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Captain John B. Jones, Jr.

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DO LOOK A GIFT HORSE IN THE MOUTH IF YOU WANT TO KEEP YOUR CAREER

Captain Ellen Kuzmaul Fujawa, JA, USAR

Editor's Note—The Department of Defense (DOD) has proposed to supplement the Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards) with the Joint Ethics Regulation (JER). The proposed JER will apply to all services and is designed to replace existing ethics regulations, govern the activities of joint command and separate DOD agencies, implement rules, and provide additional guidance on related topics from the OGE. At the time of publication, the JER is pending OGE approval. Ethics counselors should consult the JER when addressing future ethical issues.

Introduction

A grateful, elderly client brings a bottle of wine to the legal assistance attorney who has prepared her will. Regretfully, he declines her kindness, explaining that he cannot accept the gift.

Organizers of a Reserve commander's farewell party send a letter that includes, in addition to the brunch payment, a non-volitional gift donation. Furthermore, the planned gift to the commander is an engraved saber with a value of over \$200. After a review by the unit's ethics counselor, the mandatory gift donation becomes a voluntary amount and the gift is changed to a less expensive plaque.

A field recruiter is presented with an exquisite Korean jewelry box by the grateful, Korean-born parents of a young recruit. Reluctant to offend the parents by refusing the gift, yet knowing that the gift is impermissible, the recruiter defers to his chain of command on how to handle the delicate situation. Ultimately, he returns the jewelry box to the parents with an accompanying letter, drafted by a judge advocate in the Recruiting Command, explaining the Army policy against accepting gifts.

The above scenarios actually occurred and are common place. In both the active and Reserve components, soldiers and their commanders routinely face similar gift dilemmas. Accepting or giving impermissible gifts—whether from outside sources, or between employees—may create a situation that could have disastrous consequences on an otherwise fine military career.

The Army's codification of federal ethics laws has been found in *Army Regulation 600-50, Standards of Conduct for Department of the Army Personnel (AR 600-50)*,¹ and major command and local supplements to AR 600-50. While other rules and regulations govern the acceptance of gifts by Department of the Army (DA) military and civilian personnel, most command ethic counselors have relied on AR 600-50.² This regulation has applied to officer and enlisted personnel, as well as to DA civilians, and has been changed numerous times to address current gift issues.³

Because Congress and the President have moved for uniformity of ethics regulations between and within the three branches of Government, AR 600-50 has become outdated. The Department of Defense (DOD) and the Army now are governed by an Office of Government Ethics (OGE) regulation—the same regulation that governs all other executive branch agencies. This article focuses on differences between AR 600-50 and the OGE's newly promulgated *Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards)*.⁴ The article also examines how the OGE Standards relate to the receipt of gifts by DA civilian and military personnel from outside sources (other than government contractors), as well as employee-to-employee gifts.

Inception Of the New Rules

Prior to 1989, standards of conduct within the executive branch were governed by President Lyndon Johnson's Executive Order 11222, issued on May 8, 1965.⁵ This order prohibited executive branch employees from soliciting or receiving gifts from any person or entity that conducted business with, or was regulated by, that employee's agency.⁶ The individual

¹ DEP'T OF ARMY, REG. 600-50, STANDARDS OF CONDUCT FOR DEPARTMENT OF THE ARMY PERSONNEL, para. 2-1 (28 Jan. 1988) [hereinafter AR 600-50].

² Other rules, laws, and regulations that relate to DA military and civilian personnel accepting gifts in relation to their duties are DEP'T OF DEFENSE DIRECTIVE 5500.7, STANDARDS OF CONDUCT; 18 U.S.C. § 203(a), (b) (1988) (prohibiting government officers or employees from receiving payments or gifts in exchange for preferential treatment in a matter pending before their agencies); DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, para. 4-3 (15 Sept. 1989) see also DEP'T OF ARMY, PAMPHLET 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 1.7 cmt. (31 Dec. 1987).

³ With the advent of frequent flyer programs and promotions, AR 600-50 was amended to offer detailed guidance on travel gift situations. Similarly, the ceiling on gift expenditures rose over the years as inflation increased the value of gifts.

⁴ 57 Fed. Reg. 35,006-35,067 (to be codified at 5 C.F.R. pt. 2635) (proposed July 23, 1991).

