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The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)

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At 0902 on 19 April 1995, a massive car bomb, containing approximately 4000 pounds of ammonium nitrate and diesel fuel, destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.¹ The blast killed 169 people and injured 467.² By 1600 that afternoon, President Clinton had declared a federal emergency in Oklahoma City.³ Prior to that time, however, commanders at Fort Sill and Tinker Air Force Base (AFB), relying on the Immediate Response Authority,⁴ had already provided support to Oklahoma City civil authorities. Fort Sill released two medical evacuation helicopters, explosive ordnance personnel, and two bomb detection dog teams, while Tinker AFB dispatched two ambulances and a sixty-six person rescue team.⁵ In addition to that immediate support, the Secretary of the Army, through his Director of Military Support,⁶ subsequently coordinated the efforts of over 1000 Department of Defense (DOD) personnel to perform a myriad of support functions at the height of the operation.⁷ In the days following the tragedy, civilian law enforcement authorities also

requested support in the form of bomb detection dog teams and DOD linguists.

This article explores the legal authorities supporting the DOD response to the Oklahoma City bombing. It focuses on the Immediate Response Authority and the Stafford Act, the key disaster relief legal authorities underpinning Military Support to Civil Authority (MSCA) operations in Oklahoma City. In doing so, it reviews the history and limits on these authorities. It then examines some of the legal authorities and considerations triggered by requests from federal law enforcement agencies for Military Assistance to Civil Authority (MACA) in the aftermath of the bombing.⁸

MSCA in Oklahoma City

Military Support to Civil Authority refers primarily to natural disaster relief, but the term also includes a broad spectrum of support operations such as environmental clean-up assis-

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1. REPORT OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY, REVIEW OF THE BOMBING OF THE ALFRED P. MURRAH BUILDING, EM 3115, DR-1048, at 17 (1995) [hereinafter FEMA REPORT]; Information Paper, Dep't of Army Operations, DAMO-ODS, subject: Murrah Federal Building Bombing, Oklahoma City, Oklahoma, para. 1a (13 Sept. 1995) [hereinafter Information Paper].
 2. Information Paper, *supra* note 1, para. 1a.
 3. FEMA REPORT, *supra* note 1, at 18; President's Letter Declaring a Federal Emergency in Oklahoma City, 60 Fed. Reg. 22,579 (1995).
 4. The Immediate Response Authority is found in DOD Directives 3025.15 and 3025.1 and in AR 500-60, and the authority will be discussed in detail later in this article. DEP'T OF DEFENSE, DIRECTIVE 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (MACA) (18 Feb. 1997) [hereinafter DOD DIRECTIVE 3025.15]; DEP'T OF DEFENSE, DIRECTIVE 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) (15 Jan. 1993) [hereinafter DOD DIRECTIVE 3025.1]; DEP'T OF ARMY, REG. 500-60, DISASTER RELIEF (1 Aug. 1981) [hereinafter AR 500-60].
 5. *U.S. Military Support for Oklahoma City*, FEDERAL NEWS SERVICE, Apr. 20, 1995, at 2; Memorandum, Major General Robert H. Scales, Director of Military Support, to the Secretary of the Army, subject: DOD Support to the Bombing in Oklahoma City (20 Apr. 1995) [hereinafter Scales Memorandum] (on file with author).
 6. The Secretary of Defense (SECDEF) has designated the Secretary of the Army (SECARMY) as his Executive Agent for MSCA operations. DOD DIRECTIVE 3025.1, *supra* note 4, para. 3a. The Director of Military Support is the SECARMY's action agent for MSCA. AR 500-60, *supra* note 4, at 1-2. Note, however, that a recent DOD Directive has affected the SECARMY's MSCA role. The SECDEF has continued to delegate approval authority to the SECARMY for MSCA operations. To reflect the realities of post-Goldwater-Nichols DOD operations, however, SECDEF now requires SECARMY to coordinate support requests requiring the deployment of Combatant Command assets (forces or equipment) with the Chairman of the Joint Chiefs of Staff. The Chairman must then determine whether such a deployment involves a "significant issue requiring SECDEF approval." DOD DIRECTIVE 3025.15, *supra* note 4, paras. D5, D7c. The Director of Military Support actually performs these coordination functions with the Joint Staff. *Id.* If SECDEF approval is not required, then the SECARMY will approve the mission. *Id.* The guidance in DOD Directive 3025.15 formalizes the guidance contained in a fairly well publicized SECDEF policy memorandum written following a 1995 review of DOD procedures for assisting civilian authorities. Memorandum, Secretary of Defense, to Secretaries of the Military Departments, subject: Military Assistance to Civil Authorities (12 Dec. 1995).
 7. Information Paper, *supra* note 1, para. 1c. The specific types of support provided will be discussed later in this article.
 8. Military Assistance to Civil Authorities (MACA) is the new term employed in DOD Directive 3025.15 to describe several domestic support operations, specifically civil disturbance operations, key asset protection operations, disaster relief operations (MSCA), operations involving acts or threats of terrorism, and support to civilian law enforcement agencies. DOD DIRECTIVE 3025.15, *supra* note 4, para. B(2).

tance, radiological emergencies, mass immigration emergencies, wild fire support, the Military Assistance to Safety and Traffic Program, explosive ordnance support, and postal augmentation, to name a few.⁹ A recent example of a nondisaster relief MSCA mission was the DOD support of the TWA Flight 800 crash.¹⁰ Nonetheless, most of the DOD MSCA, and often the most highly visible MSCA operations, are disaster relief operations. For the vast majority of these operations, the relevant legal authority is the Stafford Act. With one exception, the Immediate Response Authority, the DOD has no legal authority outside the Stafford Act framework.¹¹

Immediate Response Authority

The Immediate Response Authority exception to the Stafford Act authorized the use of the medevac aircraft, ambulances, bomb detection dog teams, and various military personnel at Oklahoma City. This exception permits a local commander, when time does not permit prior approval from higher headquarters, to provide assistance to local authorities in the case of emergencies.¹² The provisions of *DOD Directive 3025.1* contain the most relevant articulation of the authority, stating:

Imminently serious conditions resulting from any civil emergency or attack may require

immediate action by military commanders, or by responsible officials of other DOD Agencies, to save lives, [to] prevent human suffering, or [to] mitigate great property damage. When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DOD components are authorized by this Directive, subject to any supplemental direction that may be provided by their DOD Component, to take necessary action to respond to requests of civil authorities. All such necessary action is referred to in the Directive as "Immediate Response."¹³

This authority is firmly entrenched in current Army Regulations, forerunners of which may be traced to the early twentieth century.¹⁴ Additionally, judge advocates should be aware that there is analogous emergency authority applicable to cases of civil disturbance contained in both DOD Directives and Army Regulations which has an equally distinguished lineage.¹⁵

The Immediate Response Authority reflects the historical role of the military, particularly the Army, to provide an immediate or emergency response to the civilian community in case

9. DEP'T OF DEFENSE, MANUAL 3025.1, MANUAL FOR CIVIL EMERGENCIES, 3-1 through 3-27 (2 June 1994) [hereinafter CIVIL EMERGENCIES MANUAL].

10. Message, Director, Military Support, DCSOPS, Washington, D.C., subject: Support to TWA Flight 800 Crash Investigation (251931Z July 96). Note that this was not considered support to law enforcement agencies because the National Transportation Safety Board (NTSB) acted as the lead federal agency for the investigation of the crash. While the FBI also investigated the crash scene, it was not the lead agency.

11. John J. Copelan & Steven A. Lamb, *Disaster Law and Hurricane Andrew—Government Lawyers Leading the Way to Recovery*, 27 URB. LAW. 29, 36 (1995).

12. DOD DIRECTIVE 3025.1, *supra* note 4, para. D5a. This same authority also requires the installation providing immediate assistance to notify the DOD Executive Agent (normally the Director of Military Support in the Army Operations Center in the Pentagon) through command channels, by the most expeditious means available.

13. *Id.* para. D5.

14. AR 500-60, *supra* note 4, para. 2-1f (stating that "[w]hen a serious emergency or disaster is so imminent that waiting for instruction from higher authority would preclude effective response, a military commander may do what is required and justified to save human life, [to] prevent immediate human suffering, or [to] lessen major property damage or destruction"). The 1917 Regulations Governing Flood Relief Work of the War Department also contained an emergency provision. While the regulations first state the norm, that the Army will not undertake relief efforts unless authorized by Congress, the regulations went on to state that the emergency exception applied in cases where "the overruling demands of humanity compel immediate action to prevent starvation and extreme suffering and local resources are clearly inadequate to cope with the situation." DEP'T OF ARMY, SPECIAL REG. NO. 67, para. 1 (12 Oct. 1917).

15. DEP'T OF DEFENSE, DIRECTIVE 3025.12, MILITARY ASSISTANCE TO CIVIL DISTURBANCES (MACDIS), para. D2b (4 Feb. 1994); DEP'T OF ARMY, REG. 500-50, CIVIL DISTURBANCES, para. 2-4 (21 Apr. 1972). This emergency-based authority may be traced to the late nineteenth century. In his seminal treatise on military law, Colonel William Winthrop cites, without comment, the 1895 Army Regulation authorizing officers of the Army to aid law enforcement in cases of:

[S]udden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in cases of attempted or threatened robbery or interruption of the United States mails, or to other equal emergency so imminent as to prohibit communication by telegraph, officers of the Army may, if they think a necessity exists, take such action before the receipt of instructions from the seat of Government as the circumstances of the case and the law under which they are acting may justify.

DEP'T OF ARMY, REGS., para. 489 (1895), *quoted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 868, n. 26 (2d ed. 1920).

Note also that the corresponding directives governing the provision of military support to civilian law enforcement authorities (a branch of MACA), of which MACDIS is a component, also refer to the emergency authority. DEP'T OF DEFENSE, DIRECTIVE 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, encl. 4, para. A2c (15 Jan. 1986) [hereinafter DOD Directive 5525.5]; DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT OFFICIALS, para. 3-4 (1 Aug. 1983) [hereinafter AR 500-51].

of disaster. One of the most celebrated examples of the use of this authority in this century was the 1906 San Francisco earthquake and fire. There, General Frederick Funston, commander of the Department of California and, at the time of the earthquake, the Pacific Division, deployed all troops at his disposal to assist civil authorities in both a civil disturbance and a disaster relief role.¹⁶ Destroying large parts of the city, the earthquake and resulting fire left 250,000 San Franciscans homeless. Troops were immediately employed to stop looting and to protect federal buildings such as the mint and the post office.¹⁷ In addition, they assisted firefighters in battling the conflagration.¹⁸ While General Funston telegraphed the War Department to inform it of his actions, he took those actions he deemed necessary in what was clearly an emergency situation.¹⁹

Another documented case of immediate response involves the commander of Hamilton AFB providing personnel to the local authorities of Yuba City-Marysville, California. In December 1955, a flood struck Yuba-Marysville, and base personnel assisted in building levees and evacuating civilians the day before the presidential disaster declaration.²⁰ A more recent example was the 1994 Flint River flood in southwest Georgia, which left over 40,000 people homeless. Using the Immediate Response Authority, the commander of the Marine Corps Base in Albany, Georgia provided personnel to assist in the rescue of several hundred people.²¹ Finally, in September 1996, over 600 soldiers from the XVIII Airborne Corps responded to a request from the governor of North Carolina for aid in the wake of Hurricane Fran. The soldiers provided emergency generator support and debris removal services.²²

While the doctrine has firm historical roots, there are no statutes or constitutional provisions which expressly authorize the President, much less a military commander, to direct this type

of assistance.²³ This fact alone counsels caution in its exercise. The Supreme Court, however, has articulated two lines of authority which could support the use of Immediate Response authority. The first rationale draws on the historical lineage of Immediate Response Authority. In *Cafeteria Workers v. McElroy*,²⁴ the Supreme Court held that the commanding officer of an installation, based on departmental regulations and “historically unquestioned power,” had the authority to exclude civilians from an area of his command.²⁵ The Immediate Response Authority presents a similar situation, as it, too, is expressed in regulation and has been “unquestioned” over the past century. Nonetheless, the two situations are not entirely analogous; it is one thing for the base commander to exclude persons from his post to ensure the safety and security of his installation and quite another to send personnel off-post to assist state or local authorities. For that reason, and the lack of commentary applying the *McElroy* authority to Immediate Response actions, the *McElroy* authority is not the strongest authority to support Immediate Response actions.

The second and most commonly cited rationale to support Immediate Response actions is the common law principle of necessity. To determine the nature of necessity, one must look to the nineteenth century for the seminal Supreme Court opinion. The Supreme Court, in *Mitchell v. Harmony*,²⁶ described the doctrine as follows:

[W]e are clearly of the opinion that in all of these cases the danger must be immediate and impending; or the necessity urgent of the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is

16. FEDERAL AID IN DOMESTIC DISTURBANCES, S. DOC. NO. 67-263, 309 (1922).

17. MAJOR CASSIUS M. DOWELL, THE GENERAL SERVICE SCHOOLS, FORT LEAVENWORTH, KANSAS, MILITARY AID TO THE CIVIL POWER 195 (1925).

18. *Id.*

19. *Id.*

20. Carter L. Burgess, *The Armed Forces in Disaster Relief*, 309 ANNALS AM. ACAD. POL. & SOC. SCI. 71, 72 (1957).

21. Jason Vest, *Georgia Flood Waters Continue Lethal Surge*, WASH. POST, July 10, 1994, at A-1, A-4.

22. Telephone Interview with LTC Corey Gruber, Directorate of Military Support (Sept. 27, 1996) [hereinafter Gruber Interview].

23. The Supreme Court has held, however, that the President has inherent sovereign authority to employ federal troops to preserve federal functions and to protect federal property. See *In re Debs*, 158 U.S. 564, 582 (1895). Nonetheless, the Immediate Response scenario is not a classic exercise of sovereign authority for two reasons. First, it is not the sovereign that is acting in this situation, it is the military commander. Second, the commander undertakes his Immediate Response activities not to preserve a federal function or to protect federal property, both of which are clear examples of inherent authority, but to assist state or local authorities.

24. 367 U.S. 886 (1961).

25. *Id.* at 893.

26. 59 U.S. 115 (1851). Mitchell, an army colonel, seized the private property of Harmony, a United States citizen accompanying Mitchell's force as a trader during the Mexican War. Harmony sued Mitchell for the loss of his property. The colonel was concerned that the trader would supply the enemy as well as his own forces and justified his actions on grounds of necessity. The court upheld the lower court finding that, given the facts presented, Colonel Mitchell's actions were not justified by necessity.

impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.²⁷

Although *Mitchell* and other Supreme Court opinions discussing necessity do not discuss it in a disaster relief setting,²⁸ it is not unreasonable to extend its application to such situations. The key component of necessity is protecting the public welfare, and, while not facing a foreign or internal enemy, emergency disaster relief is, nonetheless, an act of self-preservation.²⁹ Few situations can be more compelling than attempts to rescue citizens ravaged by hurricane, flood, or an explosive device.

Several commentators agree that necessity is the basis for the Immediate Response Authority. This belief first became apparent in the aftermath of the previously mentioned San Francisco fire and earthquake of 1906, the classic example of Immediate Response Authority in both a civil disturbance and a disaster relief (MSCA) setting. In commenting on the Army's response to the San Francisco disaster, then Secretary of War Robert Taft stated, "[i]n a desperate situation General Funston saw clearly the thing that was necessary to be done and did it."³⁰ Analyzing that same incident in his treatise on martial law, Frederick Wiener, Special Assistant to the Attorney General, cited necessity as the legal basis for General Funston's actions.³¹ Major Cassius Dowell, in his 1925 book entitled *Military Aid to the Civil Power*, similarly approved of the Army's actions in San Francisco and went on to say that in sudden emergencies involving disasters, military assistance should be based on

"necessity," with the local commander exercising his "best judgment."³² Finally, in an article on the Posse Comitatus Act, Major H. W. C. Furman also cited approvingly to the principle of necessity in those circumstances and stated that the faculty of The Judge Advocate General's School, U.S. Army (TJAGSA) cited necessity as the basis for a military commander's ability to conduct emergency disaster relief.³³

A 1964 TJAGSA lesson plan entitled *Martial Law* indeed cited necessity as the basis for the military commander's authority to respond to emergency situations, whether it be caused by insurrection, riot, or natural disasters.³⁴ Relying on the language of the *Mitchell* case, the lesson plan contained a two-part test for the use of the doctrine: the first element being sudden and unexpected calamity and the second being the inability of civil authorities to act effectively.³⁵

This test continues to be an apt one, and it reflects the limited nature of the doctrine—the situation must be a bona fide emergency which overwhelms the ability of civilians to respond. These limitations have found their way into the modern-day regulations governing Immediate Response Authority, which will be discussed below. The local commander must evaluate these two elements and make a decision to deploy personnel in Immediate Response based on the facts presented to him at the time of the incident.³⁶

The existence of the emergency work provisions of the Stafford Act³⁷ also underscores the limited circumstances in which commanders should rely on Immediate Response Authority. One of the principal reasons for the 1988 passage of this provision was to enable the President to deploy the armed forces "during the immediate aftermath of a natural catastrophe."³⁸ Thus, despite the rare use of the emergency work provi-

27. *Id.* at 134.

28. *See* *United States v. Russell*, 80 U.S. 623, 627-28 (1871) (justifying the federal seizure of private vessels for military service during the Civil War on the basis of necessity). Necessity is most often discussed as the basis for martial law. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1945) (Stone, J., concurring) ("[Martial law] is a law of necessity to be prescribed and administered by the executive power.").

29. *See Mitchell*, 59 U.S. at 134 (stating that necessity is related to the "public service"); *Russell*, 80 U.S. at 628 (stating that necessity arises in cases of "public danger").

30. FREDERICK B. WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* 52 (1940). Following the incident, both the governor and the state legislature had high praise for General Funston's actions. *See also* FEDERAL AID IN DOMESTIC DISTURBANCES, S. DOC. NO. 67-263, at 310 (1922).

31. WIENER, *supra* note 30, at 51-52.

32. DOWELL, *supra* note 17, at 207.

33. Major H.W.C. Furman, *Restrictions Upon Use of the Army Imposed By the Posse Comitatus Act*, 7 MIL. L. REV. 85, 105 n.120 (1960).

34. THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, COMMON SUBJECTS LESSON PLANS: MARTIAL LAW 7 (July 1964) (on file at TJAGSA).

35. *Id.*

36. *Mitchell v. Harmony*, 59 U.S. 115, 135 (1851) (stating that "[i]n deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision").

37. 42 U.S.C. § 5170b(c) (1995). *See also infra* notes 77-82.

sions,³⁹ it is clear that Congress left little room for DOD disaster relief activity outside the Stafford Act framework.

Current Guidance on the Use of Immediate Response Authority

Contemporary DOD directives ensure the limited nature of Immediate Response activities undertaken by the armed forces. First, consistent with the federalism concerns discussed below, there must be a request from local authorities.⁴⁰ In evaluating such requests, a commander should take into account two other considerations which flow from the fundamental principle that the state or local authorities have the primary responsibility to respond to these situations: Those authorities should have applied their own resources to the situation prior to making the request, and those authorities must have found that the situation was beyond their capabilities.⁴¹ The DOD, for a variety of reasons, both legal and fiscal, cannot become a “first responder” to all types of emergencies.

While the type of assistance permitted under the Immediate Response Authority is broad,⁴² it is not a blanket authority to provide disaster relief.⁴³ The authority is intended to be used in genuine emergencies which overwhelm the capabilities of local authorities. To ensure that the civilian request is for a bona fide emergency, the Director of Military Support Manual for Civil Emergencies, which implements *DOD Directive 3025.1*, places general temporal limits on the use of the authority. The manual

states that immediate response authority is “time sensitive” and that requests for assistance should be received from local officials within 24 hours of the completion of a damage assessment.⁴⁴

Fiscal concerns also limit Immediate Response activities. The Stafford Act contains a general reimbursement provision.⁴⁵ Consequently, the DOD expenditures for actions taken pursuant to a mission assignment from the Federal Emergency Management Agency (FEMA) are ultimately reimbursed by the FEMA, as long as the DOD follows the established procedures.⁴⁶ The statutory reimbursement mechanism is not available in the case of Immediate Response actions;⁴⁷ however, the DOD Directive states that even in Immediate Response situations, DOD support should be provided on a cost-reimbursable basis.⁴⁸ In these times of budget shortfalls, commands should more carefully scrutinize requests for Immediate Response support. Nonetheless, humanitarian concerns ultimately trump the fiscal concerns, as the directive emphasizes that assistance “should not be delayed or denied because of the inability or unwillingness of the requester to make a commitment to reimburse the Department of Defense.”⁴⁹

The final limit on Immediate Response activities is that such activities must not “take precedence over [the military’s] combat and combat support missions, nor over the survival of their units.”⁵⁰ This requirement is consistent with the provisions in the Military Support to Civilian Law Enforcement Agency

38. Disaster Relief, 55 Fed. Reg. 2,284 (1990).

39. The speed with which Presidents are making emergency or major disaster declarations has limited the usefulness of this authority. Gruber Interview, *supra* note 22. For example, President Clinton declared a federal emergency in Oklahoma City within seven hours of the blast.

40. DOD DIRECTIVE 3025.1, *supra* note 4, at 6 (stating that commanders may take action “to respond to the requests of civil authorities”). See also *infra* notes 56-64. The initial request may be verbal, but must be followed by a written request. DOD DIRECTIVE 3025.15, *supra* note 4, at paras. D7a, D8c.

41. Lieutenant Colonel Fenton Thomas & Lieutenant Colonel Corey Gruber, Immediate Response: In Time of Need (1994) (unpublished manuscript, on file with author).

42. It includes: the rescue, evacuation, and emergency medical treatment of casualties; maintenance or restoration of emergency medical capabilities; the safeguarding of public health; the emergency restoration of essential public services; and emergency clearance of debris, rubble, and explosive ordnance from public facilities and other areas to permit rescue or movement of people and restoration of essential services, to name a few. DOD DIRECTIVE 3025.1, *supra* note 4, at 6.

43. CIVIL EMERGENCIES MANUAL, *supra* note 9, at 2-2; Thomas & Gruber, *supra* note 41, at 2.

44. Thomas & Gruber, *supra* note 41, at 2. The authors elaborate on this point by recommending that commanders consider “a time and distance relationship in determining the appropriateness of responding to a request for military resources.” The time element referred to is the twenty-four hour time-frame mentioned in the manual, while the distance element referred to is the proximity of the afflicted area to the supporting installation. DOD Directive 3025.15 echoes this guidance by stating that the request “may be made to the nearest DOD component or military commander.” DOD DIRECTIVE 3025.15, *supra* note 4, at para. D8c.

45. 42 U.S.C. § 5147 (1995).

46. After reviewing a request for support from state or local authorities, officials from the FEMA determine what agency will provide the support. Once a determination is made, the FEMA directs the agency to perform a particular assistance mission. A mission assignment letter to the agency articulates the scope of the job, the costs, and the time limitations associated with the project. CIVIL EMERGENCIES MANUAL, *supra* note 9, at 9-2 (explaining the DOD-FEMA reimbursement process). See also *infra* notes 82, 106.

47. On occasion, however, the FEMA has provided reimbursement to the DOD for Immediate Response activities by “ratifying” the DOD action after the fact. Such ratification, however, is done on an ad hoc basis, and commanders cannot rely on the FEMA doing so in every case. Gruber Interview, *supra* note 22. The FEMA is under no obligation to reimburse the DOD for response actions taken prior to a presidential declaration.

48. DOD DIRECTIVE 3025.1, *supra* note 4, at para. 5b.

Statutes,⁵¹ which state that such support may not be provided if it will “adversely affect the military preparedness of the United States.”⁵² That provision reflects a congressional recognition that the armed forces have the ultimate responsibility for the nation’s defense and that military readiness could be seriously compromised by draining DOD assets into other agencies.⁵³ The policy behind the Immediate Response Authority stems from similar concerns about draining DOD assets.⁵⁴ Thus, while Immediate Response Authority is firmly embedded in the DOD’s history and practice, it should be employed judiciously.

The Federal Government and Disaster Relief

Although the DOD’s provision of the medevac aircraft and the bomb dog teams to authorities in Oklahoma City, pursuant to the Immediate Response Authority, was undoubtedly valuable, the bulk of the DOD disaster relief assistance derives from express statutory authority. The remainder of this section will review that authority: the Stafford Act.⁵⁵ Before reviewing the Stafford Act, however, it is worthwhile to consider the larger context in which the federal government delivers such assistance.

In the aftermath of Hurricane Andrew, the Director of the Dade County (Florida) Office of Emergency Management asked, in light of the devastation, “Where in the hell is the cavalry?”⁵⁶ This statement highlighted a misconception about the role of the federal government in disasters, whether natural (as in the case of Hurricane Andrew), or man-made (as in the case of the Oklahoma City bombing). When disasters strike, people often overlook the concept of federalism, particularly in the current age of live media coverage.⁵⁷

Within the United States constitutional system, the Tenth Amendment reserves broad authority to states.⁵⁸ Response to disasters is considered to be one of the “police powers” left to state and local governments.⁵⁹ Virtually all federal statutes and regulations dealing with disaster relief recognize the primacy of state and local governments and specify that federal aid is intended to supplement state and local efforts.⁶⁰ For that reason, in the vast majority of disaster and emergency situations, the Stafford Act requires a request for federal disaster assistance from the governor of the affected state.⁶¹

The federal government, however, has traditionally played a role in disaster relief since the nation’s birth. The first case of such assistance was in 1793 as thousands of political refugees

49. *Id.* In 1989, Congress acted to mitigate the stress placed on DOD Operations and Maintenance Funds accounts (O & M accounts) as a result of providing disaster relief by establishing the Emergency Response Fund, a revolving fund. National Defense Appropriations Act, Pub. L. No. 101-165, Title V, 103 Stat. 1126-27 (1989). The fund is designed to “finance the costs of Department of Defense efforts to relieve the effects of natural and man-made disasters prior to the receipt of a reimbursable request for assistance from Federal, state, or local authorities.” CIVIL EMERGENCIES MANUAL, *supra* note 9, at 9-1. The fund may be used for reimbursing the DOD for the provision of supplies and services, plus the costs associated with providing such supplies and services. The fund may subsequently be reimbursed by the FEMA or by civilian authorities, in the case of the Immediate Response scenario. Use of the fund requires authorization by the office of the Secretary of Defense. *Id.* at 9-3. Unfortunately, this fund is no longer available to reimburse DOD activities because it has been depleted. Gruber Interview, *supra* note 22.

