104, art. 6, para. 2.

119. *Id.* art. 6, para. 3.

120. *Id.* technical annex, para. 3.

121. *Id.* art. 5, para. 2(a).

122. *Id.* art. 5, para. 2(b).

123. *Id.* art. 5, para. 6.

124. *Id.* art. 4.

125. *Id.* technical annex, para. 2.

126. *Id.* art. 14.

127. *Id.* art. 10.

128. *Id.* art. 14.

129. Pub. L. No. 104-107, 110 Stat. 751 (1996).

130. *Id.*

131. H.R. CONF. REP. NO. 105-736, at 246 (1998).

fer of Anti-Personnel Mines and on Their Destruction¹³² (hereinafter Ottawa Convention) was signed on 2 and 3 December 1997 by 123 nations. As of December 1998, 131 nations have signed the convention and fifty-seven nations have ratified it. The convention will enter into force on 1 March 1999. The United States is not a party to the convention. Parties to the convention pledge never to use APL. In addition, the parties agree never to develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly APL. Finally, the parties agree not to assist, encourage, or induce, in any way, anyone to engage in prohibited activity to a state party under the convention. Each state party must destroy or ensure the destruction of all stockpiled APL it owns or possesses, or that are under its jurisdiction or control. This must be done as soon as possible but not later than four years after a country enters the convention into force. Though the United States did not sign the Ottawa Convention, we must consider interoperability issues related to our allies that have ratified the treaty.¹³³ Though the United States is not a party to the treaty, the President has announced several initiatives with regard to APL that are related to the treaty.

On 17 September 1997, the President explained why the United States did not sign the Ottawa Convention and announced the steps that the United States would take to “advance our efforts to rid the world of land mines.”¹³⁴ The President directed the DOD to develop alternatives to APL for use outside of Korea by the year 2003, with the goal of fielding them in Korea by 2006.¹³⁵ The President appointed a former Chairman of the Joint Chiefs of Staff as an advisor on land mines,¹³⁶ and the President pledged to increase demining programs.¹³⁷ He also stated: “[W]e will redouble our efforts to establish serious negotiations for a global antipersonnel land mine ban in the Conference on Disarmament in Geneva.”¹³⁸ Key aspects of the President’s announcement have been codified in Presidential Decision Directive 64 (PDD 64).¹³⁹ This document addresses general guidance on APL policy,¹⁴⁰ a schedule for developing APL alternatives,¹⁴¹ the development of future barrier systems as alternatives to mine systems,¹⁴² humanitarian demining programs,¹⁴³ a global APL ban,¹⁴⁴ and cooperation among allies.¹⁴⁵

132. Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Ant-Personnel Mines and on Their Destruction, *opened for signature* Sept. 8, 1997, 36 I.L.M. 1507.

133. Of the 16 NATO members, only the United States and Turkey have not signed the Ottawa Convention. Belgium, Canada, Denmark, France, Germany, Italy, Norway, and the United Kingdom had ratified the Ottawa Convention. As of 20 December 1998, Greece, Iceland, Luxembourg, Netherlands, Portugal, and Spain have signed, but not ratified the Convention. Department of the Army (HQDA), Joint Chief’s of Staff, DOD and the Department of State (DOS) are currently working on interoperability issues with a number of NATO allies. Judge advocates at field commands should consult the HQDA points of contact (listed at the end of this note) for current information pertinent to their command.

134. President William Jefferson Clinton, Remarks on Land Mines at the White House (Sept. 17, 1997), available at <<http://www.whitehouse.gov/WH/New/html/19970917-8619.html>>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Information Paper, LTC John Spinelli, Policy Analyst, Department of the Army Deputy Chief of Staff Operations and Plans, DAMO-SSP, subject: PDD-64: Anti-Personnel Landmines (APL): Expanding Upon and Strengthening U.S. APL Policy (U) (8 July 1998) (copy on file with author).

140. *Id.* Presidential Decision Directive 64 ensures that as the United States pursues its humanitarian goals, it will take necessary steps to protect the lives of American military personnel and civilians they may be sent to defend. The DOD will ensure that the design and employment features of APL alternatives provide equivalent military effectiveness and safety, while minimizing the risks to non-combatants. The DOD will also ensure that APL alternatives do not create other humanitarian problems. *Id.*

141. *Id.* The DOD will develop APL alternatives to end use of all APL outside Korea, including those that self-destruct, by the year 2003. The DOD will develop a new mixed system that provides an alternative to employing two munitions (Area Denial Artillery Munitions and Remote Anti-Armor Mine) and preserves an important anti-tank mine capability. The United States will assess the viability of other APL alternatives being explored pursuant to this PDD, as well as other relevant factors, before deciding (in FY 2001) to proceed with production. The DOD will aggressively pursue the objective of having alternatives to APL ready for Korea by 2006, including those that self-destruct. This date is an objective, rather than a deadline, because viable alternatives have not yet been identified, the risks of the program are significant, and the costs to build and deploy alternatives cannot be fully assessed at this time. *Id.*

142. *Id.* As the DOD explores alternatives to APL, it will retain mixed anti-tank mine systems as part of the current and planned inventory of anti-tank munitions. However, as alternatives to existing APL are developed, the DOD will actively investigate the use of such alternatives in place of the “anti-personnel” (AP) component in mixed munitions. The DOD will also actively explore other technologies and concepts that could result in new approaches to barrier systems that could replace the entire mixed munitions. These alternatives would also be advantageous militarily, cost effective, safe, and eliminate the need for mines entirely. No established deadline exists by which alternatives for the AP component in mixed munitions, or the entire mixed system, must be identified and fielded. Presently, an operationally viable concept has not been identified and there is no guarantee this search will be successful.