50. CIVIL EMERGENCIES MANUAL, *supra* note 9, at 2-2.

51. 10 U.S.C. §§ 371-81 (1995).

52. 10 U.S.C. § 376 (1995).

53. H.R. CONF. REP. NO. 100-989 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2582.

54. *But see* James F. Miskel, *Observations on the Role of the Military in Disaster Relief*, 49 NAVAL WAR C. REV. 105 (1996) (arguing for an expanded DOD role in disaster relief).

55. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5204 (1995).

56. Mary Jordan, *President Orders Military to Aid Florida*, WASH. POST, Aug. 28, 1992, at A1.

57. NATIONAL ACADEMY OF PUB. ADMIN., COPING WITH CATASTROPHE: BUILDING AN EMERGENCY MANAGEMENT SYSTEM TO MEET PEOPLE’S NEEDS IN NATURAL AND MANMADE DISASTERS 28 (1993), *reprinted in* *Rebuilding FEMA: Preparing for the Next Disaster: Hearing Before the Senate Comm. on Governmental Affairs*, 103d Cong., 1st Sess. (1993) [hereinafter NAT. ACAD. PUB. ADMIN].

58. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

59. NAT. ACAD. PUB. ADMIN., *supra* note 57, at 28.

60. Stafford Act, 42 U.S.C. § 5121(b) (1995) (stating that it is the intent of Congress to provide an orderly and continuing means of assistance by the federal government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from disasters); 44 C.F.R. § 205.32 (1993) (containing Federal Emergency Management Agency Rules with language that is identical to the language of the Stafford Act); DOD DIRECTIVE 3025.1, *supra* note 4, at paras. D1(b) & D4(d) (stating that federal assistance is supplemental to state and local assistance and that civil resources are to be applied first).

61. 42 U.S.C. § 5170 (1995) (stating the procedure for Presidential declaration of a major disaster); 42 U.S.C. § 5191 (1995) (stating the procedure for Presidential declaration of an emergency).

from Santo Domingo arrived in various east coast cities. To relieve the stress the refugees placed on the cities, Congress appropriated \$15,000 to ten states to relocate the refugees.⁶² In so doing, Congress exercised its spending power to promote the “general welfare.”

Congress continued this ad hoc method of disaster relief until 1950, when it passed The Disaster Relief Act of 1950.⁶³ This statute was drafted to provide nationwide, continuing authority for the Federal Government’s disaster relief efforts.⁶⁴ Thus, instead of having to make postdisaster authorizations of relief each time a hurricane or flood occurred in a region of the country, permanent legislation addressed these recurring situations. This statute and its successors authorized the President to coordinate the response of Federal agencies.⁶⁵ The current version of the Disaster Relief Act of 1950, the Stafford Act, permits Federal agencies to provide extensive assistance.

The Stafford Act

The Stafford Act contains four triggers for federal disaster relief. By far, the most widely used are the first two: the Presidential declaration of a major disaster⁶⁶ and an emergency.⁶⁷ Both scenarios require the governor to make a request to the

President for assistance.⁶⁸ The procedures in both provisions require the governor to make a finding in the request that the incident is of such “severity and magnitude” that it is beyond the State’s and the local government’s ability to remedy.⁶⁹ Specifically, the governor must state that the State has taken the appropriate response action under State law and has executed the State’s emergency response plan.⁷⁰ The major disaster provision also requires the governor to furnish information regarding the nature and amount of State and local resources committed to the incident and to certify that the State and local government obligations and expenditures will comply with all cost-sharing requirements of the Act.⁷¹ The emergency procedure provision contains slightly different additional criteria: the governor shall furnish information describing State and local efforts that have been, or will be, committed to the emergency and define the type and extent of federal aid required. The President then makes the appropriate declaration.⁷² These conditions, which the state must meet before making the request, underscore the principle of dual sovereignty and state primacy in these incidents.

The primary distinction between the two declaration procedures is the requirement in the emergency procedure for the governor to define the type and amount of federal aid required.

62. RUTH M. STRATTON, *DISASTER RELIEF: THE POLITICS OF INTERGOVERNMENTAL RELATIONS* 21 (1989) (containing a brief history of United States disaster relief policy); *See generally* PETER J. MAY, *RECOVERING FROM CATASTROPHES: FEDERAL DISASTER RELIEF POLICY AND POLITICS* (1985); CONGRESSIONAL RESEARCH SERVICE REPORT TO THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 93D CONG., 2D SESS., *AFTER DISASTER STRIKES: FEDERAL PROGRAMS AND ORGANIZATIONS* (Comm. Print 1974).

63. Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109, 1110 (1950).

64. S. REP. NO. 81-2571 (1950), *reprinted in* 1950 U.S.C.C.A.N. 4023, 4024.

65. *Id.*; Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109, 1110 (1950) (stating that federal agencies are authorized to provide assistance when directed by the President). The current disaster relief statutes, 42 U.S.C. §§ 5121-5204 (1995), contain identical language.

66. The statute contains the following definition:

“Major disaster” means any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

42 U.S.C. § 5122 (1995).

67. The statute contains the following definition:

“Emergency” means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or [to] avert the threat of a catastrophe in any part of the United States.

Id.

68. *Id.* § 5170 (containing the procedure in the case of a major disaster); *Id.* § 5191(a) (containing the procedure in the case of an emergency).

69. 42 U.S.C. § 5191(a) (1996).

70. *Id.*

71. 42 U.S.C. § 5170 (1995).

72. In the case of a request for a major disaster declaration, the President may declare a major disaster, an emergency, or deny the request. In the case of a request for an emergency declaration, the President may declare an emergency or deny the request. 44 C.F.R. § 206.38 (1993).

The distinction stems from the establishment in 1974 of the second trigger for federal disaster relief: the emergency. Prior to 1974, the President could only invoke Federal disaster statutes by declaring a major disaster; such a declaration provided all of the benefits of the Federal statutes.⁷³ Congress, however, recognized that lesser emergencies existed which did not require the full complement of Federal disaster aid.⁷⁴ Consequently, the Disaster Relief Act of 1974 established a new category of response, the emergency, to increase the flexibility of the Federal response and to make it more practicable to provide aid in situations of a less extensive nature.⁷⁵ Passage of these statutes prompted Congress to impose a five million dollar ceiling on emergency aid⁷⁶ because the assistance provided would be less comprehensive than assistance provided for major disasters. The five million dollar ceiling created a need for the State to specify the nature and amount of support needed.

The other two triggers, which are more infrequently used, were added to the Disaster Relief Act of 1974 in the 1988 revisions to that act.⁷⁷ The first permits the President, prior to making a major disaster declaration or an emergency declaration, to use the DOD resources in the immediate aftermath of an incident to preserve life and property.⁷⁸ The intent of Congress in passing this legislation was to provide “gap-filler” authority in those cases where the emergency was so severe that immediate DOD⁷⁹ involvement was necessary prior to the completion of

the Presidential declaration process.⁸⁰ This “emergency work” authority only lasts for ten days⁸¹ and also requires a request for such resources from the governor of the affected State.⁸² This authority is rarely employed.⁸³

The other trigger is the only one of the four which does not require a request from the governor. This provision, contained in the emergency assistance subchapter of the Stafford Act, allows the President to declare an emergency when the affected area is one in which the United States exercises exclusive or preeminent responsibility and authority under the Constitution or United States law.⁸⁴ While no formal request from the governor is required in this scenario, the statute does require, if practicable, consultation with the governor.⁸⁵ President Clinton was the first president to exercise this authority when he declared an emergency in the wake of the Oklahoma City Bombing.⁸⁶

The nature and extent of federal assistance varies, depending on the categorization of the catastrophe. As discussed above, the emergency declaration provision was designed to have a short-term focus, and the relief authorized in such situations reflects that statutory focus. The President’s designee, the FEMA, is authorized to direct any appropriate federal agency to employ its resources to save lives; to protect property, public health, and safety; and to lessen or to avert the threat of a catas-

73. See S. REP. NO. 93-778 (1974), reprinted in 1974 U.S.C.C.A.N. 3070, 3072.

74. *Id.*

75. *Id.* See also CONGRESSIONAL RESEARCH SERVICE, REPORT TO THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 93D CONG., 2D SESS., AFTER DISASTER STRIKES: FEDERAL PROGRAMS AND ORGANIZATIONS 68 (Comm. Print 1974) (stating that the 1974 statute eliminated “the all or nothing situation” of prior disaster relief legislation which only provided Federal assistance upon declaration of a major disaster). In 1988, Congress amended the definition of emergency to emphasize further that federal support in the case of an emergency was to be of the “short term, immediate response” variety. 55 Fed. Reg. 2,284 (1990).

76. 42 U.S.C. § 5193 (1995). This statute permits the provision of additional federal emergency funding if the President makes the requisite determination.

77. H.R. REP. NO. 100-517, at 7, 12 (1988), reprinted in 1988 U.S.C.C.A.N. 6085, 6091.

78. 42 U.S.C. § 5170b(c) (1995).

79. The authority only applied to DOD assets; it did not authorize the early involvement of any other Federal agencies under the provisions of the Stafford Act. *Id.* See also 44 C.F.R. § 206.34 (1993) (discussing the interplay of this authority with independent statutory authorities applicable to other Federal agencies).

80. 55 Fed. Reg. 2284 (1990).

81. The 10-day period begins with the FEMA’s issuance of its mission assignment. 44 C.F.R. § 206.34 (1993). The FEMA mission assignment letter is a critical document in the Federal disaster relief process. It is defined as the “[w]ork order issued to a Federal agency by the Regional Director, Associate Director, or Director (of the FEMA), directing completion by that agency of a specified task and citing funding, other managerial controls, and guidance.” 44 C.F.R. § 206.2 (1993). The mission assignment letter thus provides the basis for agency reimbursement under the Stafford Act. In acting without a mission assignment letter, DOD assets providing disaster relief assistance run the risk of the FEMA not reimbursing them for the assistance. DEP’T OF ARMY, DOMESTIC DISASTER ASSISTANCE: A PRIMER FOR ATTORNEYS 3 (1992) [hereinafter DISASTER RELIEF PRIMER].

82. 42 U.S.C. § 5170b(c) (1995).

83. See *supra* note 39.

84. 42 U.S.C. § 5191(b) (1995).

85. *Id.*

86. FEMA REPORT, *supra* note 1, at 1.

trophe.⁸⁷ In addition, the FEMA may also provide some other emergency assistance, as well as assistance under two of the major disaster provisions: temporary housing assistance and debris removal.⁸⁸ While the emergency assistance subchapter is significantly more limited in its scope of programs, it does provide ample authority for the federal government to relieve the immediate threats to persons and property with its savings clause.⁸⁹

Major disaster assistance includes all of the emergency-type assistance mentioned above plus extensive programs of a wide-ranging and long-term nature, such as unemployment assistance, individual and family grant programs, relocation assistance, legal service assistance, and crisis counseling assistance, to name a few.⁹⁰ Many of these types of assistance do not involve the DOD; nonetheless, judge advocates should keep in mind that the Stafford Act provides the authority for the vast majority of the DOD's domestic disaster relief missions.

The FEMA and DOD Disaster Relief

Since the DOD is one of several federal agencies that the FEMA may draw on once the President has declared a major

disaster or an emergency, the FEMA orchestrates the DOD support that is authorized by the Stafford Act.⁹¹ In 1992, the FEMA concluded the Federal Response Plan,⁹² which established a memorandum of understanding between the FEMA and the DOD, as well as several other federal departments and agencies, regarding the support expected from the DOD. While the FEMA had several purposes in drafting the Federal Response Plan, the FEMA's division of federal disaster response into twelve functional areas is the crucial part of the plan for the DOD.⁹³ "Public works and engineering"⁹⁴ is the emergency support function for which the DOD is responsible. The DOD's designation as the primary agency in this area does not mean that the DOD cannot be a supporting agency to all of the Federal Response Plan's emergency support functions.⁹⁵

The FEMA executed the Federal Response Plan during the Oklahoma City tragedy and activated seven Emergency Support Functions.⁹⁶ The Federal Coordinating Officer orchestrated the federal support.⁹⁷ This action was predicated on President Clinton's emergency declaration on the same day.⁹⁸ Consistent with the Stafford Act, local and state officials responded first, with Governor Keating declaring a state of emergency at 0945. The Oklahoma City Fire Department was

87. 42 U.S.C. § 5192 (1995).

88. *Id.*

89. "Whenever the federal assistance provided under subsection (a) of this section with respect to an emergency is inadequate, the President may also provide assistance with respect to efforts to save lives, [to] protect property and public health and safety, and [to] lessen or [to] avert the threat of a catastrophe." *Id.* at § 5192(b). Note also that the following section in the Stafford Act places a \$5,000,000 cap on emergency assistance. However, the section also contains Presidential waiver authority, if the President finds that: (1) continued emergency assistance is immediately required; (2) there is a continuing and immediate risk to lives, property, public health or safety; and (3) necessary assistance will not otherwise be provided on a timely basis. 42 U.S.C. § 5193(b) (1995).

90. 42 U.S.C. §§ 5170-89b (1995). For a detailed discussion of the types of Federal assistance available in cases of major disasters, see Terry A. Coble, *Disaster Assistance Guide for Legal Services Practitioners*, 29 CLEARINGHOUSE REV. 3 (1995).

91. 44 C.F.R. § 206.5 (1993). Both Presidents Carter and Bush delegated the vast majority of the authority given to them by the Stafford Act and its revisions to the Director of the FEMA via Executive Order. The primary authority reserved was that of declaring a major disaster or an emergency. Exec. Order No. 12,148, 44 Fed. Reg. 43,239 (1979), reprinted in 42 U.S.C. § 5195 (1996); Exec. Order No. 12,673, 54 Fed. Reg. 12,571 (1989), reprinted in 42 U.S.C. § 5195 (1996).

92. FEDERAL EMERGENCY MANAGEMENT AGENCY, THE FEDERAL RESPONSE PLAN (1992).

93. *Id.* at 1-2 (stating that the purposes of the plan are: (1) to establish fundamental assumptions and policies; (2) to establish a concept of operations that provides an interagency coordination mechanism to facilitate the immediate delivery of federal response assistance; (3) to incorporate the coordination mechanisms and structures of other appropriate federal plans and responsibilities into the overall response; (4) to assign specific functional responsibilities to appropriate federal departments and agencies; and (5) to identify actions that participating federal departments and agencies will take in the overall federal response, in coordination with the affected state).

94. *Id.* at 14. The twelve emergency support functions are: transportation, communications, public works and engineering, firefighting, information and planning, mass care, resource support, health and medical services, urban search and rescue, hazardous materials, food, and energy. Originally, the DOD was also assigned the urban search and rescue emergency support function; however, that function was reassigned to the FEMA.

95. *Id.*; Copelan and Lamb, *supra* note 11, at 36.

96. FEDERAL EMERGENCY MANAGEMENT AGENCY, OKLAHOMA CITY BOMBING BRIEFING BOOK 1-3 (1995) [hereinafter FEMA BRIEFING BOOK]. The seven emergency support functions were communications, public works and engineering, information and planning, mass care, resource support, health and medical, and urban search and rescue.

97. FEMA REPORT, *supra* note 1, at 14-19. In this situation, as is often the case, the FEMA appointed one of their Region Directors as the Federal Coordinating Officer, who operated out of the Disaster Field Office (DFO).

98. See *supra* note 3. Exactly one week later the President declared Oklahoma City a major disaster. Because no counterpart to section 501(b) exists for major disasters, this action required a request from Governor Keating of Oklahoma for such a declaration. FEMA REPORT, *supra* note 1, at 14.

on the scene within seconds, and the staff from the state Department of Civil Emergency Management arrived within minutes of the blast. A key participant in the State emergency response was the Oklahoma National Guard, which had been activated within an hour of the bombing to provide security.⁹⁹

The Department of the Army, as the DOD Executive Agent for MSCA, transmitted its *execute order* for military support to civil authorities on 20 April.¹⁰⁰ Citing the Stafford Act and the Federal Response Plan as the legal and procedural authority, respectively, for the support effort, the message stated the mission as being one in support of the FEMA and the Department of Justice to provide military support and to conduct disaster relief operations to assist civil authorities in Oklahoma.¹⁰¹ The Commander, United States Atlantic Command, was designated as the supported commander-in-chief for the operation. Therefore, the chain of command for the operation ran from the Commander of the United States Atlantic Command, through the Secretary of the Army and the Secretary of Defense, to the President.¹⁰² The Commander of the United States Atlantic Command deputed a Defense Coordinating Officer to work with the Federal Coordinating Officer, serving as the DOD point of contact for all requests for military support.¹⁰³

Primary efforts by the DOD involved supporting the FEMA's urban search and rescue emergency support function. The FEMA deployed eleven of its twelve urban search and rescue teams to Oklahoma City to provide a continuous rotation of searchers for the victims.¹⁰⁴ The DOD provided C-141 airlift

assets to transport civilian rescue units to Oklahoma City from places such as Dade County, Florida; Fairfax, Virginia; and San Francisco, California.¹⁰⁵ The Army Corps of Engineers augmented the efforts of those rescuers by providing two of its Systems to Locate Survivors (STOLS) teams as well as some search and structures specialists.¹⁰⁶ On a somewhat less glamorous level, the FEMA assigned the DOD to provide clothing such as field jackets, Battle Dress Uniforms, socks, and portable shower units to the rescuers.¹⁰⁷ The DOD also provided C-5 aircraft to transport FBI mobile crime lab vans.¹⁰⁸

Support to Law Enforcement Authorities in Oklahoma City

Military support to civilian law enforcement agencies is, along with MSCA, one of the principal types of MACA.¹⁰⁹ The airlift support that the DOD provided to the FBI illustrated that form of support to law enforcement agencies and also highlighted the unique nature of the Oklahoma City mission. The nature of the event, an intentional destruction of Federal property, resulted in a dual agency command designation, with the FEMA being the lead agency for all non-crime-scene relief efforts and the FBI being the lead federal agency at the crime scene.¹¹⁰ This was the first time such a bifurcation of leadership roles had occurred in a disaster situation.¹¹¹ Consequently, not only did the DOD provide MSCA, as already discussed, but it also provided support to law enforcement, as discussed below.

99. In total, 465 National Guard personnel participated in the relief effort. Information Paper, *supra* note 1.

100. Message, Headquarters, Dep't of Army, subject: Execute Order for DOD Support to the Federal Emergency Management Agency (202244Z Apr 95).

101. *Id.*

102. *Id.* Note that the Commander, United States Atlantic Command, has delegated authority to Forces Command, its Army component command, to conduct MSCA.

103. *Id.* The Public Works Director at Fort Sill, a colonel, was appointed as the Defense Coordinating Officer at 1600 on 19 April 1995. Scales Memorandum, *supra* note 5.

104. FEMA REPORT, *supra* note 1, at 3.

105. Information Paper, *supra* note 1. The FEMA initially authorized assignments for the DOD by issuing a mission assignment activation letter. This letter indicated that all mission assignments would be supported by a "Request for Federal Assistance (RFA)" form. As an example, the RFA directing the Dade County and Fairfax missions contained a funding limitation of nearly \$98,000 to provide the transportation of those units. This figure could have been augmented, if adequately supported; however, the RFA generally sets the ceiling on DOD reimbursement under the Stafford Act. Letter from Sean P. Foohey, Director, Emergency Support Team, to MG Robert H. Scales, Director of Military Support (Apr. 28, 1995) (with attached RFAs) [hereinafter Mission Assignment Activation Letter].

106. FEMA BRIEFING BOOK, *supra* note 96, at 2. The DOD provided the structures specialists, as well as some Corps of Engineer personnel to provide debris removal, under the DOD's primary support role for Emergency Support Function 3 (public works and engineering). Memorandum, Secretary of the Army, to Secretary of Defense, subject: Support to the Oklahoma Bombing #3 (21 Apr. 1995).

107. The FEMA authorized \$65,000 for the provision of 500 field jackets and Battle Dress Uniforms, plus 1,000 pairs of socks. Mission Assignment Activation Letter, *supra* note 105.

108. Memorandum, Director of Military Support, to Secretary of the Army, subject: DOD Support to the Bombing in Oklahoma City, para. 3 (20 Apr. 1995).

109. DOD DIRECTIVE 3025.15, *supra* note 4, at para. B2.

110. FEMA REPORT, *supra* note 1, at 14.

111. *Id.* at 2.

A threshold legal concern in the context of this dual support mission is the statement in *DOD Directive 3025.1* that MSCA operations do not include “military assistance for civil law enforcement operations.”¹¹² That statement, however, does not mean that the armed forces cannot undertake law enforcement support operations *concurrently* with MSCA operations. Instead, it means that commanders and judge advocates must look to separate authorities when conducting such operations. The remainder of this article discusses those authorities. Before doing so, however, it provides a brief refresher on the fundamental legal consideration in all domestic support operations, and particularly in law enforcement support operations: the Posse Comitatus Act.¹¹³

Posse Comitatus Act

The Posse Comitatus Act (PCA) is a fundamental limitation on law enforcement support operations and MSCA activities. Absent an exception, the statute prohibits the use of active duty military personnel, and certain other military personnel,¹¹⁴ to “execute the laws.”¹¹⁵ The traditional exceptions include the military purpose doctrine, sovereign authority, and civil disturbance statutes.¹¹⁶ Noticeably absent as an exception to the

Posse Comitatus Act is the Stafford Act; thus, MSCA operations do not permit DOD units to perform any law enforcement functions in support of civilian law enforcement authorities under the authority of the Stafford Act.¹¹⁷ It is conceivable, however, that a disaster situation (MSCA) may deteriorate into a civil disturbance (another type of MACA operation) and thereby fall into an exception to the Posse Comitatus Act.¹¹⁸

Whatever the situation, judge advocates should be alert to the possibility that support to law enforcement issues may arise in any MSCA operation. Such situations require judge advocates to be familiar with other statutes which do authorize military support to civilian law enforcement. These statutes are not exceptions to the PCA and, consequently, permit only indirect support. The following section discusses these statutes and their application in Oklahoma City.

General statutory authority to support law enforcement rests in the Economy Act¹¹⁹ and the Military Support to Civilian Law Enforcement Agency Statutes.¹²⁰ Regulatory guidance for such support can be found in *DOD Directives 3025.15* and *5525.5*, and each service’s implementing regulation.¹²¹ Requests for

112. DOD DIRECTIVE 3025.1, *supra* note 4, at 4.

113. 18 U.S.C. § 1385 (1995).

114. DOD DIRECTIVE 5525.5, *supra* note 15, at 4-6. Personnel not restricted by the PCA include members of the Reserves who are not on active duty, active duty for training, or inactive duty for training; members of the National Guard when not in federal service; civilian employees when not under the command and control of a military officer; and active duty personnel when off duty and in a private capacity. Note that the Navy and Marine Corps are not legally subject to the PCA, but both services are subject to the DOD guidance on the PCA as a matter of policy. The Secretary of Defense may make exceptions to this policy on an ad hoc basis. *Id.*

115. Determining when military personnel are “executing the law,” and thus violating the PCA, has been an elusive concept for the judiciary. Federal courts have articulated three separate “tests” to determine when a PCA violation has occurred. Courts may employ all three tests in a given case. See INT’L AND OPERATIONAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, 22-3 (1 June 1996); Paul J. Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109, 116-17 (1984).

116. DOD DIRECTIVE 5525.5, *supra* note 15, at 4-1 through 4-3. Often included as another exception are the Military Support to Civilian Law Enforcement Statutes (10 U.S.C. §§ 371-82); however, this DOD Directive does not categorize them as such. Instead, it considers that authority to be “indirect assistance,” discussed under the categories of training, expert advice, operating and maintaining equipment, and the transfer of information. *Id.* at 4-3 through 4-6. The final form of indirect assistance is a “catch-all” category including other actions approved in accordance with Service directives that do not subject civilians to the use of military power that is regulatory, proscriptive, or compulsory. *Id.* at 4-6. Congress passed these statutes to clarify the intent of the Posse Comitatus Act after the federal courts generated confusion as to what the PCA proscribed. Rice, *supra* note 115, at 113-17. The most recent addition to these statutes, however, contains a specific, albeit limited, exception to the PCA. Section 1416 of the 1997 National Defense Authorization Act (codified at 10 U.S.C. § 382) permits the Secretary of Defense to provide assistance to the Department of Justice in emergency situations involving a biological or chemical weapon. While the statute prohibits the direct participation of military personnel in most cases, it authorizes direct participation in arrest, search and seizure, and intelligence collection when necessary to save human life and civilian authorities are unable to take the required action, as long as the action is otherwise authorized by law. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1416, 110 Stat. 186 (1996). See also H.R. REP. NO. 104-724, at 819 (1996) (emphasizing that the use of the military in such circumstances “should be limited both in time and scope to dealing with the specific chemical or biological weapons-related incident”).

117. See DISASTER RELIEF PRIMER, *supra* note 81, at 17-18. This primer, which constituted the after-action report from Hurricanes Andrew and Iniki in 1992, reiterated that military personnel could, of course, provide security for military personnel assets and personnel. Furthermore, relying on the military purpose exception, Army units deployed to South Florida after Hurricane Andrew used active duty military personnel to direct traffic on military supply routes and to provide security to food warehouses established by the Army Material Command. *Id.* Civilian law enforcement and national guardsmen should perform the law enforcement role in MSCA operations where no military purpose doctrine exception exists. *Id.*; Copelan & Lamb, *supra* note 11, at 38. This is exactly what happened in the case of the Oklahoma City Bombing as Oklahoma National Guardsmen took on the law enforcement role.

118. The 1906 San Francisco earthquake and fire is one historical example. See *supra* notes 16-19. More recently, in 1989, before it pounded Charleston, SC, Hurricane Hugo struck the Virgin Islands. After declaring a disaster and upon notification of widespread looting in St. Croix, President Bush invoked the Civil Disturbance Statutes and dispatched units of the XVIII Airborne Corps to restore order. Exec. Order No. 12,690, 54 Fed. Reg. 39,153 (1989).

119. 31 U.S.C. § 1535 (1995). The Economy Act provides authority for federal agencies to order goods and services from other federal agencies and to pay the actual costs for those goods and services. Note that the Economy Act is limited to other federal agencies. CONTRACT L. DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-506, FISCAL LAW DESKBOOK 8-1 (May 1996) [hereinafter FISCAL LAW DESKBOOK].

support to law enforcement must be processed according to these directives. The recently promulgated *DOD Directive 3025.15* is the starting point in handling any request for DOD assistance from civil authorities.¹²² It provides policy guidance on the provision of MACA, requiring the DOD approval authorities to consider six factors in evaluating all requests by civil authorities for DOD assistance. The six factors to be considered are: legality (compliance with laws); lethality (potential use of lethal force by or against DOD forces); risk (safety of DOD forces); cost (who pays, and what is the impact on the DOD budget); appropriateness (whether conducting the requested mission is in the interest of the DOD); and readiness (impact on the DOD's ability to perform its primary mission). The directive contains guidance on the processing of, and the approval authorities for, requests for all types of MACA operations. Regarding support to law enforcement authorities, *DOD Directive 3025.15* refers the reader to *DOD Directive 5525.5* for approval procedures for such requests. However, *DOD Directive 3025.15* slightly modifies the approval procedures in *DOD Directive 5525.5* by requiring at least flag officer or general officer approval of all such requests.¹²³ Support to law enforcement authorities is subject to the restrictions of the Posse Comitatus Act and its Title 10 counterpart: 10 U.S.C. § 375.¹²⁴

To illustrate the Economy Act authority and Posse Comitatus Act limitations, consider the following example. Following the Oklahoma City bombing, the FBI requested the use of several Defense Intelligence Agency linguists to assist their special

agents in the investigation. This type of support, while of an indirect nature, is not the kind specifically authorized under the Military Support to Civilian Law Enforcement Agencies Statutes.¹²⁵ Thus, the FBI cited the Economy Act as authority for the request, and the FBI provided the required reimbursement.¹²⁶ Guidance accompanying this assignment reflected Posse Comitatus Act concerns, from both a law and policy perspective, as it forbade linguists from participating in any law enforcement activities or conducting any real-time translation. The DOD permits only non-real-time translation of tapes and documents.¹²⁷ Another legal aspect of this request involved the mission operational specialty of the detailed personnel—in this case, intelligence personnel. In addition to the normal approval required by the applicable DOD or service regulation, *DOD Regulation 5240.1-R* requires the approval of the servicing DOD component's General Counsel for use of employees of the DOD intelligence components, such as the Defense Intelligence Agency.¹²⁸ This regulation also reiterates the applicability of 10 U.S.C. § 375 to this type of support.¹²⁹

The United States Marshals Service also made a request for support in the aftermath of the bombing. While relying on the Economy Act, the request from the Marshals Service also highlighted the Military Support to Civilian Law Enforcement Agency Statutes. On 26 April 1995, the Marshals Service requested Military Working Dog Teams (MWDTs) for explosive ordnance detection purposes, primarily to check vehicles and packages.¹³⁰ In addition to the Economy Act, the DOD has analyzed the use of teams under the provisions of 10 U.S.C. §§

120. 10 U.S.C. §§ 371-82 (1995). Note the relationship between these statutes and the Economy Act. The Economy Act only applies in the absence of a more specific interagency acquisition authority (e.g., the Military Support to Civilian Law Enforcement Agency Statutes). FISCAL LAW DESKBOOK, *supra* note 119, at 8-3. Nonetheless, other federal agencies tend to cite the Economy Act as authority for various law enforcement support operations because they are accustomed to using it.

121. AR 500-51, *supra* note 15; DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (28 Mar. 1988); DEP'T OF AIR FORCE, AIR FORCE INSTR. 10-801, AIR FORCE ASSISTANCE TO CIVILIAN LAW ENFORCEMENT AGENCIES (15 Apr. 1994).

122. DOD DIRECTIVE 3025.15, *supra* note 4, at paras. D10 and 12 (stating that all requests for DOD support, whether from federal, state, or local authorities, must be in writing).

123. DOD DIRECTIVE 3025.15, *supra* note 4, at para. D7b. The service directives cited in footnote 121 amplify the guidance contained in DOD Directive 5525.5.

124. Note that 10 U.S.C. § 375 constitutes parallel prohibitory, albeit noncriminal, legislation to the PCA as it directs the Secretary of Defense to prescribe regulations that prohibit direct participation by any member of the armed forces (including the Navy and Marine Corps) in any search, seizure, arrest, or other similar activity. Those regulations are contained in DOD Directive 5525.5, which proscribes interdiction of vehicles, vessels, or aircraft; apprehension, stop, and frisk; and the use of military personnel for surveillance, the pursuit of individuals, or as undercover agents, informants, investigators, or interrogators. DOD DIRECTIVE 5525.5, *supra* note 15, at 4-3. The key difference is, of course, that 10 U.S.C. § 375 is regulatory as opposed to criminal. Additionally, these statutes also apply to the Navy and Marine Corps, to whom the PCA does not apply. Nonetheless, DOD Directive 5525.5 preserves the ability of the Navy and Marine Corps to perform any of these prohibited functions because it contains a Secretary of Defense waiver of those restrictions. *Id.* at 4-6. How can a regulation permit, through a waiver by the Secretary of Defense, what appears to be prohibited by 10 U.S.C. § 375? First, 10 U.S.C. § 375 contains qualifying language, "unless otherwise authorized by law." While the PCA does not authorize the use of the Navy and Marine Corps in direct support, it certainly does not prohibit either service from doing so. Furthermore, 10 U.S.C. § 378 provides support for the conclusion that the DOD may waive the 10 U.S.C. § 375 restrictions because it states that nothing in the Military Support to Civilian Law Enforcement Agency Statutes was intended to limit the authority of the Executive Branch beyond that provided by law before 1 December 1981. Thus, because sailors and marines were not considered to be restricted by the PCA prior to 1 December 1981, and could participate directly in law enforcement with secretarial authority, they could not be restricted by 10 U.S.C. § 375. The Secretary of Defense waiver in DOD Directive 5525.5 provided the same flexibility that previously existed. *See*, RICE, *supra* note 115, at 127.

125. Note, however, that specific authority exists for linguist support, along with nine other specific types of support, as part of counterdrug support operations. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990), *reprinted in* 10 U.S.C. § 374 (1995). Note that this authority has been extended through 1999. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

126. Letter from John C. Harley, Deputy Assistant Director, Federal Bureau of Investigation, to Chief of Staff, Defense Intelligence Agency (Apr. 20, 1995) (on file with author).

372-73. Military working dogs are considered pieces of equipment under the provisions of 10 U.S.C. § 372, and their handlers are considered expert advisors under 10 U.S.C. § 373.¹³¹ Posse Comitatus Act restrictions apply equally to these operations. The applicable DOD instruction emphasizes that only the drug detection capabilities of the MWDT are to be used; MWDTs are not to be used to “track persons, seize evidence, search buildings or areas for personnel, pursue, search, attack, hold, or in any way help in the apprehension or arrest of persons.”¹³² This DOD Instruction applies to counterdrug missions, but a recent Air Force Instruction contains these same restrictions and applies them to the MWDT’s explosive detection capabilities as well as its drug detection capabilities.¹³³ The Marshals Service indicated its awareness of these restrictions in its request, and the request was granted.¹³⁴

Conclusion

While the role the DOD assets played in support of civilian authorities in Oklahoma City was, by no means, as highly visi-

ble or as extensive as that provided following Hurricane Andrew in 1992, it, nonetheless, affords an excellent case study of various MACA legal authorities. Commanders at nearby military bases relied on the Immediate Response Authority to provide help within minutes of the blast, and those same commanders, along with units all over the country, supplied additional disaster relief support over the course of the next week under the authority of the Stafford Act. The Murrah Federal Building was also a federal crime scene, requiring the exercise of legal authorities which permitted, and also limited, the support the DOD could send to aid civilian law enforcement agencies that were providing security and investigating the crime.

Disasters, whether natural or man-made, arise with little or no warning and require swift responses in order to deal with what is inevitably a human tragedy. Judge advocates need to possess a sound knowledge of MACA authorities so they can be up to the task of supporting their commanders in a fast-moving and chaotic environment.

127. Memorandum for Record, Major P. A. Jenkins, DAMO-ODS, subject: Linguist Support to the Federal Bureau of Investigations (19 Apr. 1995) (on file with author). This guidance stems from a June 1994 FBI request for the use of DOD personnel proficient in Spanish to monitor court authorized electronic surveillance. Letter from James C. Frier, Deputy Assistant Director, Criminal Investigative Division, Department of Justice, to Mr. Brian Sheridan, Deputy Assistant Secretary for Drug Enforcement Policy and Support, Department of Defense (June 27, 1994). Prior to this request, the DOD had provided linguists for non-real-time translation support. This assistance was provided under the authority of the Economy Act. The Frier letter was thus viewed as an expansion of the DOD role in this area to include “live” monitoring. Letter from Brian Sheridan, Deputy Assistant Secretary of Defense for Drug Enforcement Policy and Support, to Mr. James C. Frier, Deputy Assistant Director, Criminal Investigative Division, Department of Justice (Nov. 16, 1994).

The DOD ultimately refused the FBI request, based on legal and policy grounds. From a legal perspective, the DOD was not convinced that a court would not view such activity by DOD personnel as a seizure in violation of the PCA. *Id.* The DOD held this opinion notwithstanding a contrary conclusion by the Department of Justice Office of Legal Counsel. Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Jo Ann Harris, Assistant Attorney General, Criminal Division, Department of Justice (Apr. 5, 1994) (stating that real-time monitoring would not violate the PCA). The DOD also cited several other policy-based concerns in denying the request (for example, creating the perception that the Army was again “spying” on U.S. citizens, adversely affecting military readiness by participating in activities with no corresponding military benefit, and disrupting unit deployments because of the requirements for court appearances).

128. DEP’T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS, 12-1 (7 Dec. 1982).

129. *Id.* (stating that the use of intelligence personnel will be consistent with enclosure 4 of DOD Directive 5525.5, the section of the directive containing the implementation of the 10 U.S.C. § 375 limitations).

130. Letter from Pat Wilkerson, United States Marshal, to Major P. A. Jenkins, DAMO-ODS (26 Apr. 1995) (on file with author) [hereinafter Wilkerson Letter]. This request, coming one week after the bombing and motivated by security concerns, can be contrasted with the immediate response use of bomb detection dog teams on the day of the blast.

131. DEP’T OF DEFENSE, INSTR. 5525.10, USING MILITARY WORKING DOG TEAMS (MWDTs) TO SUPPORT LAW ENFORCEMENT AGENCIES IN COUNTERDRUG MISSIONS 2 (17 Sept. 1990). The instruction also cites 10 U.S.C. § 374 as potential authority for the use of MWDTs as it authorizes the use of personnel to operate and maintain equipment. Section 374, however, is a more narrow authority, as it applies only to specified functions undertaken in the enforcement of specified criminal statutes.

132. *Id.* at 10.

133. DEP’T OF AIR FORCE, AIR FORCE INSTR. 31-202, MILITARY WORKING DOG PROGRAM, 8.9.3 (18 Mar. 1994). It should be noted that the DOD Instruction designated the Secretary of the Air Force as the DOD executive agent for MWDTs.

134. Wilkerson Letter, *supra* note 130.

Environmental Aspects of Overseas Operations: An Update

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Introduction

This article updates the article entitled "Environmental Aspects of Overseas Operations," published in the April 1995 edition of *The Army Lawyer*,¹ which directed judge advocates to recognize and understand the application of four sources of environmental law in regard to overseas operations. These sources of law are:

- (1) the domestic environmental law of the United States;
- (2) the law of host nations;
- (3) the traditional law of war; and
- (4) international environmental law.

Unlike the previous article, this update focuses on only one of these four sources of law: the domestic law of the United States. This emphasis is based upon the realities of current operations, doctrine, and the practices of the military lawyers who have grappled with these issues during the past several years.

Since 28 February 1991,² the United States military has executed dozens of overseas operations. In each instance, the protection of the natural environment was an important issue for both military leaders and supporting judge advocates. One of the more vexing problems in this area is the search for and determination of the rules, regulations, and law which dictate United States environmental stewardship in foreign nations. A review of these operations, however, reveals that the nature of each individual operation³ influenced the application of the law more than any other single factor.

Bearing in mind the importance of this operational context, it is important to note that not one recent operation was conducted in an armed conflict environment. Instead, the operations were all located elsewhere on the conflict spectrum, and they are frequently referred to as peace operations, stability and

support operations (SASO), or operations other than war (OOTW).⁴ In these types of operations, the military forces of the United States usually enter a nation without the direct use of military force. This fact is relevant to the discussion of what sources of law control the entering force's legal obligation to the host nation's natural environment. The law of war does not formally apply within the peace operation context, but judge advocates must determine how the other sources of law might impact the environmental law equation.

The actions of military lawyers in recent operations best illustrate the role played by judge advocates in helping commanders execute their environmental law obligations. This article will provide the reader with a summary of the legal analyses and solutions from Operations Restore Hope (Somalia), Sea Signal (Cuba), Uphold Democracy (Haiti), and Joint Endeavor (Bosnia-Herzegovina). Each of these operations was executed within a foreign nation, albeit for different purposes and under different circumstances. An evaluation of the different circumstances in each of these operations demonstrates the variable nature of the environmental law issues that confront the contemporary judge advocate.

The Role of The Judge Advocate

In order to execute the environmental aspect of the mission, judge advocates must perform five primary tasks. Determining the applicable sources of law is the first step in this process. In each of the four operations referenced above, the domestic law of the United States and host nation law were applied to protect the host nation's natural environment. In regard to future peace operations, judge advocates can safely assume that these two sources of law will occupy most of their time. With this in mind, military lawyers should focus their efforts on finding the elements of domestic and host nation law that might regulate the activities of United States forces in the area of operations.

1. Major Richard M. Whitaker, *Environmental Aspects of Overseas Operations*, ARMY LAW., Apr. 1995, at 27.

2. This was the final day of Operation Desert Storm.

3. The doctrinal term normally used to express the various types of operations is *operational environment*. See DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, 2-0 through 2-1 (14 June 1993). United States military doctrine recognizes that military forces execute operations in three primary environments: (1) war, (2) conflict, and (3) peacetime. Within each environment, the goals, conditions, and rules are different. I chose not to use the term *operational environment* within the text to avoid the dual and potentially confusing use of the term *environment*.

4. The Army officially adopted the term *peace operation* in December 1994, with the issuance of a new field manual that expresses Army doctrine for such operations. See DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS, iv (30 Dec. 1994). For a detailed discussion of SASO and OOTW see Major Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 4-7.

Second, judge advocates must master the relevant sources of law. They must have a complete understanding of how these sources of law operate. In other words, they must know what events trigger the application of the law in specific circumstances. Once a lawyer has determined what events trigger the law's application, the lawyer should next determine what actions the commander is required to take and which exceptions, exemptions, exclusions, or variances might offer the commander alternative courses of action.

Third, judge advocates must provide commanders with a complete understanding of the law and an explanation of courses of action in regard to the law. This task requires lawyers to have a solid understanding of the mission because they must explain what impact each course of action might have upon operational success. Examples of factors that lawyers should include in their advice are: (1) monetary costs associated with each course of action, (2) any possible delay in the accomplishment of a mission-essential task, (3) the impact on the popular support of the population of the host nation (both the short-term and the long-term impact), and (4) media impact (either positive or negative).

Fourth, lawyers must execute the commander's decision. This requires an understanding of what actions are necessary to satisfy the legal requirements of each relevant source of law. In regard to the domestic law of the United States, this might mean performing some type of environmental assessment, requesting an exemption to the application of a rule that requires an environmental assessment, or taking action to reduce or to avoid an adverse environmental impact revealed within some type of assessment.

Finally, lawyers must remain alert to environmental issues that relate to the original course of action selected by the commander. For example, a lawyer must advise the command that disposition of confiscated weapons and ordinance must be done

in accordance with the environmental protection rules that control other aspects of the operation.

The Domestic Law and Policy of the United States

As mentioned above, the domestic law of the United States has figured prominently into the consideration given to the environment in every recent operation. The first question for the military lawyer in regard to domestic law requirements is whether or not an environmental assessment must be performed, and if so, what type of assessment. The second question is, despite the type of assessment performed, what type of environmental standards will be established for the operation. The third question is how will the lawyer, working through the operational staff, ensure compliance with the standards.

The National Environmental Policy Act (NEPA)⁵ is the starting point for answering these questions. Generally, NEPA requires federal agencies to review their proposed actions and to prepare environmental assessments or impact statements for major federal actions that significantly affect the quality of the human environment.⁶ The problem with the performance of such a review is the amount of time required for both a formal review and the compilation of either an assessment or an impact statement. For some federal actions, the passage of time is not a critical factor. In the context of a peace operation, however, time is a critical element of operational success, and the commander must have maximum flexibility. It is primarily because of this reason that Executive Order Number 12,114 formally states that NEPA does not apply to federal actions overseas.⁷ Based upon this authority, case law, and the language of the NEPA itself, the United States Government's position is that the NEPA does not apply to overseas military operations.⁸

In situations in which the NEPA does not apply, the analysis shifts to Executive Order 12,114.⁹ The Order requires the Department of Defense (DOD) to analyze and to document major DOD actions that will significantly affect the environ-

5. 42 U.S.C. §§ 4321-70a (1996).

6. Environmental assessments (EAs) are concise public documents which provide sufficient evidence and analysis to determine if the more detailed environmental impact statement (EIS) is necessary. 40 C.F.R. § 1508.9 (1996). Environmental impact statements serve to insure that the policies and goals defined in the NEPA are integrated into the proposed action and that the decisionmakers and the public are informed as to the alternatives which would avoid or minimize the adverse impacts. 40 C.F.R. § 1502.1 (1996).

7. Exec. Order No. 12,114, 44 Fed. Reg. 1,957 (1979), *reprinted in* 42 U.S.C. § 4321 (1982) [hereinafter EO 12,114]. Portions of EO 12,114 are reprinted and discussed in DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF MAJOR DOD ACTIONS, apps. G, H (23 Dec. 1988) [hereinafter AR 200-2]. The express purpose of the Executive Order is twofold. First, to "further the purpose of NEPA" and two other environmental protection statutes. Second, to balance the importance of protecting the environment through the operation of these three statutes against the importance of the United States foreign policy and national security policies. The Executive Order executes this two-prong mandate by serving as the "United States Government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purposes of NEPA, with respect to the environment outside the United States, its territories, and possessions." EO 12,114.

8. NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993). The court examined the NEPA and found that a nonextraterritorial construction of the statute is required because of: (1) the strong presumption against extraterritorial application of United States statutes (which do not contain a clear and independent expression of extraterritorial application); (2) the possible adverse impact on existing treaty obligations; and (3) the adverse effect on United States foreign policy. *See also* E.E.O.C. v. Arabian Am. Oil Co. (ARAMCO), 111 S. Ct. 1227 (1991); Smith v. United States, 113 S. Ct. 1178 (1993); Whitaker, *supra* note 1, at 27-28 (discussing the extraterritorial issue in much greater detail). *But see* Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

9. *See* Whitaker, *supra* note 1, at 29-30 (describing in detail how the Executive Order works).

ment of: (1) global commons (e.g., oceans or Antarctica), (2) a foreign nation not participating with the United States in the action,¹⁰ (3) a foreign nation which receives from the United States (during the action) a product which is prohibited or strictly regulated by federal law, or (4) any area outside the United States with natural or ecological resources of global importance.¹¹ These four types of actions are referred to as environmental events.

If any one of the four environmental events occurs, the DOD must conduct a documented review of the major action that it contemplates, *unless an exemption applies*.¹² The most significant and frequently relied upon exemption relates to “actions taken by or pursuant to the direction of the President or [a] Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict.”¹³

In most cases, military lawyers should think of the foregoing analysis in the following way: where the host nation is not a participating nation and where none of the exemptions apply, Executive Order 12,114 requires that military leaders conduct one of several different types of documented reviews. The type of review is based upon which one of the four environmental events occurs. For example, if the event occurs within a global common, the agency must prepare an environmental impact statement. If the event occurs in a foreign nation, the agency must prepare either a “bilateral or multilateral environmental study or a concise environmental review of the specific issues involved,”¹⁴ which would include an environmental assess-

ment, summary environmental analysis, or other appropriate documents.

Executing the Operational Law Mission In Regard to the Environment

General Considerations

Executive Order 12,114 always mandates *some degree* of environmental stewardship by United States forces in regard to its operations outside of the United States and its territories. Judge advocates should add this short document to their operational law library and refer to it during the operational planning phase. In addition to the Executive Order, military lawyers should turn to the two more specific documents that implement the Order—*DOD Directive 6050.7*¹⁵ and *Army Regulation 200-2 (AR 200-2)*.¹⁶

When executing a mission within a foreign nation, the military leader should first consider three general rules which assist in the interpretation of all other rules. First, the United States, based upon operational realities and necessities, should take all reasonable steps to act as a good environmental steward.¹⁷ Second, the United States should respect treaty obligations and the sovereignty of other nations. This means, at a minimum, “exercising restraint in applying United States laws within foreign nations unless Congress has expressly provided otherwise.”¹⁸ Third, any acts contemplated by officials within the DOD that require “formal communications with foreign governments concerning environmental agreements and other formal

10. The definition of a participating nation is broad, and this status has been attributed to nations in a number of important operations to avoid the more demanding requirements of EO 12,114. See Message, Headquarters, United States Atlantic Command, subject: Applicability of Executive Order 12,114 on Operation Uphold Democracy (231921Z Nov. 94) (on file with author) [hereinafter Haiti Message] (“USACOM is not required under [EO 12,114 and DOD Dir. 6050.7] to either invoke an exemption or complete an environmental study/review for Operation Uphold Democracy. However, to promote environmental stewardship in the spirit of [EO 12,114], an environmental review will be conducted.”). See also Electronic Mail Message from Robert E. Dunn, Attorney Advisor, International and Operations Law Division, Office of the Judge Advocate, United States Army Europe and Seventh Army, to Major Richard M. Whitaker, Professor, International and Operational Law Department, The Judge Advocate General’s School, subject: Environmental Law in Bosnia (Mar. 28, 1997) (copy on file with author) [hereinafter Dunn Message]. Mr. Dunn explained that during the planning phase for Operation Joint Endeavor, both his office and the Office of the Legal Advisor to the United States European Command shared the opinion that Bosnia and other “former warring faction” nations were “participating nations” under the provisions of EO 12,114 and that there was no need to go through all the EO 12,114 exemption “hoops.” Instead, lawyers supporting Operations Joint Endeavor and Joint Guard have been executing the general environmental steward mandate by referring to the Germany Overseas Baseline Guidance Document as a guide in Bosnia, “to the extent that doing so does not unacceptably interfere with operations, especially force protection.” *Id.*

11. The Executive Order explains that “natural or ecological resources of global importance” refers to resources either designated by the President or by international agreement as having global importance. EO 12,114, *supra* note 7, § 2, para. 2-3.

12. Whitaker, *supra* note 1, at 29 (reprinting the list of exemptions).

13. EO 12,114, *supra* note 7, para. 2-5 (iii).

14. *Id.* para. 2-4.

15. DEP’T OF DEFENSE, DIRECTIVE 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DOD ACTIONS (31 Mar. 1979) [hereinafter DOD DIR. 6050.7].

16. AR 200-2, *supra* note 7.

17. See EO 12,114, *supra* note 7, § 1. See also AR 200-2, *supra* note 7, para. 1-5.

18. AR 200-2, *supra* note 7, para. 8-3 (b). This general rule has a substantial impact on the interpretation of domestic law requirements. For instance, the scope and format of any environmental review conducted within a foreign nation is controlled not just by United States laws and regulations, but by relevant international agreements and arrangements. See *id.* para. 8-5 (a).

arrangements with foreign governments” must be coordinated with the Department of State.¹⁹

The Required Analysis and Actions

The three general rules given above should be kept in mind throughout the decision-making process. The required analysis, however, comes from Executive Order 12,114, in conjunction with *DOD Directive 6050.7* and *AR 200-2*. The Army Regulation simply restates the DOD Directive, thereby avoiding additional and possibly more onerous requirements.²⁰ The DOD Directive, which is very similar to Executive Order 12,114, provides the same four types of environmental events described within the Executive Order:

1. major federal actions that do significant harm to the environment of global commons;
2. major federal actions that significantly harm the environment of a foreign nation that is not involved in the action;
3. major federal actions that are determined to be significant[ly] harm[ful] to the environment of a foreign nation because they provide to that nation: (1) a product, or involve a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because its toxic effects [to] the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by Federal law to protect the environment against radioactive substances;
4. major federal actions outside the United States that significantly harm natural or ecological resources of global importance designated by the President or, in the case of such a resource protected by international agreement binding on the United States, designated for protection by the Secretary of State.²¹

Judge advocates must consider whether a proposed operation might generate any one of the four environmental events listed above. If the answer is yes, then the military leader

should either seek an exemption or direct the production of an environmental study (ES) or an environmental review (ER) to formally take into account the operation’s impact on the environment.

The Participating Nation Exception

As judge advocates proceed through the flowchart of analyses and actions which are required by regulation, the most important and frequently encountered problem is the “participating nation” determination.²² This is because the majority of overseas contingency operations do not generate the first, third, or fourth types of environmental events listed above. Accordingly, a premium is placed upon the interpretation of the second type of environmental event (major federal actions that significantly harm the environment of a foreign nation that is not involved in the action).

The threshold issue appears to be whether or not the host nation is participating in the operation. If the host nation is participating, no study or review is technically required.²³ Known as the “participating nation exception,” this situation existed in two of the four major contingency operations referenced earlier—Operation Uphold Democracy and Operation Joint Endeavor.²⁴ Thus, the planners for these operations concluded that both Haiti and Bosnia would act as participating nations during the course of each respective operation,²⁵ and military leaders in these operations avoided the requirement for a formal review or study. In Operation Restore Hope and Operation Sea Signal, the United States could not avail itself of the participating nation exception because neither Somalia nor Cuba participated with the United States forces in either operation. Accordingly, the United States had a choice of accepting the formal obligation to conduct either an ES or an ER, or seeking an exemption. In both cases, the United States sought and received an exemption.²⁶

19. *Id.* para. 8-3 (c). Judge advocates who work with environmental law issues should open up a line of communication with a point of contact (POC) at the Department of State (DOS) early on in the process. In practical terms this means discussions with the appropriate member of the “country team” or working through the combatant commander’s staff and the Joint Staff to get access to a POC.

20. *Id.* app. H.

21. *Id.* app. H, para. B.

22. *Id.* app. H, para. B1a.

23. Even though not always technically required, a study or review of some nature has been promulgated in every recent operation.