Conclusion

The international process underway to outlaw all APL is primarily concerned with the indiscriminate effect irresponsible use has on civilian populations. United States armed forces primarily employ APL to protect our defensive positions and to prevent deactivation of our anti-tank mines. United States doctrine fully complies with Protocol II and the Amended Protocol II of the UNCCW. Except on the Korean Peninsula, the United States employs highly reliable APL that self-destruct within hours or days of their employment and contain a backup self-deactivation feature. Many non-governmental organizations and some United States allies objected to APL use as indiscriminate because of their potential for misuse; therefore, they have supported the Ottawa process. In the face of the continuing efforts to ban all APL and the scrutiny surrounding the use of any APL, judge advocates must be prepared to clearly articulate U.S. policy and applicable law. Lieutenant Colonel Barfield

Points of Contact

Questions regarding APL issues should be directed to HQDA DAMO-SSD (LTC Spinelli, (703) 695-5162 or DSN 225-9162), or OTJAG (Mr. Parks, (703) 588-0132 or DSN 425-0132).

Operational Law Seminar Evolves, Adds Sommerfeld Lecture

Beginning with the 31st Operational Law (OPLAW) Seminar, which will occur from 1 - 12 March 1999, the International and Operational Law Department will modify both the content and the organization of the course. The modified schedule retains the thematic consistency of a fictional scenario that raises legal issues for discussion. However, the revised course schedule focuses more on preparing students for the issues they will encounter during operations. More significantly, the revisions will help students develop functional legal skills rather than mere intellectual appreciation of the legal issues associated with military operations. Finally, the course will inaugurate the Sommerfeld Lecture series.

The first week of the two-week course will build on the student's understanding of the Law of War. Students attending the

Operational Law Seminar should have attended the Law of War Workshop. The first day of the new course will emphasize the nexus between Law of War issues and the practice of operational law. The remainder of the first week is devoted to teaching students the functional skills they need to practice operational law. Classes will emphasize the lawyer's role in the staff process, ROE development, and fiscal law rules. The first week also includes a series of discrete classes centered on substantive legal areas. For example, some of the first week classes include The Law of Common Spaces, Intelligence Law, High Profile Investigations, and Reserve Component Mobilization Issues. The first week concludes with each student preparing a Legal Annex to the Joint Task Force Operational Order (OPORD) for the fictional Operation Balkan Storm.

The most noticeable changes will take place during the second week of the course. Students will wear battle dress uniforms throughout the week. Each morning, the class will receive a staff briefing from the International and Operational Law "staff." The students will break down into small groups and prepare a briefing on one or two legal issues within each one of the functional legal systems. The seven functional legal systems are: Law of War (Methods and Means), Law of War (Non-combatants), Rules of Engagement, Staff Integration and Coordination, Contracts and Fiscal Law, International Law and Agreements, Administrative Law and Foreign Claims, and Discipline, Legal Assistance, and Personal Claims.

Each day of week two will present students with legal issues that arise from one phase of military operations. Monday will highlight issues from the Predeployment and Mobilization Phase. Tuesday through Thursday will respectively focus on Counterinsurgency, Combat Operations, and Post Conflict Stability and Support Operations. Students will have about three hours to research their assigned issues and prepare a briefing for the commander. Students will brief their solutions to ADI faculty that are in the role of "commander" every afternoon. The goal is to help students integrate their legal knowledge and research ability with the skill needed to stand up and brief the issues to a discerning commander.

Aside from the schedule modifications, the new OPLAW Seminar will initiate the Sommerfeld Lecture on Thursday evening of Week two. Mr. Alan E. Sommerfeld made a generous gift of \$11,000 to the Alumni Association of The Judge Advocate General's School. Named in his honor, the Sommerfeld Operational Law Lecture series will bring superb speakers

143. *Id.* The DOD executes the United States' humanitarian demining research and technology development program. In consultation with relevant agencies (including the DOS Special Representative for Global Humanitarian Demining) DOD will continue to ensure its research and development program supports the broader goals of U.S. humanitarian demining programs and the objectives established in the United States' "Demining 2010 Initiative." *Id.*

144. *Id.* While more than 120 nations have signed the Ottawa Convention, for reasons that were explained on 17 September 1997, the United States has not signed. The United States, however, will sign the Ottawa Convention by 2006 if it has identified and fielded suitable alternatives to APL and mixed anti-tank systems. The United States will continue work on a global ban in the Conference on Disarmament. *Id.*

145. *Id.* The United States will continue to work with NATO allies to ensure Ottawa Convention signing, ratification, and adherence does not undercut the alliance's ability to carry out other treaty responsibilities. The United States will also work with other allies to ensure its ability to execute its responsibilities under other regional security agreements is not adversely affected. *Id.*

to address the students after dinner the night before students depart at noon the next day. The Sommerfeld Lecture will spotlight experts in the field of Space and Missile Defense or Information Operations. The Center for Law and Military Operations and the International and Operational Law Department will seek the best available speaker to speak on the issues specified by Mr. Sommerfeld. The Sommerfeld Lecture Series also has the discretion to select other outstanding speakers on topics deemed highly relevant to current operational law issues and emerging doctrine.

Mr. Sommerfeld's gift will add an unprecedented dimension to the Operational Law Seminar that will contribute to the goals for the two-week course. In conjunction with the course, the Operational Law Seminar will provide judge advocates with legal knowledge and the practical skills to apply that knowledge. The new course will therefore enhance the competence and confidence that judge advocates bring to the modern practice of operational law. Lieutenant Colonel Barfield.