24. See Haiti Message, *supra* note 10; Dunn Message, *supra* note 10.

25. Interview with Lieutenant Colonel Richard B. Jackson, Chair of the Int’l and Operational L. Dep’t, The Judge Advocate General’s School, United States Army, in Charlottesville, Virginia (Mar. 20, 1997) [hereinafter Jackson Interview]. Lieutenant Colonel Jackson, who served as a legal advisor in the United States Atlantic Command Staff Judge Advocate’s Office during both Operation Uphold Democracy and Operation Sea Signal, notes that Cuba never did anything by act or omission that could be construed as cooperating or participating in Operation Sea Signal. On the other hand, the entrance of United States forces into Haiti was based upon an invitation that was reduced to writing and signed by the Haitian head of state, President Emile Jonassaint, on 18 September 1994. In fact, this agreement, signed by former President Jimmy Carter and President Jonassaint (referred to as the Carter-Jonassaint Agreement), expressly stated that Haitian authorities would “work in close cooperation with the U.S. Military Mission.” See also CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995—LESSONS LEARNED FOR JUDGE ADVOCATES, app. C (1995).

How does the military lawyer and operational planner distinguish between participating and nonparticipating nations? The applicable Army regulation states that the foreign nation involvement may be signaled by either direct or indirect involvement with the United States and even by involvement through a third nation or an international organization.²⁷

The regulatory guidance is helpful, but additional discussion on this point is necessary because of the uncertain nature of peace operations. One technique for discerning participating nation status is to consider the nature of the United States entrance into the host nation. There are generally three ways that military forces enter a foreign nation: (1) a forced entry, (2) a semi-permissive entry, or a (3) permissive entry. United States forces that execute a permissive entry are typically dealing with a participating (cooperating) nation. Conversely, United States forces that execute a forced entry would rarely deal with a participating nation. The analysis required for these two types of entries is fairly straightforward.

The semi-permissive entry presents a much more complex question. In this case, the judge advocate must look to the actual conduct of the host nation. If the host nation has signed a stationing or status of forces agreement, or has in a less formal way agreed to the terms of the United States deployment within the host nation's borders, the host nation is probably participating with the United States (at a minimum, in an indirect manner). If the host nation expressly agrees to the United States' entry and agrees to cooperate with the military forces of the United States, the case for participating nation status is even stronger.²⁸ Finally, if the host nation agrees to work with the

United States on conducting a bilateral environmental review, the case is stronger still.²⁹

There is no requirement for a status of forces or other international agreement between the host nation and the United States forces in order to document participating nation status. Participation and cooperation, however evidenced, is the only element required under Executive Order 12,114 and its implementing directive. Lawyers, however, look to written agreements as the most logical and obvious evidence of such participation. In recent operations, the United States and its host nation partners have documented the requisite participation within such agreements.

The decision to assume participating nation status is made at the unified command level by the combatant commander.³⁰ Once this election is made, the second decision of what type of environmental audit³¹ to perform is also made at the unified command level.³² In the cases of Operations Uphold Democracy and Joint Endeavor, the complete action was prepared by the tandem effort of the respective J4-Engineer Section and the Staff Judge Advocate's Office.³³ It was also these members of the staff who disseminated the environmental guidelines and standards adopted in the operations plans.

Operation Joint Endeavor provided the most recent example of a participating nation. Under the terms of the Dayton Peace Accords,³⁴ the parties agreed to "welcome and endorse" the arrangements and agreements to implement the Accord's military aspects, to include the mission of the Implementation Force (IFOR) led by United States forces.³⁵ The detailed nature of the Accord, particularly Article VI, removes any doubt that all parties agreed to participate in an endeavor to bring peace to

26. See Memorandum, Director, Joint Staff, to The Under Secretary of Defense for Acquisition and Technology, subject: Exemption from Environmental Review (17 Oct. 1994) [hereinafter Kross Memorandum]. In regard to Operation Sea Signal, LTG Walter Kross (the director of the Joint Staff) forwarded the request for exemption. The request was based on a disciplined review of Sea Signal's probable environmental impact, a short rendition of the facts, and a brief legal analysis and conclusion. See also CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION RESTORE HOPE, 5 DECEMBER 1992-5 MAY 1993, 23 (30 Mar. 1995) [hereinafter RESTORE HOPE AAR]. It is important to note that in both operations, even though United States forces received an exemption from the review and documentation requirement, the United States still prepared an environmental audit, and United States forces applied well-established environmental protection standards to events likely to degrade the host nation's environment.

27. See AR 200-2, *supra* note 7, app. H, para. A1a.

28. See Memorandum, Major Mike A. Moore, United States Atlantic Command J4-Engineer, to Lieutenant Colonel Richard B. Jackson, subject: Environmental Concerns of MNF (24 Jan. 1995) [hereinafter Moore Memorandum] (explaining that EO 12,114 did not apply to Operation Uphold Democracy because Haiti was a participating nation and that United States forces should coordinate with Haitian authorities to conduct a bilateral environmental audit).

29. *Id.*

30. See DOD Dir. 6050.7, *supra* note 15.

31. See Moore Memorandum, *supra* note 28. The word "audit" was adopted in lieu of the words "review" or "study" to make clear that the environmental assessment was driven by policy and not by the formal documented review or study requirement of EO 12,114 or DOD Directive 6050.7.

32. Telephone Interview with Lieutenant Colonel Mike A. Moore, United States Atlantic Command J4-Engineer (Mar. 27, 1997) [hereinafter Moore Interview]. Lieutenant Colonel Moore served as the action officer tasked with the determination of Command environmental/legal responsibilities during Operations Sea Signal and Uphold Democracy. He was also tasked with ensuring that an environmental audit was performed for Operation Uphold Democracy. Based upon his coordination with judge advocates in the Command's legal office, he and the Command's Staff Judge Advocate recommended that the Commander-in-Chief adopt the participating nation status and conduct a thorough environmental audit. Lieutenant Colonel Moore noted that the authority to make the decision rested at the unified command level. He also stated that several of the exemptions in EO 12,114 were delegated down to United States Atlantic Command.

33. *Id.*

the nations of the former Yugoslavia. The obligation to work together, to coordinate decisions, and to provide logistical support is abundantly clear.

The operational planners for Operation Joint Endeavor and their legal advisors integrated this analysis into their planning.³⁶ They found that each of the nations impacted by the operation were participating nations. They forwarded their conclusions to General George A. Joulwan, the Commander-in-Chief, European Command, who approved the participating nation status by approving the environmental appendix to the operation plan.³⁷ General Joulwan's action took advantage of the participating nation exception, which neutralizes the formal documented review requirement of Executive Order 12,114 and *DOD Directive 6050.7*.

The only possible argument which would support the contention that the participating nation exception did not apply in either Operation Uphold Democracy or Operation Joint Endeavor is that the nations which hosted these operations did not freely volunteer to host United States forces. Instead, the argument might go, both Haiti and Bosnia-Herzegovina agreed to the entrance of the multinational forces only after the United States applied the world class coercion of a super power. Is a nation considered a "participating nation" if the participation is the product of coercion? This question does not have a simple

answer. It is clear, however, that host nations that consent to the entry of United States forces within a legitimate international agreement fall within the participating nation exception of Executive Order 12,114.

The next issue concerns what elements are necessary to have an enforceable (or legitimate) international agreement. The 1996 United States Army Operational Law Handbook states that the elements required for an international agreement are: "(1) an agreement, (2) between governments (or agencies, instrumentalities, or political subdivisions thereof) or international organizations (3) signifying an intent to be bound under international law."³⁸ Under contemporary international law, if the "intent to be bound" is formed while under duress, the agreement is invalid.³⁹

If, however, the intent is formed under pressure which is applied as a result of lawful action that is orchestrated under the provisions of the United Nations Charter, the resulting leverage is not unlawful, and the intent formed on the part of the host nation is not the result of improper coercion.⁴⁰ For example, the United States entry into Haiti as the lead nation for a multinational force, as authorized under the provisions of United Nations Security Resolution 940 (which was authorized under the provisions of Chapter VII of the United Nations Charter), was lawful.⁴¹ The Carter-Jonassaint Agreement,⁴² negotiated

34. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, *Bosn.-Herz.*, 35 I.L.M. 75. See also Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, Nov. 10, 1995, *Bosn.-Herz.*, 35 I.L.M. 170. The text of the Dayton Accords was initialed in Dayton, Ohio on 21 November 1995, and signed in Paris, France, on 14 December 1995. The United Nations Security Council, in acknowledgment of the Accords, issued Resolution 1031 which authorizes a multinational implementation force (IFOR) "to take all necessary measures to effect the implementation" of Annex 1-A of the Accords. See S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., UN Doc. S/RES/1031 (1995) [hereinafter Resolution 1031].

35. Resolution 1031, *supra* note 34, Art. II.

36. See Operations Plan 4243, United States Atlantic Command, Annex D, app. 5, Tab B (unclassified) (2 Dec. 1995) [hereinafter Joint Endeavor Operation Plan] (pertaining to "environmental considerations and services" for Operation Joint Endeavor). The planners wrote that one of several major assumptions was that "[a]ll foreign nations potentially impacted by [the] operation are active participants or [are] otherwise involved in the operation." *Id.* The import of this assumption is that it grants the "participating nation" exception to Executive Order 12,114's formal environmental review or study requirement. The plan went on to document that the limited amount of time available to prepare for the execution of the operation warranted the use of the exception. Very important to this analysis and not mentioned within the plan is the fact that the decision to take advantage of the participating nation exception can be made at the Unified Command level. Accordingly, the Commander and Chief, United States European Command, does not have to forward this decision to a higher level of authority.

37. *Id.*

38. INTERNATIONAL & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, THE 1996 OPERATIONAL LAW HANDBOOK, 3-3 (1 June 1996) [hereinafter JA 422] (paraphrasing DEP'T OF ARMY, REG. 550-51, FOREIGN COUNTRIES AND NATIONAL AUTHORITY AND RESPONSIBILITY FOR NEGOTIATING, CONCLUDING, FORWARDING, AND DEPOSITING OF INTERNATIONAL AGREEMENTS (1 May 1985)). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (1987) [hereinafter RESTATEMENT].

39. Under traditional (or pre-United Nations Charter) "international law, consent to a treaty could not be invalidated on the basis of coercion of a state or its representative." However, the prohibition on the use or threat of force in international relations, found in article 2(4) of the United Nations Charter, has made coercion an improper form of leverage during the negotiation of an international agreement. See RESTATEMENT, *supra* note 38, § 331. See also DEP'T OF ARMY, PAMPHLET 27-161-1, LAW OF PEACE, 8-8 (1 Sept. 1979).

40. See RESTATEMENT, *supra* note 38, § 331, cmt. d.

41. In 1994, the United Nations Security Council authorized the creation of a multinational force to rid Haiti of an "illegal de facto regime," to stop violations of human rights law, and to restore the legitimately elected President to power. See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994). The subsequent diplomacy (including all international agreements and implementing arrangements) between the de facto regime and the later restored legitimate regime were properly executed under the Resolution 940 mandate.

42. See *supra* note 25 and accompanying text.

under the authority of Resolution 940 to provide for the peaceful entry of the multinational force, was similarly lawful and valid. Consequently, the terms of cooperation expressed in that lawful and valid agreement signified a certain degree of participation by Haiti in the operation, and the agreement satisfied the requirements of the participating nation exception.⁴³

The Exemptions

If the facts in a particular operation are similar to those in either Operation Joint Endeavor or Operation Uphold Democracy, judge advocates would, under most circumstances, find that the host nation is a participating nation. No further action would be required under the provisions of the service regulations that implement Executive Order 12,114. In cases where the facts do not indicate a participating nation, military lawyers must continue to search for answers within these regulations. The most probable course of action is to determine whether the proposed operation properly falls within one of the exemptions in Executive Order 12,114. If an exemption applies, and is granted by the proper authority, the Executive Order requires no further action (i.e., no formal documented review or study is required under *DOD Directive 6050.7*).⁴⁴

Operations Restore Hope and Sea Signal provide recent examples of exempted operations. In Operation Sea Signal, for example, military lawyers quickly determined that Cuba was not a participating nation. They then considered the ten exemptions provided in *DOD Directive 6050.7* (reprinted in *AR 200-2*)⁴⁵ and forwarded a request for a national security exemption.⁴⁶

The ten exemptions are broad and would likely provide exempted status to most foreseeable overseas military operations. Consequently, these operations would be exempted from the documented review requirements in Executive Order 12,114.⁴⁷ Unlike the participating nation exception, however, exempted status requires the military leader to take an affirmative step to gain a variance from the formal documentation

requirements.⁴⁸ In the case of Operation Sea Signal, the Commander in Chief, United States Atlantic Command, forwarded a written request for exempted status for the construction and operation of temporary camps at Naval Station Guantanamo Bay, Cuba. The request was forwarded through appropriate legal channels and the Joint Staff (through the Chairman's Legal Advisor's Office) to Mr. Paul G. Kaminski, The Under Secretary of Defense for Acquisition and Technology, for approval. Mr. Kaminski approved the request, citing the importance of Operation Sea Signal to national security.⁴⁹

The entire written action was only three pages long, including the one page (three short paragraphs) signed by Mr. Kaminski.⁵⁰ The action is shorter than most actions that involve the environment, because it may be drafted and forwarded with little prior review of environmental impact. In fact, the military lawyers involved in the process (the probable drafters of the action) need only know that the proposed operation is:

- (1) a major federal action;
- (2) which will likely cause significant harm to the host nation's environment;
- (3) where the host nation is not participating; and
- (4) one of the ten exemptions is applicable.

Once the exemption is approved, the exempted status should be integrated into the operation plan. If this event occurs after the original plan is approved, the exempted status should be added as an additional appendix to the plan to provide supplemental guidance for the environmental considerations section of the basic plan.

Executing the Operation Plan

Whether the operation plan contains a participating nation assumption or serves as further documentation of an approved Executive Order 12,114 exemption, the result is the same. In both cases, no formal documented review or study is required.

43. If the host nation agrees to participate with the United States and does so, then a prima facie case for a "participating nation" is made. However, the agreement must be one that is enforceable (i.e., lawfully entered). Since almost no contract or agreement between any person or entity is entered into without some degree of leverage, the issue is not whether coercion occurs, but whether the coercion is lawful. Even in the case of a lawful forced entry, if at some point the host nation cooperates with the United States efforts to minimize adverse environmental impacts, the host nation could arguably be categorized as a participating nation.

44. DOD DIR. 6050.7, *supra* note 15.

45. *Id.* The list of ten exemptions includes activities of the intelligence components (DIA, NSA, etc.), actions with respect to arms transfers, actions taken with respect to membership in international organizations, and actions taken when national security or interests are involved. See Whitaker, *supra* note 1, at 29.

46. See Memorandum, Under Secretary of Defense for Acquisition and Technology, to Director, Joint Staff, subject: Exemption from Environmental Review Requirements for Cuban Migrant Holding Camps at Guantanamo, Cuba (Operation Sea Signal Phase V) (5 Dec. 1994).

47. See Whitaker, *supra* note 1, at 29.

48. Under the participating nation exception, the unified commander may simply approve the operation plan that integrates the exception into its environmental considerations appendix. See, e.g., Joint Endeavor Operation Plan, *supra* note 36.

49. The decision memorandum integrated into the final action informed the Under Secretary of Defense for Acquisition and Technology (the approval authority) that the United States Atlantic Command had determined that Cuba was not a participating nation and that a significant impact on the host nation environment was likely. The author of the memorandum requested that the approval authority grant an exemption based upon the national security interests involved in the operation. See Kross Memorandum, *supra* note 26.

This does not, however, mean that commanders should not initiate some type of study or audit to minimize the environmental impact of the operation. The United States seeks to avoid the formal review or study requirement in order to enhance operational flexibility and, in turn, to enhance the opportunity for operational success,⁵¹ but it is United States policy to reduce potential adverse consequences to the host nation's environment.⁵² The practical result of this policy is that United States forces require "adherence to United States domestic law standards for environmental actions where such procedures do not interfere with mission accomplishment."⁵³ Accordingly, from the planning phase to the execution phase, the environment is an important aspect of all United States operations.

Early involvement by judge advocates is "essential to ensure that all appropriate environmental reviews [sic] have been completed"⁵⁴ either prior to the entry of United States forces or soon thereafter.⁵⁵ Additionally, lawyers at all levels of command must be cognizant of an operation's environmental dimension

to ensure that the doctrinally required environmental consideration is integrated into operation plans and orders, training events, and civil-military operations.⁵⁶

Once the operation plan is drafted and approved, the military lawyer's job is not complete. The lawyer must be heavily involved in the execution phase. Leaders, having read the general guidance contained in the operation order, will seek the lawyer's assistance in the onerous task of translating this guidance into action.⁵⁷ The judge advocate must ensure that this translation takes a form that those who are charged with its execution can easily understand.⁵⁸

Joint doctrine provides the framework for translating the guidance contained in the operation order and for related legal work.⁵⁹ This framework contains seven elements for environmental planning and compliance. These elements are:

50. The action memorandum provided: (1) the "general rule," as required by Executive Order 12,114 and DOD Directive 6050.7, (2) the explanation of why the operation does not fall within either of the two exceptions (either an action that does not cause a significant environmental impact or an action involving a host nation that is a "participating" nation), and (3) the four courses of action. The courses of action were provided as follows:

- (1) make a determination that the migrant camp operation has no significant impact;
- (2) seek application of the national security interest or security exemption;
- (3) seek application of the disaster and emergency relief operation exemption; or
- (4) prepare an [sic] "NEPA-like" environmental review.

Id.

The action memorandum then provided discussion regarding each of the four options. The memorandum explained that the first option "is without merit" because the "migrant camp will clearly have an adverse impact on the environment." It found merit with each of the exemptions but concluded that approval of an exemption alone might later subject the Department of Defense to criticism on the ground that it actively avoided its environmental stewardship responsibility. The last option was rejected as setting an inappropriate and unsound precedent of admitting legal responsibilities not actually required by the law. *Id.*

51. It is not the intent of United States forces to circumvent their environmental stewardship responsibilities. Military leaders must work within the system of law to balance operational success with many concerns, to include their environmental stewardship obligations.

52. See DEP'T OF DEFENSE, JOINT PUBLICATION 4-04, JOINT DOCTRINE FOR CIVIL ENGINEERING SUPPORT, II-7, para. 4a (26 Sept. 1995) [hereinafter JOINT PUB. 4-04] ("[O]perations should be planned and conducted with appropriate consideration of their effect on the environment in accordance with applicable [United States and host nation] agreements, environmental laws, policies, and regulations.").

53. See RESTORE HOPE AAR, *supra* note 26, at 23. During Operation Restore Hope, the multinational force, under United States leadership, determined that the actions of United States forces in that operation were exempted from the formal review or study requirement of Executive Order 12,114, but the force adhered to United States domestic law to the greatest extent possible (defined as the extent to which such adherence did not frustrate operational success).

54. *Id.* para. 4b. The author of the AAR used the term "review" in the general sense, not intending to indicate that a formal review, as contemplated in various regulatory sources, was required during United States operations in Haiti. As indicated earlier, the preferred term when no formal review or study is required is "audit."

55. *Id.*

56. *Id.* para. 4c.

57. Interview with Lieutenant Colonel George B. Thompson, Jr., Chief of the Int'l and Operational L. Div., Office of The Judge Advocate, Headquarters, United States Army, Europe and Seventh Army, in Willingen, Germany (Feb. 4, 1997). Lieutenant Colonel Thompson points out that a number of judge advocates "have their hands full working the day to day environmental piece." One such judge advocate, Major Sharon Riley (who is currently deployed to Bosnia-Herzegovina), has spent a good portion of her time assisting commanders in determining acceptable environmental standards by balancing operational considerations and realities with the DOD general environmental standards.

58. *Id.* The translation will usually require more than a single articulation. For example, some degree of soldier training must occur to ensure that soldiers understand the basic rules. This articulation of the standards is typically very basic. A more sophisticated articulation is made for subordinate commanders and engineering personnel who execute the environmental compliance mission.

59. See JOINT PUB 4-04, *supra* note 51, at II-8.

- (1) policies and responsibilities to protect and preserve the environment during the deployment;
- (2) certification of local water sources by medical field units;
- (3) solid and liquid waste management;
- (4) hazardous materials management (including pesticides);
- (5) flora and fauna protection;
- (6) archeological and historical preservation; and
- (7) base field spill plan.⁶⁰

Lawyers can use this framework when assisting military leaders in the construction of an environmental compliance standard. In each of the previously mentioned operations, a checklist similar to the seven element framework set out above was used to construct an environmental compliance model that took into account each element or item on the checklist. For example, during Operation Joint Endeavor, military lawyers working in conjunction with both the civil engineering support elements and medical personnel established concise standards for the protection of host nation water sources and the management of waste.⁶¹ This aspect of host nation environmental protection was executed and monitored by a team comprised of judge advocates, medical specialists, and representatives from the engineer community.⁶²

By using this same type of framework, lawyers can also troubleshoot problems that arise in compliance. For example, during Operation Restore Hope, judge advocates working for the task force legal advisor conducted weekly coordination

meetings with members of the task force staff and used a checklist similar to the seven element list described above. The same approach was subsequently used in Operations Sea Signal, Uphold Democracy, and Joint Endeavor. Using this approach, lawyers in Operation Restore Hope discovered that the task force engineers planned to use waste oil to suppress the dust problem (typical of many areas in Somalia) that hampered early aspects of the mission. Working with the task force staff, task force lawyers advised the use of environmentally sound dust suppressants.⁶³

In addition to the seven elements listed above, military lawyers must also integrate into the operation plan a directive for documentation of initial environmental conditions. In Operation Joint Endeavor, unit commanders took photographs and made notes in regard to the status of land that came under the control of their units.⁶⁴ As a result of this excellent planning and execution, United States forces were protected against dozens of fraudulent claims filed by local nationals.⁶⁵

When searching for applicable standards to apply to the seven elements expressed in Joint Publication 4-04, military lawyers can direct their search to several readily available sources. First, they can review and consider the environmental standards set out in Department of Defense directives and regulations. Second, they can consider the rules and standards set out in the DOD Overseas Environmental Baseline Guidance Documents (OEBGD).⁶⁶ Although baseline documents are not technically applicable to overseas contingency operations

60. *Id.* (providing a description and examples for some of the elements).

61. See HEADQUARTERS, UNITED STATES EUROPEAN COMMAND, OFFICE OF THE LEGAL ADVISOR, INTERIM REPORT OF LEGAL LESSONS LEARNED: WORKING GROUP REPORT, 3 (18 Apr. 1996). Management and disposal of waste involved a significant expenditure of task force manpower and fiscal assets. Early identification of environmental issues and continued monitoring is critical.

62. See Joint Endeavor Operation Plan, *supra* note 36, Annex D, app. 5, Tab B, para. 3c(1). This obligation was written into the operation plan under the heading "Potable water." The central theme of this objective was to protect host nation water sources from contamination through "suitable placement and construction of wells and surface treatment systems, and siting and maintenance of septic systems and site treatment units." *Id.*

63. Unfortunately, the suppressants did not perform well, and the task force eventually had to resort to waste oil. However, the effort made to avoid the use of oil demonstrates the sensitivity of United States forces to the Somali environment. Once the decision was finally made to use waste oil, the task force developed a plan to limit the use of oil and to prevent an unnecessarily harsh impact on the environment. See RESTORE HOPE AAR, *supra* note 26, at 24.

64. See Joint Endeavor Operation Plan, *supra* note 36, para. 3c14.

65. See, e.g., Memorandum, Captain David G. Balmer, Foreign Claims Judge Advocate, 1st Armored Division (Task Force Eagle), to Major Richard M. Whitaker, Professor, Int'l & Operational L. Dep't, The Judge Advocate General's School, United States Army, subject: Suggested Improvements for Chapter 10 of Operational Law Handbook (4 Dec. 1996) (on file with author). Captain Balmer stated that the number of claims alleging environmental damage was "fairly high, and very difficult to adjudicate in the absence of photographs taken prior to the occupation of the area by United States forces." Captain Balmer also stated that such pictures repeatedly "saved the day when fraudulent claims were presented by local nationals."

66. Department of Defense Directive 6050.16 requires that:

DOD components operating abroad develop country specific "baseline" guidance documents. The baseline consists of standards applicable to similar operations conducted in the United States. The baseline is compared with existing host nation law. After consultation with the United States Diplomatic Mission in the host nation, the "Executive Agent" for that country determines whether to apply the baseline standards or the host nation standards.

DEP'T OF DEFENSE, DIRECTIVE 6050.16, DOD POLICY FOR ESTABLISHING AND IMPLEMENTING ENVIRONMENTAL STANDARDS AT OVERSEAS INSTALLATIONS, para. C (20 Sept. 1991) [hereinafter DOD DIR. 6050.16].

See also JA 422, *supra* note 38, at 16-2.

where the United States presence is less than permanent,⁶⁷ they provide a solid starting point for the formulation of environmental standards.

In each of the operations described in this article, the measures established within a country-specific baseline document were used (to varying extents) to develop the applicable environmental standards. For example, in Operation Joint Endeavor, the Germany baseline document was integrated into the operation plan as a reference⁶⁸ and as a “source of additional environmental standards, as [might be] deemed appropriate” in the interpretation or supplementation of the plan.⁶⁹

It is important to bear in mind, however, that any particular country-specific baseline document does not control what United States forces do in a contingency operation.⁷⁰ These guidelines are only used as a tool; they provide lawyers and other staff officers with a starting point when dealing with host nation environmental issues. A number of experts in this area recommend that lawyers and staff officers avoid the use of the term “overseas environmental baseline guidance document,” as it might confuse those charged with actual execution of environmental compliance.⁷¹ Everyone involved in this process must clearly understand that all of the guidelines, to include the baseline documents, are merely advisory in nature.

A third source of guidance for the construction of a system of standards is the growing collection of after action reports, operation plans, and operation orders from recent operations. The plans from each of the foregoing operations would serve as excellent starting points.⁷² With each successive operation, United States forces have become more experienced in their handling of the environmental dimension of overseas operations.⁷³

Command environmental standard operating procedure manuals, regulations, and instructions serve as the final source of guidance. For example, United States Atlantic Command is in the process of writing an Atlantic Command Instruction on environmental security, which provides detailed guidance on overseas operational compliance, cleanup, conservation, and environmental planning and training.⁷⁴

The Future and Changes in U.S. Policy and Law

Much of the analysis offered in this article could change if the current draft version of Department of Defense Instruction 4715.II is approved and issued by the Secretary of Defense to replace DOD Directive 6050.7.⁷⁵ The Instruction is seen as a

67. The OEBGD “applies where EO 12,114 does not apply, It establishes the environmental standards by which we run our installations overseas.” Briefing Slides, Colonel Richard D. Rosen, Deputy Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, subject: Combatant Commander’s Environmental Responsibilities Overseas, slides 10-11 (unpublished slide presentation, on file with author).

68. See Joint Endeavor Operation Plan, *supra* note 36, at 3c.

69. *Id.* The general guidance in the plan stated that:

[O]perations shall be conducted in a manner that exhibits leadership in the area of protection of human health and the environment. Operations will be conducted with the effects on the environment considered to the extent feasible under the existing conditions. Commanders will ensure potential harm to the environment is avoided or minimized when possible. The referenced OEBGD may be used as a source for additional environmental standards, as deemed appropriate. Units will operate under their respective service environmental procedures while ensuring compliance with the following minimum standards and mitigative measures.

Id.

70. See DOD Dir. 6050.16, *supra* note 66. See also Dunn Message, *supra* note 10.

71. Officers from all levels felt that using the term baseline guidance document might lead to a misunderstanding of its actual application. Telephone Interview with Mr. William Mackie, J4-International Legal Engineer Division (Mar. 27, 1997) [hereinafter Mackie Interview]; Interview with Lieutenant Colonel John M. McAdams, Jr., Judge Advocate Division, Headquarters, United States Marine Corps, in Charlottesville, Virginia (Mar. 27, 1997) [hereinafter McAdams Interview]. See also Jackson Interview, *supra* note 25; Moore Interview, *supra* note 32.

72. The legal work done in regard to the environment during Operation Restore Hope was excellent. The work done during Operation Uphold Democracy was even better, and the work already done and currently being done in Operation Joint Endeavor is better yet. These improvements are largely because: (1) judge advocates have done a superb job of documenting their lessons learned and (2) the service judge advocate general’s corps has made capturing lessons from recent operations a priority.

73. McAdams Interview, *supra* note 71. Lieutenant Colonel McAdams served as the Joint Task Force Legal Advisor during Operation Sea Signal and stated that environmental issues consumed an appreciable amount of his time. He believes that he profited from the legal work done in Operation Restore Hope and feels that the United States Atlantic Command clearly profited from the lessons he and his staff learned during Sea Signal. He stated that he saw the product of these lessons in the execution of Operation Uphold Democracy. Specifically, he cites the decision to perform a more detailed environmental audit during Uphold Democracy, instead of the less detailed assessment performed during Sea Signal.

74. A draft version of the Atlantic Command Instruction is on file with the author.

75. See Mackie Interview, *supra* note 71. Mr. Mackie stated that Draft DOD Instruction 4715.II has been coordinated with each of the unified commands and each of the services, except for the Army. His opinion is that once the Army finishes its review, formal adoption will require at least one additional year. Accordingly, in his opinion, the instruction will not become effective until after June 1998.

compromise between a revised version of Executive Order 12,114 (with a more restrictive mandate for the Department of Defense) and the favorable mandate of the current version of the Executive Order. Some military lawyers believe that if the draft instruction is approved it will have a significant impact on the flexibility of military leaders charged with the execution of overseas contingency operations.⁷⁶

The most controversial aspect of the proposed instruction is its impact on the participating nation exception of Executive Order 12,114. Currently, in planning for a contingency operation, the unified commander is free to make a determination that a host nation is a participating nation. Once this determination is reached, the unified command is not required to conduct any specific type of environmental review or to coordinate with the host nation (unless required by an independent international agreement) in assessing potential adverse consequences to a host nation's environment.⁷⁷ If the draft instruction is approved, it will reduce the discretion of combatant commanders by directing them to "coordinate and approve implementation of [the] Instruction by the environmental executive agents in their geographical areas of responsibility."⁷⁸ Previously, this type of coordination was only required under DOD Directive 6050.16 for permanent United States installations in foreign nations, not for contingency operations.

The draft instruction further reduces the discretion of combatant commanders in nations where no environmental executive agency has been appointed by directing them to:

- (1) identify applicable host nation environmental laws and regulations prescribing environmental analysis for actions occurring within the nation;
- (2) determine whether the host nation has an environmental analysis regime;
- (3) consult with host nation authorities on environmental analysis issues as required to maintain effective cooperation;

(4) provide DOD Components with information on the host nation's environmental analysis regime;

(5) consult with the Chief of the U.S. diplomatic mission in the host nation on significant issues arising from DOD environmental analysis in that country; and

(6) ensure preparation of environmental analysis in compliance with this instruction for major DOD actions necessary to perform assigned missions of the command, including military operations, joint training, and logistics.⁷⁹

The participating nation exception is substantially changed by the foregoing procedures and by another section in the draft instruction that provides additional guidance in regard to such nations.⁸⁰ That section states that unless an exemption is applicable, the participating nation status of the host nation does not serve as a categorical exception to the requirement to conduct some type of environmental review.⁸¹ Instead, the operational planners must determine if the host nation is already applying an environmental analysis regime to the DOD action.⁸² If the host nation is applying its own regime, the operational planners must request a copy of the host nation's analysis report. The planners should then use the report to "make informed decisions" about the execution of the operation.⁸³ If the host nation is not performing any form of environmental analysis or refuses to produce a report of such an analysis, the United States should offer to assist with some type of analysis.⁸⁴

The United States may elect to proceed with the operation, even if the host nation has no intention of analyzing the environmental impact of the operation or releasing the report of such an analysis. If the United States makes this election, however, they must conduct an environmental audit "on the basis of whatever information is readily available."⁸⁵

As referenced above, a unified command may still request the exemptions provided in Executive Order 12,114.⁸⁶ However, the language of the draft instruction in regard to the

76. Working Memorandum, Colonel Ronald J. Later, Deputy Director for Logistics, United States Atlantic Command, to Joint Staff, J5 (Attention: Commander Mark Rosen), subject: DODI 4715.II, Analyzing Defense Actions With the Potential for Significant Environmental Impacts Outside the United States—Action Memorandum (Undated Working Memorandum, on file with author).

77. Although, as stated earlier in this article, the United States performs such assessments as a matter of policy.

78. DEP'T OF DEFENSE, INSTR. 4715.II, ANALYZING DEFENSE ACTIONS WITH POTENTIAL FOR SIGNIFICANT ENVIRONMENTAL IMPACTS OUTSIDE THE UNITED STATES, para. E5 (Undated Draft Version, on file with author).

79. *Id.* para. E5b.

80. *Id.* para. F3b.

81. *Id.*

82. The planners must "[consult] with the Executive Agent (or the cognizant combatant commander if no Executive Agent has been designated for the designated nation)." *Id.* para. F3b(1).

83. *Id.* para. F3c(2).

84. *Id.* para. F3c(3).

85. *Id.* para. F3c(4).

exemptions is very different from the language of DOD Directive 6050.7. The draft instruction only exempts the DOD component from formal analysis that precedes the action.⁸⁷ Accordingly, even the leadership of exempted operations must conduct an environmental audit to consider the effects of the operation on the host nation's environment.⁸⁸

The goal of the draft instruction is to "strengthen compliance with Executive Order 12,114" so as to avoid the possibility of the issuance of a more stringent executive order.⁸⁹ The strategy is to design a compromise regime that is less restrictive than a new executive order might be, but more restrictive than the current rules. It appears that this strategy will prevail, and the Department of Defense will soon have a new instruction to guide its overseas operations in regard to the environment.

Conclusion

As our nation becomes increasingly environmentally conscious, the attention focused on integrating environmental considerations into all phases of overseas operations will increase. A number of other initiatives are now under way to incorporate an increased awareness of the environment into both the planning and execution phases of all military operations and activities. In fact, as the Army Judge Advocate General's Corps rewrites its current version of its own keystone doctrinal source for legal operations, it has initiated a separate review into the role the environment should play in operational law doctrine.⁹⁰

Judge advocates, as they have traditionally done, must continue to stay cognizant of changes in both doctrine and law in this area. In the end, their advice must be based upon a complete understanding of the law, the mission, and common sense. This article should help judge advocates from all services provide accurate, up to date, and meaningful advice.

86. *Id.* para. F2.

87. *Id.*

88. A formal analysis, such as an environmental study or review, is not required.

89. Joint Staff Action Processing Form, Commander Mark Rosen, J5, DODI 4715.II Action Officer, subject: Analyzing Defense Action Impacts Outside the United States (10 May 1996) (copy on file with the author).

90. The current version of the Army Judge Advocate General's Corps doctrine on "Legal Operations" described environmental law practice as one of the discrete areas of the law that judge advocates practice within the operational context. *See* DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS 3 (3 Sept. 1991). The leadership of the Judge Advocate General's Corps recently directed the judge advocates charged with updating the current doctrinal manual with conducting a separate review regarding how the Corps should integrate environmental protection and considerations into its doctrine. *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, DRAFT FIELD MANUAL 27-100, LEGAL OPERATIONS (unpublished draft version, on file with author).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

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

Office Management Note

New Tax Law Course Offered

The Judge Advocate General's School is offering a new course 15-17 December 1997. The course is Tax Law for Attorneys and is designed for the legal assistance officer in charge of the tax program at each installation. Staff judge advocates and chiefs of legal assistance should plan to send one attorney from their offices. A course very similar to this one has been taught overseas for years, and attorneys who have attended it have indicated that it was invaluable. The goal is to provide the same instruction to attorneys stateside. Again, each installation should seriously consider sending one attorney. As always, spaces will be limited, and registration will be handled through ATRRS.

Family Law Note

Modifying Support Orders Under the Uniform Interstate Family Support Act and the Federal Full Faith and Credit for Child Support Orders Act

Since 1950, the Uniform Reciprocal Enforcement of Support Act (URESA)¹ has been the primary interstate support stat-

ute addressing establishment, enforcement, and modification of support orders. While reviewing URESA in 1992, the National Conference of Commissioners on Uniform State Laws promulgated an entirely new act entitled the Uniform Interstate Family Support Act (UIFSA)² to replace URESA. The UIFSA, however, is not currently adopted in all 50 states.³ In an attempt to force the URESA states to follow the limitations on modification of existing support orders set out in the UIFSA, Congress enacted the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).⁴ The FFCCSOA prohibits states from modifying existing support orders except under specific circumstances identical to those spelled out in the UIFSA.⁵ The FFCCSOA, therefore, is essentially a stop gap measure which is only necessary until all 50 states adopt the UIFSA. Because it is a federal statute, federal supremacy requires URESA states to follow the FFCCSOA when a conflict arises.

Judge advocates should understand the UIFSA rules on modification because: (1) these rules are the future of support modification and (2) even current URESA states must adhere to the UIFSA model, as mandated by the FFCCSOA. The hallmark of the UIFSA is the establishment of one controlling order that cannot be modified by any other state tribunal except under restricted rules.⁶ Under the UIFSA, the issuing state of the controlling order is the only state that can modify the order, so long as it retains continuing exclusive jurisdiction (CEJ).⁷ If all parties have moved from the issuing state of the controlling order, another tribunal can modify the order, but the petitioner seeking modification must go to the state of residence of the other party. Alternately, the parties can agree in writing to consent to a tribunal modifying the order. The modified order becomes the controlling order, and the state of CEJ changes to that of the court which modified the order. The support guidelines of the modifying state control the amount of support.⁸

The UIFSA and the FFCCSOA dramatically change traditional family law rules on modifying support orders. Since mil-

1. 9B U.L.A. 567 (1988) (*amended* 1958). The URESA was extensively revised in 1968 and was called the Revised Uniform Reciprocal Enforcement of Support Act (RURESA). All 50 states eventually adopted some version of the URESA.

2. 9 U.L.A. 229 (1993) (*amended* 1996). See Family Law Note, *Welfare Reform Act Mandates Adoption of Uniform Interstate Family Support Act*, ARMY LAW., Mar. 1997, at 15 [Hereinafter Welfare Reform Note].

3. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), requires states to adopt the UIFSA by 1 January 1998. Currently, 36 states have enacted the UIFSA. See Welfare Reform Note, *supra* note 2, at n. 3 for a list of the UIFSA states.

4. 28 U.S.C.A. § 1738B (West 1996) (*amended* 1996). As originally enacted, the FFCCSOA had slight variations from the UIFSA. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 amended the FFCCSOA to rectify these differences.

5. *Id.*

6. See Welfare Reform Note, *supra* note 2, at 15 (discussing how to establish which order controls).

7. The UIFSA defines this as the state that issues a support order and remains the residence of the obligor, obligee, or child.

itary families are some of the most mobile in our society, legal assistance attorneys must be able to answer questions on jurisdiction to modify support orders. Attorneys cannot accurately advise clients on this important issue without a basic understanding of the UIFSA and FFCCSOA rules. Major Fenton.

Consumer Law Notes

The IRS Helps to Collect Student Loans

The National Consumer Law Center (NCLC) reports that the use of tax refund intercepts⁹ to collect delinquent student loans is on the rise.¹⁰ The ratio of refund intercepts to lawsuit filings for collection of student loans is 70 to 1.¹¹ Last year, refund intercepts resulted in the recovery of over half a billion dollars.¹²

Intercepting a tax refund to help satisfy debts owed to federal agencies is an attractive procedure because it requires only minimal due process.¹³ In recent years, the statute authorizing this collection procedure has been changed to include "debt[s] administered by a third party acting as an agent for the Federal Government."¹⁴ In actual practice, however, tax intercepts based upon debts administered by third parties have still been initiated through the appropriate federal agency, despite the presence of the "third party" language. For student loans, the guaranty agency would ordinarily assign the debt to the Department of Education (DOE), which would process the intercept to the Internal Revenue Service (IRS).¹⁵ If any debt remained

after the intercept, DOE would assign the debt back to the guaranty agency for further collection actions.¹⁶

The NCLC now indicates that this practice has changed. The IRS is now accepting intercept claims directly from guaranty agencies.¹⁷ This makes intercept actions easier to process for guaranty agencies¹⁸ and allows the agency to file as a principal.¹⁹

Legal assistance practitioners should be aware of the possibility of tax intercept so that they can properly and fully advise their clients who may be struggling with student loan debts or other debts owed to federal agencies. Additionally, soldiers who have already defaulted on a debt may receive an intercept notice from the agency and may seek an explanation from the legal assistance office. For soldiers in these situations, legal assistance attorneys should be aware of potential avenues to avoid the intercept action. The NCLC lists a number of possibilities, including filing bankruptcy, entering into a repayment agreement, obtaining a closed school or false certification discharge, and seeking a loan consolidation.²⁰

As the cost of higher education skyrockets, the amount of debt that students undertake to finance their degrees is increasing. Legal assistance practitioners should remain aware of developments in the administration and recovery of student loan debts so that they can properly advise soldiers who face debt problems from these loans. The ease of processing a tax intercept makes it a likely avenue that DOE and guaranty agencies will use to collect from students in default. Major Lescault.

8. UIFSA § 611, 9 U.L.A. 229 (1993) (*amended* 1996).

9. A "tax refund intercept" is the reduction of any refund of Federal taxes paid by the amount of a debt legally owed to a federal government agency. *See* 31 U.S.C.A. § 3720A (West Supp. 1996).

10. *Coping With the Flood of Tax Refund Intercepts*, 15 NCLC REPORTS, DECEPTIVE PRACTICES AND WARRANTIES EDITION 13 (Nat'l Consumer L. Ctr.) Jan./Feb. 1997 [hereinafter NCLC Reports].

11. *Id.*

12. *Id.*

13. The due process mandated by the statute is simply notice, 60 days for the person to respond and present evidence that the debt is not past due or is not legally enforceable, and consideration of any evidence presented. 31 U.S.C.A. § 3720A(b) (West 1997).

14. This language was originally added in 1992. *See id.* notes (1992 Amendments). Further amendments in 1996 changed the location and punctuation of the third party language. *See id.* notes (1996 Amendments).

15. *See* NCLC Reports, *supra* note 10, at 13; NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 11.2.4.1 (Supp. 1996) [hereinafter UDAP].

16. UDAP, *supra* note 15.

17. NCLC Reports, *supra* note 10, at 13.

18. For example, under the prior practice of assigning the debt to the federal agency for intercept, it was considered too complicated to assign a debt that had been reduced to judgment. Now guaranty agencies can easily submit intercept actions on these debts. *See id.*

19. *Id.*

20. *See id.* at 13-14. *See also* UDAP, *supra* note 15, § 11.2.4.

Tie-ins for Lease of Mobile Home Space May Be an Unfair Deceptive Acts and Practices (UDAP) Violation

The practice of conditioning the lease of mobile home space on the purchase of a mobile home from a particular seller is a fairly widespread practice.²¹ In a 1996 decision, the Vermont Supreme Court called this practice, which is usually referred to as a “tie-in,” a state Unfair Deceptive Acts and Practices (UDAP) violation.²²

In *Russell v. Atkins*,²³ the court dealt with a number of issues surrounding attempts by the owners of a mobile home park to sell the park and, when that failed, to convert the park to a condominium arrangement.²⁴ For the purposes of this note, the critical claim was raised by plaintiff Russell, who alleged that the owners of the park had conditioned the rental of a site on the purchase of a mobile home from them.²⁵ Russell claimed that this practice violated Vermont’s Consumer Fraud Act²⁶ because the state’s Mobile Homes Park Act²⁷ did not address the tie-in issue.

The trial court found that there was no violation of the Vermont Consumer Fraud Act because the legislature had considered and rejected a provision forbidding tie-ins when it passed the Vermont Mobile Home Park Act.²⁸ The lower court felt that this legislative omission was intended to permit the tie-in practice.²⁹ The Vermont Supreme Court disagreed.

The Vermont Supreme Court looked to the Vermont Consumer Fraud Act itself and found that it “explicitly states that ‘in construing [the Act], the courts of this state will be guided by the construction of similar terms contained in section 5(a)(1) of the Federal Trade Commission Act as . . . amended by the Federal Trade Commission and the courts of the United

States.’”³⁰ The court went on to note that “[u]nder section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), which is identical to 9 V.S.A. § 2453, the FTC has declared that it is illegal to tie or condition the leasing of lots in mobile home parks to the purchase of homes from the park owner.”³¹ Thus, the court found that Russell’s claim was actionable under the Consumer Fraud Act.³²

Russell is significant because it marks the first time that a reported decision has held the practice of tie-ins involving mobile home park rental space to be a state UDAP violation.³³ Moreover, it demonstrates the utility of using UDAP statutes to deal with conduct that eliminates competition.³⁴

Many soldiers live in mobile home parks. Consequently, protections from abusive practices by mobile home park owners may be valuable to them. Legal assistance practitioners should be aware of the decision in *Russell* and use it to the advantage of their clients, particularly where similar statutory language and reliance on interpretation of the Federal Trade Commission Act are contained in their state’s statutes. More importantly, however, attorneys must remain aware of protections available to soldiers in their state’s UDAP legislation and use these protections creatively in *any* situation where doing so will protect their clients’ interests. Major Lescault.

Tax Notes

Limit on Deductions With Certain Rental Property

Taxpayer deductions for rental property may be limited to the amount of income when the taxpayer uses the rental property for more than 14 days or 10% of the number of days that

21. NCLC Reports, *supra* note 10, at 16.

22. *Id.*

23. 679 A.2d 333 (Vt. 1996).

24. *Id.* at 334.

25. *Id.* at 336.

26. VT. STAT. ANN. tit. 9, §§ 2451-80g (West 1995) (This is Vermont’s Unfair and Deceptive Acts and Practices (UDAP) legislation.).

27. VT. STAT. ANN. tit 10, §§ 6201-65 (West 1995).

28. *Russell*, 679 A.2d at 336.

29. *Id.*

30. *Id.* (quoting VT. STAT. ANN. tit 9, § 2453(b)).

31. *Id.* (citing *Mobile Homes—Multiplex Corp.*, 94 F.T.C. 151, 156 (1979); *MacLeod Mobile Homes, Inc.*, 94 F.T.C. 144, 148 (1979)).

32. *Id.*

33. NCLC Reports, *supra* note 10, at 16.

34. *Id.*

the property is rented during the year, whichever is greater.³⁵ Personal use of the property includes use by family members,³⁶ including brothers, sisters, spouses, ancestors, and lineal descendants.³⁷

The tax court reiterated these rules in a recent case in which a taxpayer rented out several rooms in his house, but continued to occupy a room in the house.³⁸ Since the taxpayer continued to live in the residence, the court held that he could only deduct as much of the expenses and depreciation as would reduce his income to zero.³⁹ He could not report a loss on the rental of the rooms.

Legal assistance attorneys should be careful when calculating rental property income to ensure that their client's deductions are not limited because the client or a family member occupied the rental property. There are two common situations in which this rule applies. First, when a client rents out part of a building in which he is also living, the deduction will be limited. Second, when the client has vacation property that he rents to others, but in which he also spends more than the allowed time, the deduction will be limited.

It is important to note that this rule does not apply to the situation where the taxpayer lives in a home during part of the year and then rents the home for the remainder of the year. The reason it does not apply is because the property was not rental property until the taxpayer began renting it. For example, a client who lives in a residence from January to June and rents it to others from July to December may be entitled to deduct fully all expenses and depreciation. This is true so long as neither the client nor a family member lives in the residence for more than the allowed time during the period from July to December. This situation is frequently encountered when a client moves during the year and either cannot or does not sell his residence.

In contrast, use of a dwelling by family members can sometimes be beneficial to the taxpayer. In *Dickerson v. Commissioner*,⁴⁰ the taxpayer had let his grandson live in a second home rent free. Since the use by the grandson counted as personal use by the taxpayer, the taxpayer was entitled to treat the home as his second home and deduct the interest payments on the mortgage. Lieutenant Colonel Henderson.

Rollover of Individual Retirement Account Must Be to a United States Account

An Individual Retirement Account (IRA) is a good way to save money for retirement. Although many service members cannot deduct contributions to IRAs,⁴¹ the earnings generated in an IRA are exempt from taxation.⁴² When using an IRA to save money, however, taxpayers must be cautious to ensure that their actions comply with the legal requirements for an IRA.

Taxpayers can only contribute \$2,000 each year to an IRA. If a taxpayer contributes more than \$2,000, he will be subject to a 6% tax.⁴³ Taxpayers can also be subject to a 10% penalty for early withdrawal of money from an IRA.⁴⁴ A taxpayer can be subject to a \$100 penalty for overstating the amount of a non-deductible IRA contribution, and is also subject to a \$50 penalty for failing to file IRS Form 8806 when he has made nondeductible IRA contributions.⁴⁵

Rollover of an IRA into another IRA is one area where it is easy to run afoul of the IRA rules. If a taxpayer fails to transfer or rollover an IRA properly, he may have to include some or all of the withdrawal in his gross income for the year. The taxpayer may also be subject to the 10% early withdrawal penalty.

In order to rollover an IRA, the taxpayer must deposit, within 60 days from the date of receipt, the entire amount he desires to rollover.⁴⁶ This can be difficult since the IRA custodian is required to withhold 20% from the amount the taxpayer

35. I.R.C. § 280A(d) (RIA 1996).

36. *Id.* § 280A(d)(2). Note, however, that use by family members does not count as personal use if the family members pay fair market value for such use and use the rental property as their personal residence. *Id.* § 280(d)(3)(A).

37. *Id.* § 267(c)(4).

38. *Shih v. Commissioner*, 73 T.C.M. (CCH) 2588 (1997).

39. *Id.*

40. 73 T.C.M. (CCH) 2506 (1997).

41. See I.R.C. § 219(g) (RIA 1996) (limiting the deductibility of IRA contributions for active participants in other retirement plans); *id.* § 219(g)(5)(A)(iii) (treating all government employees as active participants).

42. *Id.* § 408(e).

43. *Id.* § 4973.

44. *Id.* § 72(t).

45. *Id.* § 6693(b).

wants to receive from the custodian to rollover into another IRA.⁴⁷ This withholding can be avoided by having the old custodian pay the IRA assets directly into a new IRA account. By using this method, the taxpayer avoids all the potential pitfalls of trying to rollover the IRA account himself.

A taxpayer can only rollover an IRA once within a one-year period,⁴⁸ and in order for a rollover to qualify, it must be made from one IRA into another qualifying IRA. A qualifying IRA is a trust that is "created or organized in the United States."⁴⁹ In *Chiu v. Commissioner*,⁵⁰ the taxpayer withdrew his money from an IRA account in the United States and deposited it into an account in China. The court held that the transfer was not a qualifying transfer because the account in China was not a United States account or trust.⁵¹ As a result, Mr. Chiu had to include the withdrawal in his gross income and pay a 10% early withdrawal penalty.

Legal assistance attorneys who have clients with IRAs should ensure that their clients have complied with all the various IRA requirements. If a client has not complied with some requirements, the attorney must advise the client as to how to come into compliance and what the penalties are for noncompliance. Lieutenant Colonel Henderson.

46. *Id.* § 408(d)(3).

47. *Id.* § 3405(c)(1).

48. *Id.* § 408(d)(3)(B).

49. *Id.* § 408(a).

50. 73 T.C.M. (CCH) 2679 (1997).

51. *Id.*

52. DEP'T OF ARMY, NATIONAL GUARD REG. 635-101, EFFICIENCY AND PHYSICAL FITNESS BOARDS, para. 14 (14 Aug. 1977) [hereinafter NGR 635-101]. Army National Guard FWR board actions are roughly equivalent to Active Component Army officer separation board actions. A federal withdrawal of recognition board recommendation to withdraw federal recognition of an Army National Guard officer, upon approval of the Chief, National Guard Bureau (acting for the Secretary of the Army), is tantamount to separation from the military. Normally, National Guard officers, because of their unique dual federal-state status under Title 32, United States Code, upon having their federal recognition withdrawn, are transferred to the Individual Ready Reserve, United States Army Reserve, and separated for cause. If they are jointly boarded for withdrawal of federal recognition and separation from the Reserve Components, they are discharged. Army National Guard officers, upon withdrawal of federal recognition, while still members of their state guard organization, are not eligible to be mobilized or federalized to serve on any Title 10, U.S. Code status federal active duty.

53. *Id.* paras. 12-16.

54. *Id.* Pursuant to NGR 635-101, ARNG officers may lose their federal recognition status because of substandard performance of duty; moral or professional dereliction; national security violations; or medical, physical, or mental conditions which prevent further Guard service. In most cases, a board must be appointed prior to action being taken by the Chief, National Guard Bureau.

55. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS [ARMY NATIONAL GUARD AND ARMY RESERVE], paras. 1-4, 2-16b (22 Feb. 1971). "Area commanders" and "area commands" are defined by reference to the definitions in the Consolidated Glossary for the Reserve Components Personnel UPDATE. DEP'T OF ARMY, RESERVE COMPONENTS PERSONNEL UPDATE 23, Consolidated Glossary (1 Sept. 1994) [hereinafter UPDATE 23]. Area Commanders are defined as "Commanders of area commands." Area Commands are defined as:

- a. (Rescinded.) [Previously CONUSAs]
- b. United States Army, Europe (USAREUR).
- c. United States Army Pacific Command (USARPAC).
- d. United States Army Southern Command (SOUTHCOM).
- e. United States Army Special Operations Command (USASOC).
- f. United States Army Reserve Personnel Center (ARPERCEN).
- g. United States Army Reserve Command (USARC).

Army National Guard Note

Regulatory Problem for *Federal Withdrawal of Recognition* Boards is Resolved

Army National Guard (ARNG) commands recently faced a perplexing problem. The Continental United States Armies (CONUSAs), which appoint ARNG officer *federal withdrawal of recognition* (FWR) boards,⁵² realized that they had inadvertently lost their regulatory authority to appoint such boards because of a change in regulations. As a result of the change, CONUSAs temporarily froze appointments of FWR boards for the ARNG until the problem could be resolved.

National Guard Regulation 635-101, which governs FWR boards for Guard officers, states that the Army area commander is charged with the responsibility of reviewing recommendations for withdrawal of federal recognition of Guard officers who are endorsed to them by the appropriate State Adjutant General.⁵³ The Army area commander is also responsible for appointing FWR boards for the ARNG, when appropriate.⁵⁴ The terms "area commander" and "area commands" are terms of art defined in Army Regulation 135-175.⁵⁵ No definitions of

“area commands” or “area commander” are provided in the National Guard FWR regulation.⁵⁶

Prior to the start of the United States Army Reserve Command (USARC) in 1991, the CONUSA commanders were solely responsible for: (1) reviewing officer separation recommendations for action by either the Army Reserve or the Army National Guard, (2) appointing separation boards, and (3) reviewing board results for legal sufficiency.⁵⁷ With the advent of the USARC, all United States Army Reserve officer elimination actions were transferred to the USARC,⁵⁸ but the CONUSAs continued to process ARNG officer FWR actions.⁵⁹

When the Reserve Components Personnel UPDATE was revised in 1994, the Consolidated Glossary dropped all mention of the CONUSAs as Army area commands.⁶⁰ The apparently unintended result of this action was that the CONUSAs no longer had clear regulatory authority to initiate FWR boards for ARNG officers. Despite the regulatory fog created by the rescission of the CONUSAs as area commands for Reserve Component personnel actions, the CONUSAs continued to review ARNG recommendations for FWR of Guard officers, to appoint FWR boards, and to conduct legal reviews of board proceedings. The definition deletion was not discovered until the fall of 1996, and the CONUSAs immediately halted appointing any new ARNG boards.⁶¹

On 25 March 1997, the Headquarters, Department of the Army, recognizing the potential for a buildup of unresolved cases, issued a message which restored the CONUSAs as area commands for ARNG matters only and designated CONUSAs

as area commands for the Reserve Components Personnel UPDATE.⁶² Thus, the message restored the status quo. Lieutenant Colonel Conrad.

Contract Law Note

Recent Changes to the Administrative Dispute Resolution Act Affecting Federal Agency Use of Alternative Dispute Resolution Techniques

The concept of using alternative dispute resolution (ADR) techniques to resolve government contract protests and disputes has received increased emphasis in recent months, as Congress and federal agencies struggle to cope with the tension between decreased budgets and the demands of litigation. This Practice Note will address the recent changes to the Administrative Dispute Resolution Act that can impact the government contracting process.

The Administrative Dispute Resolution Act (ADRA)⁶³ was originally enacted in 1990 after Congress determined that “administrative proceedings had become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes.”⁶⁴ The area of contract disputes was one of the areas Congress identified as being in need of help. Only twelve years earlier, Congress enacted one of the first statutes to incorporate an ADR approach to dispute resolution, the Contract Disputes Act of 1978 (CDA).⁶⁵ The intent of the CDA was “to provide, to the fullest extent practicable, informal, expeditious, and inexpensive resolution of [contract] disputes.”⁶⁶

56. NGR 635-101, *supra* note 52.

57. DEP'T OF ARMY, RESERVE COMPONENTS PERSONNEL UPDATE 22, Consolidated Glossary (1 June 1990).

58. *Id.*, Interim Change No. I01 (28 Feb. 1992) (adding the USARC to the definition of area commands in the Consolidated Glossary).

59. The USARC, as an Army Reserve Command, declined to take responsibility for ARNG separation actions.

60. UPDATE 23, *supra* note 55 (rescinding CONUSAs from the commands defined as area commands in the Consolidated Glossary).

61. Telephone Interview with Colonel Gary Casida, Staff Judge Advocate, Fifth U.S. Army, Fort Sam Houston, Texas (May 7, 1997).

62. Message, Headquarters, Dep't of Army, DAAR-PE-P, subject: Change to Reserve Components Personnel Update 23, Consolidated Glossary (251900Z Mar 97). The message reads in part:

1. Effective immediately, subparagraph A of the definition of “area command” as defined in the Consolidated Glossary of Reserve Components Personnel Update 23 is changed to read as follows: “Continental United States Army (CONUSA), for Army National Guard matters only.”
2. Previous editions of the Reserve Components Personnel Update Consolidated Glossary contained a definition of area command that included CONUSA. However, this definition was deleted in Update 23, inadvertently withdrawing authority for CONUSA Commanders to appoint federal withdrawal of recognition boards.
3. The change in paragraph 1 will restore authority for CONUSA Commanders to appoint federal withdrawal of recognition boards.

63. 5 U.S.C. §§ 571-84 (1990).

64. Administrative Dispute Resolution Act (ADRA), Pub. L. No. 101-552, § 2(2), 104 Stat. 2738 (1990).

65. 41 U.S.C. §§ 601-13 (1978).

66. *Id.* § 607.

Unfortunately, the Congressional intent has not been realized in the judicialized rules of practice and procedure followed by the Boards of Contract Appeals, especially when combined with the complex nature of many government contract claims.

Congress saw that ADR was being used successfully in the private sector and that several government agencies, most notably the United States Army Corps of Engineers, had developed ADR procedures on their own that showed that ADR could work in the public sector. In light of the success of ADR in both the private and public sectors, the ADRA became a much touted solution to the problem of spiraling litigation costs, leading to “more creative, efficient and sensible outcomes.”⁶⁷ In the ADRA Congress explicitly authorized federal agencies to use “any alternative means of dispute resolution” to resolve administrative disputes, including contract disputes.⁶⁸ The ADRA required each agency to adopt an ADR policy, but it also included a “sunset provision” which provided for the ADRA’s expiration on 30 September 1995.

After temporarily extending the ADRA by four years to 30 September 1999,⁶⁹ Congress decided to make the ADRA permanent and to fix some of the perceived flaws in the original ADRA. Thus, on 30 September 1996, Congress passed the Administrative Dispute Resolution Act of 1996.⁷⁰

One of the more controversial changes to the ADRA was the elimination of the right of federal agencies to *opt out* of arbitration decisions with which they disagreed. Previously, the head of the agency was authorized to terminate an arbitration proceeding at any time for any reason and could vacate an arbitration award before the award became final.⁷¹ All that was required to *opt out* was notice to the other party or parties to the arbitration.⁷²

At the time the original *opt out* provision was enacted, Congress believed that the long-standing conclusion of the Department of Justice (DOJ) that the United States Constitution’s Appointments Clause prohibited federal agencies from submitting to *binding* arbitration by an independent arbitrator was correct.⁷³ This conclusion was based upon the argument that only officers appointed under the Appointments Clause could bind

the United States to an action or payment, and arbitrators are not typically appointed as officers under that Clause. However, in an opinion issued on 7 September 1995, DOJ reversed its position, stating that because arbitrators are normally retained one case at a time they are not in a position of employment within the federal government, and thus they are not “officers” within the meaning of the Appointments Clause. Left unstated in the DOJ opinion is the key assumption that the contracting officer or other person who agrees to the binding nature of an arbitration in the first place must be an “officer” within the meaning of the Clause (i.e., who can bind the United States to the action or subsequent requirement to pay an arbitration award).

Section 8 the 1996 ADRA amendments eliminated the *opt out* provision and, in effect, allows federal agencies to agree to use binding arbitration to settle contract disputes. However, before a federal agency can use binding arbitration, the agency must consult with the DOJ and issue guidance on the appropriate use of binding arbitration.⁷⁴ The Department of Defense (DOD) has not yet cleared this last remaining hurdle and might not do so for several months.

When issued, the agency’s guidance must incorporate another key change made by the 1996 amendments to the ADRA: every binding arbitration agreement must specify a maximum award that may be issued by the arbitrator. Agency guidance may also include other conditions limiting the range of possible outcomes, but the inclusion of such conditions is not mandatory.⁷⁵ These provisions have the effect of limiting the potential for the agency getting stuck with an outrageous decision from a “runaway arbitrator,” as well as taking care of any Antideficiency Act concerns.

The 1996 ADRA amendments also made two other significant changes regarding federal agency use of ADR in general. First, the amendments eliminated the requirement that, as a condition of the federal agency agreeing to use any form of ADR, the contractor certify its claim regardless of its amount. Now, only claims which exceed the Contract Disputes Act threshold (\$100,000) need to be certified.⁷⁶ The other change expanded the protections from disclosure of communications

67. ADRA, § 2(3), (4).

68. 41 U.S.C. § 605(d) (1996).

69. Pub. L. No. 103-355, § 2352(a) (codified at 41 U.S.C. § 605(e) (1996)).

70. Administrative Dispute Resolution Act of 1996 (ADRA 1996), Pub. L. No. 104-320, 110 Stat. 3870 (1996).

71. By statute, an arbitration award does not become final until 30 days after it is served on all parties. 5 U.S.C. § 580(b)(2) (1996).

72. *Id.* § 580(c).

73. *See* U.S. CONST. art. II, § 2, cl. 2.

74. ADRA 1996, § 8(c) (amending 5 U.S.C. § 575).

75. *Id.*

made to and from ADR “neutrals,” for example, mediators or other facilitators of settlement discussions. Previously, such communications were protected from disclosure in the ADR process, but they were not protected from disclosure under the Freedom of Information Act. The 1996 amendments to the ADRA fixed this problem by making the ADRA a statute which specifically exempts disclosure under section 552(b)(3) of the FOIA.⁷⁷

Although the use of ADR techniques to resolve contract disputes and protests remains voluntary⁷⁸ and agencies may not require contractors to agree to arbitration as a condition to receiving a contract,⁷⁹ the 1996 amendments to the ADRA show that even Congress recognizes the potential benefits of

more widespread use of ADR techniques. Further legislation is both pending and expected, including HR 903 which would encourage arbitration of government contract cases pending before federal district courts.

There are a wide variety of ADR techniques available for use even while waiting for DOD to issue its guidance on the use of binding arbitration. Judge advocates may want to get on the ADR bandwagon and check out some of these techniques when faced with a potentially costly or time-consuming contract dispute or protest. Colonel McCann.

76. *Id.* § 6 (amending 41 U.S.C. § 605).

77. *Id.* § 3(d) (amending 5 U.S.C. § 574).

78. 5 U.S.C. § 572(c) (1996).

79. *Id.* § 575(a)(3).

Notes from the Field

Judge Advocate “Firsts”

Introduction

Last year, The Judge Advocate General directed the writing of the history of Army lawyers in combat operations since Vietnam. The theme of the book, titled *Judge Advocates in Combat*, is the developing role of Army lawyers in military operations and how that development enhances the ability of commanders to succeed. Because the way judge advocates enhance the capabilities of commanders has evolved dramatically over the past thirty years, *Judge Advocates in Combat* explores how soldier-lawyers have adjusted from their Vietnam-era responsibility simply to provide traditional services—military justice, claims, legal assistance, administrative law—to today’s integration into operational issues at all levels. Judge advocate integration into operations, particularly in the last ten years, has enhanced the ability of commanders to achieve mission success.

In researching and writing *Judge Advocates in Combat*, much has been learned, including the following “firsts” in the history of The Judge Advocate General’s Corps. Since 29 July marks the anniversary of Mr. William Tudor’s appointment as the first Judge Advocate of the Army in 1775, this article presents an excellent and timely opportunity to illustrate that the Judge Advocate General’s Corps has a rich and fascinating history and that Army lawyers have always been an integral part of our Army.

Generally

Judge Advocate Insignia

Army regulations first authorized the wearing of distinguishing judge advocate insignia in 1857, when Army lawyers were permitted to wear a “white pompon.” This was a tuft of cloth material that looked like an undersized tennis ball and protruded from the hat. Today’s familiar *sword and pen crossed and wreathed* device was not created until 1890. Judge advocates have worn this distinguishing insignia since that time, although a *Roman sword and balance* insignia was worn briefly in the 1920s.

The Title “The Judge Advocate General”

In 1775, the 2d Continental Congress elected Mr. William Tudor as the “Judge Advocate of the Army of the United Colonies.” In 1776, Congress accorded Mr. Tudor the title of “Judge Advocate General” and the rank of lieutenant colonel in the new Army of the United States. Tudor’s successors continued to be known as the “Judge Advocate General” until 1792, when the American army was reorganized as the “Legion of the United States” and the top lawyer was given the title “Judge Marshal and Advocate General.”

In 1801, the Legion of the United States was abolished, and the senior judge advocate in the reorganized Army of the United States was the “Judge Advocate of the Army.” This title continued to be used until 1862, when Congress revived the title “Judge Advocate General.” Not until 1884, however, did the Judge Advocate General have “flag” rank, when Congress authorized the senior Army lawyer to serve in the rank of brigadier general.

Finally, in 1917, Congress gave the Judge Advocate General the rank and pay of a major general. But not until 1924 did the Judge Advocate General become The Judge Advocate General (TJAG), when War Department General Orders No. 2, published on 31 January, added the capitalized “The” to the title.

Air Judge Advocate

The Office of the Air Judge Advocate was created in March 1942, with the Air Judge Advocate as the chief legal officer of the Army Air Forces. The first Air Judge Advocate was Brigadier General Lawrence H. Hedrick. By the summer of 1945, he had overall responsibility for the roughly 1500 legal officers serving in the Army Air Forces in the United States and overseas.

With the creation of a separate United States Air Force in 1949, the title and position of Air Judge Advocate disappeared along with the Army Air Forces.

Chief Judge of the United States Army Court of Military Review (now the Army Court of Criminal Appeals)

After retiring as TJAG in 1971, Major General Kenneth J. Hodson was immediately recalled to active duty to become the first Chief Judge of the United States Army Court of Military Review. At the same time, General Hodson became the first chief of the newly created U.S. Army Legal Services Agency. He ended his recall period in 1974 and reverted to his retired status.

Personnel Milestones

The first female judge advocate was Captain Phyllis L. Propp. Appointed as a Second Lieutenant in the Women’s Army Corps in 1942, Propp transferred as a captain to the Judge Advocate General’s Department in 1944. She was assigned as the Staff Judge Advocate, Fort Des Moines, Iowa.

Major A.E. Patterson was the first black judge advocate, and served in the Judge Advocate General’s Department during World War I.

On 1 April 1991, Kenneth D. Gray was promoted to brigadier general, becoming the first black general officer in the Judge Advocate General's Corps. He was promoted to major general on 1 October 1993 and retired as The Assistant Judge Advocate General on 30 April 1997.

Major Berryman Green received the first direct appointment from civilian life when he was commissioned as a major in February 1942. He was immediately assigned to the Office of The Judge Advocate General to handle "taxation problems."

While serving as an enlisted soldier at Camp Beauregard, Louisiana, in July 1942, Theodore F. Cangelosi became the first enlisted soldier to receive a direct appointment. Cangelosi, who had graduated from law school at Louisiana State University in 1934, was appointed a judge advocate at the rank of First Lieutenant. He had also served as a member of the Louisiana State Legislature from 1940 until he enlisted in the Army.

First Lieutenant John E. Park was the first enlisted soldier selected for, and the first applicant to, The Judge Advocate General Officer Candidate School (OCS). He served as an enlisted soldier from 1942 until 1944, when he graduated from the first OCS class.

Government Office

Captain John Marshall served as a judge advocate during the Revolutionary War and was the first judge advocate to serve on the United States Supreme Court. In 1801, he was appointed as the fourth chief justice of the United States Supreme Court. He served as chief justice until 1835 and authored numerous landmark decisions.

The first judge advocate to serve as the Secretary of War was Major Henry L. Stimson. During World War I, Major Stimson served as a judge advocate, but he served as President Roosevelt's Secretary of War during World War II.

In the 1970s, Captain Togo D. West, Jr. served as a judge advocate. He is now the Secretary of the Army and is the first judge advocate to serve in that position.

Deployments

In every military operation, judge advocates deploy with the units they support. Throughout the history of the United States Army, many of these soldier-lawyers have distinguished themselves by being the first judge advocates deployed in particular operations or certain parts of the world. The first judge advocate ashore in combat operations against Mexico at Vera Cruz was Arthur W. Brown, who served as acting judge advocate of the United States Expeditionary Forces assaulting Vera Cruz in 1914. The first judge advocate in Russia was Lieutenant Colonel Edward S. Thurston, who served as Judge Advocate, United States Troops, Archangel, Russia, from 1918-1919. Thurston was the lone Army lawyer accompanying the "Murmansk

Expedition"—part of the American Expeditionary Force that intervened in Russia in the aftermath of World War I.

At the request of Lieutenant General Joseph Stilwell, The Judge Advocate General activated a branch office for the China, Burma, and India (CBI) Theater in October 1942. In December 1942, Colonel Robert W. Brown, accompanied by four Army lawyers, arrived for duty in New Delhi as the Assistant Judge Advocate General. By 1945, the CBI Theater had split into a Burma India (BI) Theater and a China Theater. Brigadier General Clarence C. Fenn was the Judge Advocate of the BI Theater. The China Theater Judge Advocate was Colonel Edward H. Young, former Commandant of the Judge Advocate General's School, Ann Arbor, Michigan. Young and eleven judge advocates worked at Theater headquarters in Chungking, China.

Lieutenant Colonel Paul J. Durbin was the first judge advocate in Vietnam. He served as the Staff Judge Advocate for the United States Military Assistance Advisory Group, Vietnam. Durbin, who served in Saigon from 1959 to 1961, was also the first judge advocate ashore in the amphibious landings at Inchon, Korea in 1950.

In October 1983, Lieutenant Colonel Quentin Richardson airlanded as part of the Assault Command Post on the first day of Operation Urgent Fury in Grenada. Richardson, who was the Staff Judge Advocate for the 82d Airborne Division, was the first judge advocate in Grenada during the operation.

The first judge advocate in Saudi Arabia as part of Operation Desert Shield was Captain Mark C. Prugh. Captain Prugh arrived at Dhahran, Saudi Arabia in July 1990, as part of the XVIII Airborne Corps Assault Command Post forces.

The first judge advocate in command during combat operations was Colonel Blanton Winship, who commanded the 110th and 118th Infantry Regiments of the 28th Division while simultaneously serving as Judge Advocate for the 1st Army in France in 1918. For his gallantry in action, Colonel Winship was awarded the Silver Star. He was also awarded the Distinguished Service Cross for "extraordinary heroism in action" near Lachausee, France, on 9 November 1918.

Honors

As mentioned above, Colonel Blanton Winship was awarded the Distinguished Service Cross (DSC) for his actions in World War I. Although a number of Army officers who have been awarded the DSC later served as judge advocates, only Colonel Winship received the DSC while serving as an Army lawyer. Along with being the first judge advocate to receive the DSC, Colonel Winship was the first judge advocate to receive the Silver Star.

The highest gallantry award to a judge advocate in World War II was the Silver Star, which was awarded to First Lieutenant Samuel Spitzer. Lieutenant Spitzer served as a judge advo-

cate attached for duty with the 4th Armored Division. On 31 July 1944, Spitzer laid aside his personal weapons and openly walked down the center of a small French town occupied by the enemy, calling out loudly in German that the town was surrounded by American forces and demanding that the Germans surrender. As a result of his courage, 508 German soldiers laid down their arms and were taken prisoner.

The most highly decorated judge advocate was Captain Donald E. Grant. Captain Grant entered the Judge Advocate General's Department in 1944. For combat in France during World War I, he had already been awarded the DSC, two Silver Stars, and the Purple Heart.

Specialty Badges

Over the years, judge advocates have stayed in step with other soldiers by attending and completing various courses such as Airborne School. Judge advocate participation in these courses highlights once again that there are two aspects to being a judge advocate—soldier and attorney.

The first “jumping” judge advocate was Lieutenant Colonel Nicholas E. Allen, who completed a ten-day jump school con-

ducted by the 82d Airborne Division in the European Theater in 1945. Allen was the judge advocate for the division. His parachutist badge was pinned on his chest by the Division Commander, Major General James M. Gavin.

Lieutenant Colonel James J. Smith became the first judge advocate credited with a combat parachute jump. Smith was the Staff Judge Advocate, 82d Airborne Division, and participated in the airborne assault onto Torrijos during Operation Just Cause in December 1989.

In addition to the Airborne-related firsts mentioned above, judge advocates have completed other qualification courses. In 1977, Captain John D. Altenburg, Jr., who was assigned as a judge advocate with the Special Forces, successfully completed the scuba diver course and became the first scuba qualified judge advocate. In 1983, Captain Fred L. Borch completed the Pathfinder course while assigned as a judge advocate at the Infantry School, Fort Benning, Georgia, and he became the first Pathfinder qualified judge advocate. Lieutenant Colonel Frederic L. Borch, III, Special Assistant to The Judge Advocate General.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically in the Environmental files area of the Legal Automated Army-wide Systems (LAAWS) Bulletin Board Service (BBS). The latest issue, volume 4, number 8, is reproduced in part below. The *Bulletin* is also available on the Environmental Law Division Home Page (<http://160.147.194.12/eld/eldlink2.htm>) for download as a text file or in Adobe Acrobat format.

Overseas Environmental Baseline Guidance Document (OEBGD)

The Air Force is currently updating the OEBGD, but no formal draft has yet been submitted to the Services for comment.¹ The OEBGD is designed to set specific criteria that establish a baseline standard for military installations and that are designed to protect human health and the environment.

The Air Force is designated as the lead Service to review and update the OEBGD,² last promulgated in October 1992. As part of the review process, Air Force technical staff recently submitted a draft revision of the OEBGD to several technical counterparts at overseas commands. This informal draft created some controversy at several overseas commands. As a result, the Air Force environmental staff requested guidance from the Office of the Deputy Under Secretary of Defense for Environmental Security (DUSD) on several policy issues raised by the revision process. At a meeting called by the DUSD staff on 16 April 1997, the Services agreed to coordinate several policy precepts to guide the Air Force revision process. The services requested a sufficient formal comment period to allow time for coordination with overseas commands on any draft revised OEBGD. Also, Department of Defense Directive 4715.5 requires formal coordination with the Services prior to publication of an OEBGD. Major Ayres.

Executive Order for Protection of Children from Environmental Health Risks and Safety Risks

On 21 April 1997, President Clinton issued Executive Order 13,045 (EO 13,045), Protection of Children From Environmental Health Risks and Safety Risks,³ which notes that children often suffer disproportionately from environmental health and safety risks, due in part to a child's size and maturing bodily systems. The executive order defines environmental health and safety risks as:

risks to health or to safety that are attributable to products or substances that the child is likely to come in contact with or ingest (such as the air we breathe, the food we eat, the water we drink or use for recreation, the soil we live on, and the products we use or are exposed to).⁴

In light of these risks, EO 13,045 requires Federal agencies, to the extent permitted by law and mission, to identify and assess environmental health and safety risks that may affect children disproportionately. The Order further requires Federal agencies to ensure that its policies, programs, activities, and standards address these disproportionate risks.

Installations will find that EO 13,045 could have wide reaching implications, and commanders and judge advocates should begin integrating it into daily practice. The National Environmental Policy Act (NEPA) is one area of integration and is the perfect tool to examine the effects an action will have on children. The integration of EO 13,045 into NEPA is similar to what is currently being done with Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations. Major Polchek.

Federal Facilities And The Clean Water Act

Bigger, better, and faster seems to be the trend in recent legislation which provides for federal facility sovereign immunity waivers under the major federal environmental laws. On 20 March 1997, Representative Dan Schaefer introduced a bill⁵ which would expand the present waiver of sovereign immunity under the Clean Water Act (CWA). The proposed legislation

1. DEP'T OF DEFENSE, INSTR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (22 Apr. 1996) (mandating the establishment and maintenance of the OEBGD).

2. *Id.*

3. Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (1997).

4. *Id.*

follows the pattern set by the waivers passed under the Resource Conservation and Recovery Act and the Safe Drinking Water Act, both of which Mr. Schaefer introduced.

The bill was initially referred to the House Committee on Transportation and Infrastructure, and it was subsequently referred to the Subcommittee on Water Resources and Environment on 3 April 1997. This bill exemplifies the type of narrowly drafted and relatively unresisted CWA legislation that is expected during this Congress. While it may appear that the legislation has a way to go before becoming law, it is not likely to encounter significant opposition, unlike other proposed environmental reforms, such as the amendment of Superfund or the Intermodal Surface Transportation Efficiency Act. Captain DeRoma.

Cumulative Effects Under the National Environmental Policy Act (NEPA)

The Cumulative Effects analysis of most National Environmental Policy Act (NEPA) documents is an area worthy of careful scrutiny, yet it is often neglected. This deficiency is not surprising considering the lack of direction on this issue provided in NEPA and in the implementing Council on Environmental Quality (CEQ) regulations. To remedy this problem, the CEQ recently published *Analyzing Cumulative Effects Under the National Environmental Policy Act* to provide a practical framework for assessing the cumulative impacts of an agency's proposed action.

Many actions are insignificant when viewed in isolation. When added together with other actions, however, the effects may collectively become significant. These cumulative effects are of the type of effects that NEPA documents should be examining. Cumulative effects are defined as:

The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.⁶

The new CEQ guidance recommends paying particular attention to cumulative effects during the scoping process, while describing the affected environment, and when analyzing the environmental consequences of the action. In the guidance, which provides eight general principles for assessing cumulative effects, the CEQ recommends examining the cumulative effects on a resource or ecosystem beyond traditional political or administrative boundaries. For example, this might require examining the impact an action will have on an entire watershed, not just within the installation. In addition, the CEQ provides many examples of tools available to assist the NEPA practitioner in assessing cumulative impacts, ranging from simple checklists and questionnaires to more formal modeling or trends analysis techniques.

Army NEPA practitioners are encouraged to adopt some or all of the CEQ guidance in order to strengthen this traditionally weak area of analysis. Copies of the guidance are available in the Environmental Law files of the LAAWS BBS. Major Polchek.

Enforcement Update

Statistics

Since Congress expanded the waiver of sovereign immunity for solid and hazardous waste violations in October 1992, Army installations have been assessed \$13.4 million in 147 fines and penalties cases.⁷ Although ninety-seven of the 147 fines and penalties were levied by States for a total of \$4.7 million, the twenty-nine imposed by the EPA amount to \$8.5 million. Sylvia Lowrance, the EPA's Deputy Assistant Administrator for Enforcement and Compliance Assurance, indicated that the numbers will likely increase markedly in FY 1997, stating, "the environmental cop is back on the beat."⁸

Reporting Requirements

The new *Army Regulation 200-1*, published in February 1997, provides slightly different reporting requirements than the previous edition of the regulation. Installations must report enforcement actions through the Army Compliance Tracking System Report (ACTS) within forty-eight hours and any fine or penalty within twenty-four hours.⁹ An enforcement action is defined as "[a]ny written notice of a violation of any environmental law from a regulatory official having a legal enforcement authority."¹⁰ This includes a "Warning Letter, Notice of

5. Federal Facilities Clean Water Compliance Act of 1997, H.R. 1194, 105th Cong. (1997).

6. 40 C.F.R. § 1508.7 (1996).

7. Of the 147 cases, 83 involved fines for RCRA violations, accounting for 78 percent of the fines and a total of \$10.4 million.

8. See Bureau of Nat'l Aff., *Record Amount of Criminal Penalties Leads EPA Accomplishments for Fiscal 96*, TOXICS L. REP., at 1098-99 (Mar. 5, 1997). The EPA's combined total of \$173 million in criminal, civil, and administrative penalties assessed (\$76.6 in criminal penalties, \$66.3 in civil judicial penalties, and \$29.9 million in administrative penalties) was the highest in the EPA's history.

9. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, paras. 1-27a(16), 13-6, 15-7b (Feb. 1997).

Noncompliance (NON), Notice of Violation (NOV), Notice of Significant Noncompliance (NOSN), Compliance Order (CO), Administrative Order (AO), Compliance Notice Order (CNO), [and] Finding of Violation.”¹¹ Any enforcement action that “involves a fine, penalty, fee, tax, media attention, or has potential for off-post impact” must be reported within forty-eight hours through legal channels (i.e., through the MACOM ELS), at the same time it is reported through ACTS; this initial notification will be followed by written notification within seven days.¹² Note that the notification requirement extends not only to an assessed fine, but also to a “fee.” In the past, “fees” assessed by states against installations were actually imposed to settle minor instances of noncompliance or were a veiled tax, both of which Federal facilities may not pay. Therefore, the portion of the reporting requirement quoted above requires that every “enforcement action that involves a fee” be reported, but it does not require that a report be made of every fee that is paid.

Increased use of BEN Model by States

The EPA’s Inspector General is recommending that the EPA prompt state regulatory agencies to recover the economic benefit of noncompliance from alleged violators. The EPA inspector general’s 31 March 1997 report, *Further Improvements Needed in the Administration of RCRA Civil Penalties*, specifically notes: “[I]t is essential that EPA and state enforcement actions recover a violator’s benefit of economic noncompliance [through use of the ‘BEN Model’], and that EPA’s ‘overfiling’ authority can be used to recover these benefits ‘when necessary,’ i.e., when a state has not properly applied the BEN Model.”¹³

The current DOD position is that application of economic benefit principles, based upon avoided or delayed compliance expenditures, to Federal facilities is not appropriate because: (1) the DOD is not a profit-seeking enterprise and has a non-profit mission; (2) DOD facilities do not self-determine their environmental compliance budgets but are dependent upon outside executive and legislative authorizations; and (3) the federal budget structure is such that imposing BEN-based penalties is more likely to reduce the level of environmental compliance spending than to increase it and could draw money from otherwise achievable environmentally beneficial projects. In light of this stepped-up pressure from the EPA, installations should be

wary of state attempts to impose inappropriate BEN-based penalties in enforcement actions. Captain Anders.

Has the EPA Deserted *Oregon Natural Desert*?

On the issue of regulating nonpoint source runoff from federal lands via state water quality certification programs, guidance from the EPA is mixed. This issue arose after the United States District Court for the District of Oregon issued its opinion in *Oregon Natural Desert Association v. United States Forest Service*.¹⁴ In that opinion, the court held, inter alia, that the phrase “any discharge” under section 401 of the Clean Water Act was not restricted to point source discharges and stated that “[section] 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources.”¹⁵ Following the court’s decision, the EPA began drafting a preliminary framework for the regulation of nonpoint sources similar to those addressed in the case. The framework purportedly would have broadened the types of discharges from federal lands to be considered by states when establishing water quality standards and also would have delineated how states should analyze the impact of the discharges upon water quality.

Several federal agencies were surprised by the decision in *Oregon Natural Desert* and the EPA’s subsequent reaction. Since these events, the Department of Agriculture has asked the Department of Justice (DOJ) to support an appeal of the case, and DOJ has filed a motion of appeal. When asked about the status of the framework, one EPA staff member stated that progress had been frozen. The individual would not state if further progress would occur or whether the project had been abandoned. If work on the framework resumes, it is possible that it could significantly affect the ability of states to control federally permitted or licensed activities on federal lands via section 401 certification. These activities are currently addressed by memoranda of understanding between the EPA and other federal agencies. Captain DeRoma.

Punitive Fines and the Clean Air Act

Recently, in *United States v. Tennessee Pollution Control Board*,¹⁶ the United States District Court for the Middle District of Tennessee held that the Clean Air Act (CAA) allows States to assess punitive fines against federal facilities. This decision

10. *Id.* at 37.

11. *Id.* app. A.

12. *Id.* para. 15-7c.

13. Inside Wash. Publishers, *IG Calls for Increased Pressure on States to Recover “Economic Benefit,”* 18 INSIDE EPA 2, 2-3 (Apr. 11, 1997).

14. 940 F. Supp. 1534 (D. Or. 1996).

15. *Id.* at 1540.

16. No. 3:96-0276 (M.D. Tenn. Apr. 10, 1997).

is contrary to another United States District Court decision in *United States v. Georgia Department of Natural Resources*.¹⁷

The Tennessee case began when, on 20 August 1993, the Tennessee Air Pollution Control Board (TAPCB) assessed a \$2,500 civil penalty under the Tennessee Air Quality Act against the Milan Army Ammunition Plant (Milan) for past violations of Tennessee's Division of Air Pollution Control rules. Although Milan did not dispute the underlying allegation that it failed to provide written notice of its intention to remove 330 linear feet of pipe containing asbestos, the Army contended that the sovereign immunity of the United States barred imposition of the penalty. Following a hearing on this issue, an administrative law judge concluded on 26 January 1996 that CAA section 118(a) waives sovereign immunity.

On 14 February 1996, the TAPCB issued orders providing final denial of the Army's administrative appeal and staying enforcement of the penalty until exhaustion of judicial remedies. The Army sought to enjoin the penalty in the United States District Court.

In the memorandum in support of its motion for summary judgment, the United States argued that, based on the Supreme Court decision in *United States Department of Energy v. Ohio*,¹⁸ the CAA did not waive sovereign immunity for civil penalties. In that case, the Supreme Court held that neither the Clean Water Act (CWA) nor the Resource Conservation and Recovery Act (RCRA) waived sovereign immunity for civil penalties.¹⁹ The United States also emphasized the recent United States District Court ruling in *Georgia Department of Natural Resources*,²⁰ where that court, based on facts nearly identical to those in the Milan case, held that the CAA does not waive immunity.²¹

The TAPCB filed a cross-motion and argued that the CAA's language was sufficiently different from the CWA and RCRA to find a waiver. The TAPCB also argued that the citizen suits provision²² provided a wiver. On 8 April 1997, the court rejected the United States arguments, granted TAPCB's cross-motion for summary judgment, and dismissed the complaint for failure to state a claim.

This adverse decision was not entirely unexpected because the same judge hearing the *Milan* case had held in *United States v. Tennessee Air Pollution Control Board*,²³ that the CAA allowed States to impose punitive fines against federal facilities. The Army expects that this decision will be appealed to the United States Court of Appeals for the Sixth Circuit and has not changed its position that Army facilities do not pay punitive fines assessed under the CAA. Lieutenant Colonel Olmscheid.

U.S. Army Environmental Management and ISO 14000

The Army study team working on ISO 14000 recently briefed their progress to the Deputy Assistant Secretary of the Army (DASA) for Environment, Safety, and Occupational Health. ISO 14000 is an internationally accepted standard for environmental management. Many multinational companies are converting to this management system so that they can compete in the European market, where such a system is a generally accepted practice. The Army is examining the potential benefits of adopting or incorporating ISO 14000 into its current environmental management program. The Army's Environmental Compliance Assessment System and Installation Status Report II programs are widely approved by regulators and provide commanders with all required information to stay in compliance with environmental laws. Although ISO 14000 is not required to ensure compliance, it might add an improved management tool for use by installation commanders. The Study Team recommended, and the DASA approved, a pilot program at Fort Lewis and Tobyhanna Army Depot to gauge the benefits of ISO 14000 to the Army. Mr. Nixon.

EAB Decision Upholds Use of Penalty Policies, Even Absent Rulemaking

A February decision by the United States Environmental Protection Agency's Environmental Appeals Board (EAB) dealt a small blow to industry when it ruled that the EPA's penalty policies under the various environmental statutes could guide the process of setting the amount of a punitive fine,²⁴ even though the policies failed to use the formal public notice and comment rulemaking process under the Administrative Procedure Act (APA).²⁵ Industry facilities have long used the lack of compliance with the APA as a possible defense in con-

17. 897 F. Supp. 1464 (N.D. Ga. 1995).

18. 503 U.S. 607 (1992).

19. *Id.*

20. 897 F. Supp. 1464.

21. *Id.*

22. Clean Air Act, 42 U.S.C.A. § 7604 (West 1997).

23. 31 Env't Rep. Cas. 1500 (M.D. Tenn. 1990).

24. Employers Ins. Co. of Wausau and Group Eight Tech., Inc., TSCA Appeal No. 95-6, (EAB, Feb. 11, 1997).

testing penalties derived mechanically under one of the environmental penalty policies.

In 1995, Chief Administrative Law Judge Jon Lotis ruled that the EPA's environmental penalty policies do not bind judicial penalty decisions, unless those policies were promulgated through a formal rulemaking process under the APA.²⁶ Judge Lotis reduced the amount of a fine assessed against a company under the Toxic Substances Control Act (TSCA) from \$76,000 to \$58,000, and he held that the fine was rigidly derived under the EPA's TSCA Penalty Policy, which had not been adopted pursuant to the APA's rulemaking procedures.²⁷ The case was hailed as a significant victory for industry, as it obligated the EPA to support factually any findings, assumptions, or determinations on which its assessed penalties rest. Then, as long as the hearing judge had "considered" the penalty policy, he or she would be free to apply the policy or to depart from it, basing the decision solely upon the strength of the evidence.²⁸

On appeal, however, the EAB ruled that Judge Lotis had taken an extreme position on the rulemaking issue and held that mechanically applied penalty policies could form the basis for civil penalties, even though they had foregone APA formal rulemaking procedures.²⁹ The EAB explained, "we readily agree that [the] EPA's adjudicative officers must refrain from treating [a penalty policy] as a rule," and should question the policy where applicable.³⁰ The Board stopped short, however, of disallowing reliance on the penalty policies by enforcement officials, "either as a tool for developing penalty proposals or to support the appropriateness of such proposals in individual cases."³¹

The EAB's ruling still retains some of the sting of Judge Lotis' ruling, to the satisfaction of industry practitioners. The EAB specified that penalties are only supportable to the extent that they are:

calculated in a manner consistent with the Agency's obligation to "take into account" the factors enumerated in [the TSCA penalty policy] It is therefore incumbent upon the complainant in all TSCA penalty cases, in order to establish the "appropriateness" of a recommended penalty, to demonstrate how the TSCA penalty criteria relate to the particular facts of the violations alleged.³²

The EAB also reaffirmed that presiding officers are not bound by the EPA's penalty policies and can depart where the facts make departure appropriate. The Board, citing 40 C.F.R. § 22.27(b), held that the presiding officer may disagree with the Region's analysis and application of the statutory penalty factors to particular cases.³³ Further, the Presiding Officer may assess a penalty which is different from the penalty recommended by the Region. "While the Presiding Officer must consider the Region's penalty proposal . . . he or she is in no way constrained by the Region's penalty proposal, even if that proposal is shown to have 'take[n] into account' each of the prescribed statutory factors."³⁴

Installation attorneys should press EPA regional counsel to comply fully with Agency internal policy guidance concerning building a case for administrative fines in enforcement actions. A memorandum from the Director of the EPA's Office of Regulatory Enforcement directs EPA attorneys to follow specific procedures.³⁵ For example, "[i]n the prehearing exchange or hearing, the facts relevant to determining an appropriate penalty under the particular statute should be presented as evidence."³⁶ The memorandum also directs EPA attorneys to maintain a "case 'record' file," which documents all factual information relied upon in developing the penalty amount pled in the complaint, and which "may be provided to the Respondent with copies of relevant documents from the case file."³⁷ Captain Anders.

25. 5 U.S.C.A. § 552 (West 1997).

26. *Employers Ins. Co. of Wausau and Group Eight Tech., Inc.*, TSCA-V-C-62-90, 1995 TSCA LEXIS 15 (Sept. 29, 1995).

27. *Id.*

28. *Id.* at 37.

29. *Wausau*, TSCA Appeal No. 95-6.

30. *Id.* at 35 (citing *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988)).

31. *Id.*

32. *Id.* at 29.

33. *Id.* at 30.

34. *Id.*

35. Memorandum from Robert Van Heuvelen, Director, Office of Regulatory Enforcement, EPA, to EPA Regional Offices (Dec. 15, 1995).

36. *Id.*

Litigation Division Note

The Civilian Personnel Branch of Litigation Division provides the following note. For further information you may call DSN 426-1600.

Feres Cases Need Investigation, Too

Introduction

Attorneys who are generally aware of the Federal Torts Claims Act³⁸ (FTCA) also know of the *Feres* doctrine, which stands for the proposition that the FTCA does not waive the sovereign immunity of the United States against suits brought by military members for “incident to service” injuries.³⁹ In the past, courts readily dismissed *Feres* cases when there was simply evidence that a service member was injured on post, even in the absence of a detailed factual investigation.⁴⁰ Many of today’s courts no longer find such basic facts sufficient to dismiss a lawsuit.⁴¹ This note discusses the need for Litigation Division to factually support motions to dismiss with much more information than is currently being captured during the administrative claims investigation of *Feres* cases.

“Incident to Service” Factors

The *Feres* doctrine continues to be a strong and reliable defense for the United States because the United States Supreme Court has consistently upheld the doctrine.⁴² The *Feres* defense consists of arguing the “incident to service” factors: (1) situs of the injury; (2) nature of the plaintiff’s activities at the time of the incident; (3) the duty status of the plaintiff at the time of the incident; and (4) the benefits accruing to the service member.⁴³

In the Supreme Court’s most recent case discussing *Feres*, the Court reaffirmed a straightforward application of the “incident to service” test, believing any other approach would

impermissibly intrude into military affairs.⁴⁴ “The ‘incident to service’ test . . . provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.”⁴⁵

Situs of the Injury

Although the situs of the injury is a relatively simple concept, litigation reports often do not adequately address this factor. A fully documented litigation report will not only identify exactly where the incident occurred, but it will also provide other pertinent information surrounding the location. If off-post, what are the “incident to service” factors? Did the incident occur at an off-post bus stop used solely by military buses? Was the incident off-post, but just outside the gate? Was the incident on federal land (and under federal control), or did it occur on a state highway that runs through the installation or on a railroad or power company easement? Was the installation a closed or open post? Could civilians access the area where the incident occurred? Was the area off-limits, or was the service member not authorized to be there? Answers to these types of questions (along with supporting evidence) are crucial to successfully asserting the *Feres* defense.

Duty Status

Whenever a plaintiff is a service member, a litigation report should include evidence of the service member’s status at the time of the incident. Standard evidence in the litigation report should include, for example, a copy of the member’s personnel file, a DA Form 2-A or 2-1 (or service equivalent), a copy of a Leave and Earnings Statement for the month in question, the member’s Reserve Officer Training Corps contract (or orders for a particular event), reserve orders, interview notes from the service member, and interview notes from the supervisor addressing the service member’s status.⁴⁶ Absent such evidence, trial attorneys are forced to use limited discovery to substantiate a plaintiff’s duty status at the time of the accident.

37. *Id.*

38. 28 U.S.C.A. §§ 1346(b), 2671-80 (West 1996).

39. *Feres v. United States*, 340 U.S. 135 (1950).

40. *See, e.g., Shaw v. United States*, 854 F.2d 360 (10th Cir. 1985); *Flowers v. United States*, 764 F.2d 759 (11th Cir. 1985).

41. *See, e.g., Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994), *aff’g* 877 F. Supp. 1569 (M.D. Ga. 1992), *vacated for rehearing en banc*, 28 F.3d 1076 (1994), *judgment affirmed by equally divided court*, 37 F.3d 617 (1994). The end result of the appellate court action leaves the district court judgment (a soldier injured in on-post quarters while on leave is not *Feres*-barred) intact.

42. *United States v. Johnson*, 481 U.S. 681 (1987); *United States v. Stanley*, 483 U.S. 669 (1987).

43. Many courts also consider whether a service member has available an alternate compensation scheme. Therefore, claims attorneys must obtain factual information concerning any compensation available, whether paid or not.

44. *Stanley*, 483 U.S. at 682-83.

45. *Id.*

Nature of Plaintiff's Activities

A detailed review (during the claims investigation) of the plaintiff's activities at the time of the incident is essential to establish that the injury was incident to service. This requires a claims investigator to interview claimants carefully to see what they were doing, where they were coming from, where they were going, and why they were engaged in the activity.⁴⁷ The chain of command should also be interviewed about the incident and the duty status of the service member.

Benefits Accruing to the Plaintiff

In many cases, substantiating the benefits accruing to the plaintiff is relatively simple. Free medical care and access to military flights are obvious benefits to members of the military and universally act to bar service members from recovery. However, further investigation may be necessary if the incident occurs, for example, at an off-post event (such as a command sponsored golf tournament or other group recreational activity). Was the service member involved in a physical activity (i.e., getting the benefit of improved physical fitness)? Do nonmilitary personnel have access to the same benefit? If an automobile accident occurs off-post, did the service member receive payment for using the vehicle (e.g., financial benefits)?

Available Compensation Scheme⁴⁸

The availability of an alternate compensation scheme is not one of the factors of the "incident to service" test, but some courts look at it when deciding *Feres* cases.⁴⁹ As a result, every litigation report raising the *Feres* defense should include basic

information and evidence to support the proposition that compensation was available to the plaintiff, whether paid or not.

While the compensation depends on the injuries suffered by the plaintiff, a brief discussion (with statutory authority) on the benefits available from the Department of Veterans Affairs (DVA) would greatly assist an Assistant United States Attorney (AUSA).⁵⁰ Similarly, a discussion on the availability of guaranteed military medical care and the benefits available from the Physical Evaluation Board (PEB) process for "incident to service" injuries is crucial to understanding the breadth of the compensation scheme available to all active duty service members, and such a discussion should be included in the litigation report for any claim of injury.⁵¹ Copies of all documents proving receipt of the compensation or results of a PEB must be included in the litigation report. Bear in mind that while some, but not all, AUSAs are familiar with the military and can generally argue the availability of compensation, the details of each case must come from those who prepare the litigation report.

A recent case highlights the importance of fully developing the facts in a *Feres* case. The plaintiff alleged that an Army and Air Force Exchange Service (AAFES) truck hit him on his way to work. The Government successfully argued in the motion to dismiss that the plaintiff (an active duty sailor at the time of the incident) was *Feres*-barred for an off-post accident that occurred while he was driving to his place of duty. Because the case appeared to be one in which a military member was simply commuting to work, the "incident to service" factors were not addressed in the litigation report.⁵² As a result, most of the substantive factual basis relied on in the motion to dismiss was developed well after the litigation had begun.⁵³

The administrative claims investigation correctly identified that plaintiff was on active duty, lived on a federal installation, and was on his way to work. In preparing the motion to dis-

46. While interview notes cannot be used as evidence, they are useful in understanding the facts surrounding an incident. Notes also identify people from whom declarations may need to be obtained in support of a motion to dismiss.

47. Look for a military connection. Was the soldier driving to the post exchange or medical clinic? Was the soldier benefiting from the activity by maintaining his physical fitness or improving his morale?

48. In addition to the fairly clear (but sometimes difficult to apply) "incident to service" test, there are broader rationales underlying the congressional refusal to waive sovereign immunity for suits by service members. These include: (1) the availability of a separate, comprehensive compensation scheme (*i.e.*, Veterans benefits); (2) the effect upon military order, discipline, and effectiveness if service personnel are permitted to sue the government; (3) the distinctly Federal relationship between the government and members of the armed services; and (4) the unfairness of permitting "incident to service" claims to be determined by local (*i.e.*, nonuniform) laws.

49. *See, e.g.*, *Dreier v. United States*, 106 F.3d 844 (9th Cir. 1997).

50. For example, the DVA determines (and funds) dependency and indemnity compensation and provides lifetime medical treatment for service-related injuries. In *Dreier*, the court held that the soldier was not barred by *Feres* and relied, in part, on its finding that the deceased's family was denied administrative compensation for the soldier's death. *Id.* at 855. Government counsel determined after the decision that, in fact, the family was receiving appropriate survivor benefits from both the Army and DVA.

51. DEP'T OF ARMY, REG. 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION (1 Sept. 1990). This process evaluates soldiers for "incident to service" injuries and determines if a soldier qualifies for a disability rating.

52. In most jurisdictions, commuting to work does not bring an employee into the scope of his or her employment, and the person is individually liable. *See generally* 2 LESTER S. JAYSON, PERSONAL INJURY, HANDLING FEDERAL TORT CLAIMS § 9.07[3][a] (1996) (citations omitted; discussing the concept that service members commuting to or from work are not within the scope of their employment).

Conclusion

miss, the government discovered additionally that, at the time of the accident, plaintiff was billeted at the Army installation because the Navy barracks at his nearby duty station were being completely renovated. According to plaintiff's senior Non-Commissioned Officer (an E-9), the command had decided to house sailors with cars at the Army installation. Those without cars would be bussed to the duty station from closer barracks. The sailors temporarily billeted at the Army installation were directed to use privately owned vehicles to drive to work.

This additional information surrounding plaintiff's activities and the duty status of the plaintiff at the time of the incident provided sufficient evidence to successfully assert the "incident to service" *Feres* defense.

The days of an "easy" *Feres* case are over. Because *Feres* decisions can—and often do—hinge on a single fact, claims attorneys must investigate and support all factors.⁵⁴ To accomplish this, claims attorneys must first understand the differences between the "incident to service" test and the *Feres* rationales. Second, they must then conduct a thorough investigation that identifies and develops the facts that best support *all* the issues that often arise during the course of litigation. While the government is still largely successful when raising the *Feres* defense, conducting full investigation of *Feres* cases will insure the defense retains its vitality. Major Boucher.

53. Development of the facts late in the process is difficult and invites disaster. For example, the speed at which lawsuits are processed in the Eastern District of Virginia (the "Rocket Docket") is dramatic, and there is little time for factual development. As a result, AUSAs rely heavily on the facts contained in the litigation report.

54. Nick Adde, *Ruling Gives Suits Chance, Chips at Feres Doctrine*, ARMY TIMES, Apr. 21, 1997, at 21 ("[A] case that might go one way under *Dreier* would come out differently if one fact were different." (quoting Eugene R. Fidell)).

Claims Report

United States Army Claims Service

Personnel Claims Notes

Theft of Services Not Cognizable Under Article 139

Several field claims offices have contacted the U.S. Army Claims Service concerning the proper disposition of claims under Article 139, Uniform Code of Military Justice,¹ for theft of services. The queries typically arise after an Article 139 claim is presented to the claims office and alleges either of two common fact patterns. The first occurs when a claimant has performed labor for a soldier and the soldier fraudulently refuses to pay the amount of compensation which had been agreed upon by the parties.² The second occurs when a claimant discovers that a soldier has obtained and used the personal identification number (PIN) of the claimant's phone card to obtain unauthorized phone service.

Neither of these scenarios is cognizable under Article 139 which is an "extraordinary administrative claims settlement authority" and must not be expanded "beyond its strict limits."³ The remedy it provides must be strictly construed. There is no authority in the statute, the implementing regulation, or the Army's past practice which permits the application of Article 139 to anything other than the willful damage or wrongful taking of tangible property. This aspect of the Army's policy is in accord with the policies of our sister services and ensures that commanders do not exercise authority which is reserved to civil judicial authority.⁴ Unless Congress and the President increase the scope of Article 139, field offices must ensure that claims for theft of services are properly denied. The Special Court

Martial Convening Authority (SPCMCA) can deny such claims prior to the appointment of an investigating officer.⁵

When reviewing claims involving *both* theft of services and theft of property, field offices must take special care to ensure that damages are only assessed for loss of property. For example, Sergeant Jones is preparing to depart the command on permanent change of station orders, and he desires to have Mr. Turner, a former employee of a body shop, paint his vehicle for free. To carry out his scheme, Sergeant Jones offers to pay Mr. Turner \$1,500 for the entire job, including \$500 for paint and other materials and \$1,000 for labor. Mr. Turner completes the work and requests payment, but Sergeant Jones states that he is unable to make payment now but promises to send a check for the full amount the day after he receives his next paycheck. Sergeant Jones departs the command and subsequently fails to pay. Mr. Turner files an Article 139 claim for \$1,500. The claim is cognizable in the amount of \$500, which represents the value of the property wrongfully taken.⁶ Mr. Turner cannot, however, recover the \$1,000 promised for the value of his services under Article 139.

In analyzing such cases, it is critical to determine the relative portions of the claim pertaining to property loss and to loss of services. This distinction should also be explained to investigating officers prior to submitting their findings and recommendations to the SPCMCA. Captain Metrey.

Importance of the Purchase Amount on DD Form 1844

1. UCMJ art. 139 (1988).

2. If otherwise appropriate, an Article 139 claim is cognizable if a contractual dispute is "merely a cloak for an intent to steal." DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, para. 10-3(b) (15 Dec. 1989) [hereinafter DA PAM 27-162].

3. *Id.* para. 10-1.

4. The Air Force defines property as:

an item that is owned or possessed by an individual or business. Property includes a tangible item such as clothing, household furnishings, motor vehicles, real property, and currency. The term does not include intangible property or items having no independent monetary worth. Items that should not be considered property for the purposes of this chapter include stocks, bonds, checks, check book, credit cards, telephone service, and cable television services.

AIR FORCE GEN. CLAIMS DIV., GEN. CLAIMS HANDBOOK, Ch. 6 (Apr. 1997).

The Navy regulation implementing Article 139 does not contain a definition of property but does limit the Article 139 remedy to acts that are punishable under Article 109, UCMJ. It further requires that the damage, loss or destruction of property be caused by "riotous conduct, willful conduct, or acts showing such reckless or wanton disregard of the property rights of others that willful damage or destruction is implied." This requirement necessarily limits the remedy to acts involving tangible property. DEP'T OF NAVY, MANUAL OF THE JUDGE ADVOCATE GENERAL, CHAPTER IV, ARTICLE 139 CLAIMS—REDRESS OF DAMAGE TO PROPERTY (1990).

5. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 9-7(c)(2) (1 Aug. 1995). A legal review is required of any Article 139 claim submitted to an approval authority for final action.

6. DA PAM 27-162, *supra* note 2, para. 10-5(e)(3).

When a claimant files a claim for loss of, or damage to, household goods, it is important to ensure that the DD Form 1844, List of Property and Claims Analysis Chart, includes not only the date each item was purchased, but also the original cost. The original cost is not always a controlling factor for adjudication purposes.⁷ For purposes of carrier recovery, however, it can be an important issue because carriers may contend that the amount of repair exceeds the value of the item.⁸ Some carriers deny all liability; other carriers offer much less than the unknown original cost. The issue of original cost, if not resolved early, can become a major problem if the claimant can no longer be located.

A recent case involved a nine piece sectional sofa with a reupholstery cost of \$3,187.50. The sectional sofa was purchased in 1978, picked up for nontemporary storage in 1989,

and delivered to the claimant in 1992. The amount of the original purchase price was missing, and the carrier contended that it was overcharged, because the reupholstery bill was so expensive. The claimant could not be located, and the U.S. Army Claims Service was forced to compromise for an amount much less than the claimant was paid.

As this case demonstrates, it is imperative that field claims offices check the column marked "Original Cost" to see that the original cost was entered, along with the original date of purchase. If these entries are missing, it may be impossible to reconstruct them later, and it may be very difficult to pursue recovery against the carrier responsible for the damage. Ms. Schultz.

7. For adjudication purposes, an item's value is usually determined by using the value of similar used items or the depreciated replacement cost. Only if no better method of valuing a claimant's loss is available may the original purchase price be used to determine value through the adjusted dollar value method. *See id.* para. 2-39.

8. Carriers may argue that the original purchase price should be used to determine an item's value.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

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

The following is a current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization (JAGSO) units or other troop program units to attend On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session.

1997-1998 Academic Year On-Site CLE Training

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

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact me on the Internet at riveraju@otjag.army.mil. Major Rivera.

GRA On-Line!

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

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IMA Assistant

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

**THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT
(ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE**

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*</u>	<u>ACTION OFFICER</u>
27-28 Sep	Pittsburgh, PA 99th RSC Pittsburgh Airport Marriott 100 Aten Road Coraopolis, PA 15108 (412) 788-8800	AC GO RC GO GRA Rep	BG John F. DePue 1LT Geo. W. Boguslawski, Jr. Office of the SJA 99th RSC 5 Lobaugh Street Oakdale, PA 15071-5001 (412) 693-2144 e-mail:boguslawski@jagc.army. mil
17-19 Oct	San Antonio, TX 1st LSO Hilton Airport Hotel 1 611 NW Loop 410 San Antonio, TX 78216 (210) 340-6060	AC GO RC GO GRA Rep	BG Richard M. O'Meara LTC Jim Jennings 1920 Harry Wurzbach San Antonio, TX 78209 (210) 221-2900 e-mail: 71134.3012@ compuserve.com or lbrown906@aol.com
1-2 Nov	Minneapolis, MN 214th LSO Thunderbird Hotel & Convention Center 2201 East 78th Street Bloomington, MN 55425 (612) 854-3411	AC GO RC GO GRA Rep	BG Thomas W. Eres MAJ Bruce Wenger 4726 Ridge Wind Trail Eagan, MN 55122-2686 (612) 215-0656 Fax (612) 215-0673
15-16 Nov	New York, NY 4th LSO/77th RSC Fordham University School of Law 160 West 62d Street New York, NY 10023	AC GO RC GO GRA Rep	BG Richard M. O'Meara COL Myron J. Berman 370 Lexington Avenue Suite 715 New York, NY 10017 (212) 696-0165 Fax (212) 696-0493
10-11 Jan 98	Long Beach, CA 78th MSO	AC GO RC GO GRA Rep	BG John F. DePue LTC Andrew Bettwy 5241 Spring Mountain Road Las Vegas, NV 89102 (702) 876-7107

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

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*</u>	<u>ACTION OFFICER</u>
31 Jan-1 Feb	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO GRA Rep	BG Richard M. O'Meara LTC David F. Morado 909 1st Avenue, #200 Seattle, WA 98199 (206) 220-5190, ext. 3531 email: david-morado@hud.gov
7-8 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO GRA Rep	BG John F. DePue LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: tdonne2947@aol.com
21-22 Feb	Salt Lake City, UT 87th MSO University Park Hotel 480 Wakara Way Salt Lake City, UT 84108 (801) 581-1000 or outside UT (800) 637-4390	AC GO RC GO GRA Rep	BG Thomas W. Eres MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
7-8 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO GRA Rep	BG Richard O'Meara COL Robert P. Johnston/ Ruth Blackmon Office of the SJA 12th LSO 5116 Forest Drive Fort Jackson, SC 29206 (803) 751-1223
14-15 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO GRA Rep	BG John F. DePue CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
14-15 Mar	San Francisco, CA 75th LSO	AC GO RC GO GRA Rep	BG Thoms W. Eres LTC Alan D. Hardcastle Judge, Sonoma County Courts Hall of Justice Rm 209-J 600 Administration Drive Santa Rosa, CA 95403 (707) 517-2571 email: avbwhr727@aol.com
21-22 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO GRA Rep	BG John F. DePue MAJ Ronald C. Riley P.O. Box 1395 Homewood, IL 60008 (312) 443-6064

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*</u>	<u>ACTION OFFICER</u>
28-29 Mar	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO GRA Rep	BG Thomas W. Eres LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
4-5 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO GRA Rep	BG Thomas W. Eres MAJ Barbara Koll Office of the Cdr 213th LSO 1650 Corey Blvd. Decatur, GA 30032-4864 (404) 286-6330/6364
25-26 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Trng Ctr 360 Elliott Street Newport, RI 02841	AC GO RC GO GRA Rep	BG Richard M. O'Meara MAJ Lisa Windsor Office of the SJA 94th RSC 50 Sherman Avenue Devens, MA 01433 (508) 796-2140
2-3 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36547 (334) 948-4853 or (800) 544-4853	AC GO RC GO GRA Rep	BG Thomas W. Eres CPT Scott E. Roderick Office of the SJA 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209 (205) 940-9304

CLE News

1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZHA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys Course** 5F-F10

Course Number—133d Contract Attorney's Course **5F-F10**

Class Number—**133d** Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states requiring mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1997

22 June- 5 July	143d Basic Course (Phase 1, Fort Lee) (5-27-C20).
30 June- 2 July	28th Methods of Instruction Course (5F-F70).
30 June- 2 July	Professional Recruiting Training Seminar.

July 1997

6 July- 12 Sept.	143d Basic Course (Phase 2, TJAGSA) (5-27-C20).
7-11 July	8th Legal Administrators Course (7A-550A1).
23-25 July	Career Services Directors Conference.

August 1997

4-8 August	1st Chief Legal NCO Course (512-71D-CLNCO).
4-15 August	139th Contract Attorneys Course (5F-F10).
5-8 August	3d Military Justice Managers Course (5F-F31).
11-15 Aug.	8th Senior Legal NCO Management Course (512-71D/40/50).
11-15 Aug.	15th Federal Litigation Course (5F-F29).
18-22 Aug.	66th Law of War Workshop (5F-F42).
18-22 Aug.	143d Senior Officers Legal Orientation Course (5F-F1).
18 Aug. 1997- 28 May 1998	46th Graduate Course (5-27-C22).

September 1997

3-5 September	USAREUR Legal Assistance CLE (5F-F23E).
8-12 September	USAREUR Administrative Law CLE (5F-F24E).
8-19 September:	8th Criminal Law Advocacy Course (5F-F34).

October 1997

1-14 October	144th Basic Course (Phase 1, Fort Lee) (5-27-C20).
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6-10 October	1997 JAG Annual CLE Workshop (5F-JAG).	12-15 January	PACOM Tax CLE (5F-F28P).
14-17 October	4th Ethics Counselors Workshop (5F-F201).	12-16 January	USAREUR Contract Law CLE (5F-F15E).
15 October-19 December	144th Basic Course (Phase 2, TJAGSA) (5-27-C20).	20-22 January	HAWAII Tax CLE (5F-F28H).
20-24 October	41st Legal Assistance Course (5F-F23).	20-30 January-	145th Basic Course (Phase 1, Fort Lee) (5-27-C20).
27-31 October	49th Fiscal Law Course (5F-F12).	21-23 January	4th RC General Officers Legal Orientation Course (5F-F3).
27 October-7 November	28th Operational Law Seminar (5F-F47).	26-30 January	146th Senior Officers Legal Orientation Course (5F-F1).
November 1997			
3-7 November	144th Senior Officers Legal Orientation Course (5F-F1).	31 January-10 April	145th Basic Course (Phase 2, TJAGSA) (5-27-C20).
		February 1998	
3-7 November	USAREUR Criminal Law CLE (5F-F35E).	9-13 February	68th Law of War Workshop (5F-F42).
17-21 November	21st Criminal Law New Developments Course (5F-F35).	9-13 February	Maxwell AFB Fiscal Law Course (5F-12A).
17-21 November	51st Federal Labor Relations Course (5F-F22).	23-27 February	42nd Legal Assistance Course (5F-F23).
		March 1998	
17-21 November	67th Law of War Workshop (5F-F42).	2-13 March	29th Operational Law Seminar (5F-F47).
December 1997			
1-5 December	145th Senior Officers Legal Orientation Course (5F-F1).	2-13 March	140th Contract Attorneys Course (5F-F10).
1-5 December	USAREUR Operational Law CLE (5F-F47E).	16-20 March	22d Admin Law for Military Installation Course (5F-F24).
8-12 December	Government Contract Law Symposium (5F-F11).	23-27 March	2d Contract Litigation Course (5F-F102).
15-17 December	1st Tax Law for Attorneys Course (5F-F28).	23 March-3 April	9th Criminal Law Advocacy Course (5F-F34).
	1998	30 March-3 April	147th Senior Officers Legal Orientation Course (5F-F1).
January 1998			
5-16 January	JAOAC (Phase 2) (5F-F55).	April 1998	
6-9 January	USAREUR Tax CLE (5F-F28E).	20-23 April	1998 Reserve Component Judge

	Advocate Workshop (5F-F56).	18 July- 25 September	146th Basic Course (Phase 2, TJAGSA) (5-27-C20).
27 April- 1 May	9th Law for Legal NCOs Course (512-71D/20/30).	22-24 July	Career Services Directors Conference.
27 April- 1 May	50th Fiscal Law Course (5F-F12).	August 1998	
May 1998		3-14 August	10th Criminal Law Advocacy Course (5F-F34).
4-22 May	41st Military Judge Course (5F-F33).	3-14 August	141st Contract Attorneys Course (5F-F10).
11-15 May	51st Fiscal Law Course (5F-F12).	10-14 August	16th Federal Litigation Course (5F-F29).
June 1998			
1-5 June	1st National Security Crime and Intelligence Law Workshop (5F-F401).	17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).
1-5 June	148th Senior Officer Legal Orientation Course (5F-F1).	17 August 1998- 28 May 1999	47th Graduate Course (5-27-C22).
1-12 June	3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).	24-28 August	4th Military Justice Managers Course (5F-F31).
1 June-10 July	5th JA Warrant Officer Basic Course (7A-550A0).	24 August- 4 September	30th Operational Law Seminar (5F-F47).
8-12 June	28th Staff Judge Advocate Course (5F-F52).	September 1998	
15-26 June	3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).	9-11 September	3d Procurement Fraud Course (5F-F101).
29 June- 1 July	Professional Recruiting Training Seminar.	9-11 September	USAREUR Legal Assistance CLE (5F-F23E).
July 1998		14-18 September	USAREUR Administrative Law CLE (5F-F24E).
6-10 July	9th Legal Administrators Course (7A-550A1).	3. Civilian-Sponsored CLE Courses	
6-17 July	146th Basic Course (Phase 1, Fort Lee) (5-27-C20).	1997	
7-9 July	29th Methods of Instruction Course (5F-F70).	July	
13-17 July	69th Law of War Workshop (5F-F42).	30 July-2 Aug., AGACL	Death Penalty Litigation and Appeals Conference San Antonio, TX
		For further information on civilian courses in your area, please contact one of the institutions listed below:	
		AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404

ABA:	(205) 391-9055 American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200	GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
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	GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS (215) 243-1600	GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, D.C. 20052 (202) 994-5272
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990	IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973	LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, Va 22314 (703) 684-0510 (800) 727-1227
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747	LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662	MICLE:	Institute of Continuing Legal Education 1020 Greene Street Ann Arbor, MI 48109-1444 (313) 764-0533 (800) 922-6516
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900	MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, D.C. 20006-3697 (202) 638-0252	NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300	NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108

(612) 644-0323 in (MN and AK)
(800) 225-6482

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

		<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557 (702) 784-6747	Alabama**	Administrative Assistant for Programs AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 261-6310	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003	Arizona	Administrator State Bar of AZ 111 W. Monroe Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328	-Fifteen hours per year; three hours must be in legal ethics. -Reporting date: 15 September.
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637	Arkansas	Director of Professional Programs Supreme Court of AR Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700	California*	Director Office of Certification The State Bar of CA 100 Van Ness Ave. 28th Floor San Francisco, CA 94102 (415) 241-2117	-Thirty-six hours over 3 year period. Eight hours must be in legal ethics or law practice management, at least four hours of which must be in legal ethics; one hour must be on prevention, detection and treatment of substance abuse/emotional distress; one hour on elimination of bias in the legal profession.
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421			-Full-time U.S. Government employees are exempt from compliance. -Reporting date: 1 February.
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 School of Law Office of Continuing Legal Education 727 Est 26th Street Austin, TX 78705-9968	Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094	-Forty-five hours over three year period; seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 229054.	Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 330-B Wilmington, DE 19801 (302) 658-5856	-Thirty hours over a two-year period; three hours must be in legal ethics, and a minimum of two hours, and a maximum of six hours, in professionalism. -Reporting date: 31 July.

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>	<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
Florida**	Program Assistant Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (904) 561-5842	-Thirty hours over a three year period, two hours must be in legal ethics. -Active duty military attorneys, and out-of-state attorneys are exempt but must declare exemption during reporting period. -Reporting date: Every three years during month designated by the Bar.	Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 566-1600	-Fifteen hours per year; one hour must be in legal ethics. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.
Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8715	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January	Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (612) 297-1800	-Forty-five hours over a three-year period. -Reporting date: 30 August.
Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500	-Thirty hours over a three year period; two hours must be in legal ethics. -Reporting date: Every third year determined by year of admission.	Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056	-Twelve hours per year; one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt, but must declare exemption. -Reporting date: 31 July.
Indiana	Executive Director IN Commission for CLE Merchants Plaza South Tower #1065 115 W. Washington St. Indianapolis, IN 46204-3417 (317) 232-1943	-Thirty-six hours over a three year period. (minimum of six hours per year); of which three hours must be legal ethics over three years. -Reporting date: 31 December.	Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128	-Fifteen hours per year; three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076	-Fifteen hours per year; two hours in legal ethics every two years. -Reporting date: 1 March.	Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5	-Fifteen hours per year. -Reporting date: 1 March
Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (913) 357-6510	-Twelve hours per year; two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE course.	Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. 2 Reno, NV 89502 (702) 329-4443	Twelve hours per year; two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795	-Twelve and one-half hours per year; two hours must be in legal ethics. -Reporting date: June 30.			

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>	<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
New Hampshire**	Assistant to the NH MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942	-Twelve hours per year; two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client disputes; six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.	Oklahoma**	MCLE Administrator OK State Bar P.O. Box 53036 Oklahoma City, OK 73152 (405) 524-2365	-Twelve hours per year; one hour must be in legal ethics. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 February.
New Mexico	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 (505) 842-6132	-Fifteen hours per year; one hour must be in legal ethics. -Reporting date: 31 March.	Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 368	-Forty-five hours over three year period; six hours must be in legal ethics. -Reporting date: Every three years from admission; new members must report after first year.
North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123	-Twelve hours per year; two hours must be in legal ethics; Special three hours (minimum) ethics course every three years; nine of twelve hours per year in practical skills during first three years of admission. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.	Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139	-Twelve hours per year, one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA defer their requirement, but must declare their exemption. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec
North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404	-Forty-five hours over three year period; three hours must be in legal ethics. -Reporting date: Reporting period is 1 July - 30 June. Report must be filed by 31 July.	Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 277-4942	-Ten hours each year; two hours must be in legal ethics. -Active duty military attorneys are exempt, but must declare their exemption. -Reporting date: 30 June.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. Second Floor Columbus, OH 43266-0419 (614) 644-5470	-Twenty-four hours over two year period; two hours must be in legal ethics and substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.	South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	-Fourteen hours per year; two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 January.

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>	<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096	-Fifteen hours per year; three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.	West Virginia	Mandatory CLE Coordinator MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992	-Twenty-four hours over two year period; three hours must be in legal ethics and/or office management. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106	-Fifteen hours per year; three hours must be in legal ethics. -Full-time law school faculty are exempt. -Reporting date: Last day of birth month each year.	Wisconsin*	Director Board of Bar Examiners 119 Martin Luther King, Jr., Blvd. Room 405 Madison, WI 53703-3355 (608) 266-9760	-Thirty hours over two year period; three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be filed by 1 February.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Ste. 312 Salt Lake City, UT 84111-3834 (801) 531-9095	-Twenty-four hours, plus three hours in legal ethics per two year period. -Reporting date: 31 December (end of assigned two-year compliance period).			
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281	-Twenty hours over two year period. -Reporting date: 15 July.	Wyoming	CLE Program Analyst WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061	-Fifteen hours per year. -Reporting date: 30 January.
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219 (804) 775-0578	-Twelve hours per year; two hours must be in legal ethics. -Reporting date: 30 June.			
Washington	Executive Secretary WA State Board of CLE 500 Westin Bldg. 2001 6th Ave. Seattle, WA 98121-2599 (206) 727-8202	-Forty-five hours over a three-year period. -Reporting date: 31 January.			

*Military exempt

**Must declare exemption.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

- a. Martindale-Hubbell (<http://www.martindale.com>).

At this site, you can do an on-line search of law firms and lawyers around the world. It is a great place to locate lawyers and legal services.

- b. DOD Standards of Conduct Office (http://www.dtic.mil/defenseink/dodgc/defense_ethics/index.html).

This is a valuable site for the ethics counselor. The Department of Defense (DOD) Designated Agency Ethics Official (DAEO) invites you "to use this resource to better understand the ethical standards by which . . . DOD employee[s], both civilian and military, perform their official duties." You will find up-to-date ethics resources, including the most recent changes to the Joint Ethics Regulation and discussions on many ethics issues.

- c. Combined Arms and Services Staff School (<http://www-cgsc.army.mil/cas3/index.htm>).

For those who have not yet attended CAS3, this site is an excellent introduction. It provides up-to-date data on the course, including practical information on lodging, per diem, what to bring, and many other topics.

- d. United States Code (<http://law.house.gov/usc.htm>).

You can search the United States Code at this site.

- e. Code of Federal Regulations/Federal Register (<http://www.access.gpo.gov/nara/cfr/index.html>).

Search the Code of Federal Regulations and the Federal Register here without logging onto Westlaw or Lexis.

2. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and the School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information

Center (DTIC). An office may obtain this material in two ways. The first is through your installation library. Most libraries are DTIC users and would be happy to identify and order the material for you. If your library is not registered with DTIC, then you or your office/organization may register for DTIC services.

If you require only unclassified information, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. 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) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1, fax (commercial) (703) 767-8228, fax (DSN) 426-8228, or e-mail to reghelp@dtic.mil.

If you have a recurring need for information on a particular subject, you may want to subscribe to our Current Awareness Bibliography Service, a profile-based product, which will alert you, on a biweekly basis, to the documents that have been entered into our Technical Reports Database which meet your 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.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$6, \$11, \$41, and \$121. The majority of documents cost either \$6 or \$11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

You may pay for the products and services that you purchase 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 your user packet.

You may also want to visit the DTIC Home Page at <http://www.dtic.mil> and browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven 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.

If you wish to receive more information about DTIC, or if you have any questions, please call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1, or send an e-mail to bcorders@dtic.mil.

Contract Law

Determinations, JA-231-92 (89 pgs).

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

AD A311070 Government Information Practices, JA-235-96 (326 pgs).

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

AD A259047 AR 15-6 Investigations, JA-281-96 (45 pgs).

AD A265777 Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Labor Law**Legal Assistance**

AD A323692 The Law of Federal Employment, JA-210-97 (288 pgs).

AD A263082 Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).

*AD A318895 The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

AD A323770 Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (59 pgs).

Developments, Doctrine, and Literature

AD A313675 Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

AD A282033 Preventive Law, JA-276-94 (221 pgs).

Criminal Law

AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A297426 Wills Guide, JA-262-95 (517 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A308640 Family Law Guide, JA 263-96 (544 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD A280725 Office Administration Guide, JA 271-94 (248 pgs).

AD A302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A322684 Tax Information Series, JA 269-97 (110 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

International and Operational Law**Administrative and Civil Law**

AD A310157 Federal Tort Claims Act, JA 241-96 (118 pgs).

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

Reserve Affairs

AD A311351 Defensive Federal Litigation, JA-200-96 (846 pgs).

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

AD A255346 Reports of Survey and Line of Duty

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

a. *The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988).*

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

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

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

(4) *Reserve Officer Training Corps (ROTC) Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPDC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33 you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

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

4. The Legal Automation Army-Wide System Bulletin Board Service

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

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

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

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

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

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

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

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

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

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

LAAWS Project Office
ATTN: Sysop

c. Telecommunications setups are as follows:

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

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

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

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

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

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

IP Address = 160.147.194.11

Host Name = jagc.army.mil

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

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

(1) Terminal Users

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

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone

lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

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

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

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

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

(5) Choose "F" to sort by file name. Press Enter.

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

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

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

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

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

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

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

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

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

(e) Press the "Clear" button.

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

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

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

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

(j) Click on the "Download" button.

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

(l) From here your computer takes over.

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

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

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

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>			
			FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.	FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.	FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, (Part 1), November 1995.
ALAW.ZIP	June 1990	<i>The Army Lawyer/ Military Law Review</i> Database ENABLE 2.15. Updated through the 1989 <i>The Army Lawyer</i> Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.	FOIA2.ZIP	January 1995	Freedom of Information Act Guide and Privacy Act Overview, (Part 2), November 1995.
			FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA of actual class instructions presented at the school in Word 6.0, May 1997.	21ALMI.EXE	April 1997	Administrative Law for Military Installations Deskbook , March 1997.
CHILDSPT.TXT	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.	50FLR.EXE	June 1997	50th Federal Labor Relations Deskbook, May 1997.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.	137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
			JA200.EXE	September 1996	Defensive Federal Litigation, March 1996.
CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.	JA210DOC.ZIP	April 1997	Law of Federal Employment, May 1997.
CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAIBC, March 1997.	JA211.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.
EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advances Evidence, March 1997.	JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.

JA230.EXE	April 1997	Morale, Welfare, Recreation Operations, August 1996.	JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA231.ZIP	January 1996	Reports of Survey and Line Determinations—Programmed Instruction, September 1992 in ASCII text.	JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.	JA275.EXE	June 1997	Model Income Tax Assistance Guide, June 1997.
JA235.EXE	January 1997	Government Information Practices, August 1996.	JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA241.EXE	June 1997	Federal Tort Claims Act, May 1997.	JA281.EXE	February 1997	15-6 Investigations, December 1996.
JA250.EXE	April 1997	Readings in Hospital Law, January 1997.	JA280P1.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 1, (LOMI), February 1997.
JA260.ZIP	April 1997	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.	JA280P2.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.
JA262.ZIP	June 1997	Legal Assistance Wills Guide, June 1997.	JA280P3.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.
JA263.ZIP	October 1996	Family Law Guide, May 1996.	JA280P4.EXE	February 1997	Administrative and Civil Law Basic Handbook (Parts 4 7 5, Legal Assistance/Reference), February 1997.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.	JA285V1.EXE	June 1997	Senior Officer Legal Orientation, Vol. 1, June 1997.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.	JA285V2.EXE	June 1997	Senior Officer Legal Orientation, Vol. 2, June 1997.
JA267.ZIP	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.	JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA269.DOC	December 1996	Tax Information Series, December 1996.			
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.			

JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.	JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.	JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.	JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.	JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.	1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.	1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.	1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.	1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.	1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.	1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.	JA509-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.	JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.	JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.	JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.	JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.

JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.	YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.	YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.	YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.	YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.	YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.	YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.	YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.	YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.	YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.	YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.			
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.			
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.			
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.			
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.			

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. *The Army Lawyer* on the LAAWS BBS

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

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

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

(2) Double click on "Files" button.

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

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

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

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

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

b. For each of the "PK" files, execute your down-

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

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

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

For example: c:\wp60\wpdocs
or C:\msoffice\winword

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

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

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

PKUNZIP JULY.ZIP

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

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

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

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

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

7. Articles

The following information may be useful to judge advocates:

Michael B. Bressman & Fernando R. Laguarda, *Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 CREIGHTON L. REV. 319 (February 1997).

Thomas D. Lyon & Jonathan J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43 (November 1996).

John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405 (May 1997).

8. TJAGSA Information Management Items

a. The Judge Advocate General's School, United States Army has upgraded its network server to improve capabilities for the staff and faculty, and many of the staff and faculty have received new pentium computers. These initiatives have greatly improved overall system reliability and made an efficient and capable staff and faculty even more so! The transition to Windows 95 is almost complete and installation of Lotus Notes is underway.

b. The TJAGSA faculty and staff are accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling IMO.

c. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978, extension 435. Lieutenant Colonel Godwin.

9. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. The Army Lawyer will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.