⁵ Exec. Order No. 11222, sec. 201(a) reprinted in AR 600-50, supra note 1, app. C, at 21.

⁶ Id. at 201(b).

executive branch agencies were instructed to issue their own standard-of-conduct regulations to implement this order.⁷ The Civil Service Commission—later the Office of Personnel Management—was given responsibility to review and approve the various agency ethics regulations.⁸ The Civil Service Commission developed a loose regulatory framework for the individual agencies to follow in developing their individual ethics codes,⁹ but the uniformed services specifically were exempt from this regulation.¹⁰ The DOD only was obligated to issue regulations that conformed with the executive order,¹¹ which resulted in *DOD Directive 5500.7 (Standards of Conduct)* and *AR 600-50*.

For twenty-five years, the DOD and executive branch agencies policed the ethical conduct of their personnel. Executive branch scandals during the 1980s exposed the discrepancies in agency ethics regulations concerning their interpretation of Executive Order 11222.¹² Additional scandals within the legislative branch led to the belief that a uniform set of ethics rules was needed for all agencies and branches of government.¹³

After considerable study and deliberation, President George Bush, on April 12, 1989, issued Executive Order 12674.¹⁴ This order provided that executive branch employees could not accept any gift from any person or entity "seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interest may be substantially affected by the performance or nonperformance of the employee's duties."¹⁵ Furthermore, the OGE—with the assistance of the Attorney General—was commissioned to promulgate "a single comprehensible and clear set of execu-

utive branch Standards of Conduct that shall be objective, reasonable and enforceable."¹⁶

Congress passed Title III of the Ethics Reform Act of 1989, amending Title 5 of the United States Code by adding section 7353, which, in language virtually identical to that contained in section 101(d) of Executive Order 12674, restricts the solicitation and receipt of gifts from outside sources by members of Congress and the members of the executive and judicial branches of government.¹⁷ Like Executive Order 12674, this legislation specifically authorizes the OGE to issue implementing regulations for the executive branch.¹⁸

On July 23, 1991, the OGE published for comment a proposed rule to establish uniform standards of ethical conduct for all employees of the executive branch.¹⁹ An appropriate amount of time was allowed for review as well as public and agency comment.²⁰ On August 7, 1992, the OGE issued a final rule, effective February 3, 1993.²¹ This final rule established standards for executive branch agencies relating to the receipt of gifts, regardless of whether they are from prohibited sources, because of official position, or between employees.²²

Applicability to the Department of the Army

The intent of the President and Congress in mandating the OGE to issue its new standards was to eliminate the multitude of separate agency standards-of-conduct regulations that had emerged during the previous twenty-five years and to "establish a single, comprehensible, and clear set of executive branch standards of conduct that shall be objective, reasonable, and enforceable."²³ The new standards apply to all execu-

⁷*Id.*

⁸*Id.*

⁹5 C.F.R. pt. 735 (1991) (Employee Responsibilities and Conduct).

¹⁰5 C.F.R. § 735.102 (1991).

¹¹*Id.*

¹²Edmondson, *And Gifts and Travel for All: A Summary and Explanation of the Ethics Reform Act of 1989*, 37 *FED. B. NEWS & J.* 402, 403 (1990).

¹³*Id.* at 404 and 405.

¹⁴57 *Fed. Reg.* 33,778 (1991).

¹⁵Exec. Order No. 12674, sec. 101(d), 54 *Fed. Reg.* 15159 (1989), as modified by Exec. Order 12731, 55 *Fed. Reg.* 42457 (1990), reprinted in 5 *U.S.C.A.* § 7301 (West Supp. 1992).

¹⁶*Id.* sec. 201(a).

¹⁷Ethics Reform Act of 1989, 5 *U.S.C.A.* § 7353 (West 1992).

¹⁸*Id.* § 7553(d)(1)(D).

¹⁹57 *Fed. Reg.* 33,778 (1991).

²⁰The proposed rule notice provided a 60-day comment period and invited comments by agencies and the public (1068 comments were received—37 from executive branch agencies and the remainder from individuals and organizations. 57 *Fed. Reg.* 35,006 (1992) (to be codified at 5 *C.F.R.* pt. 2635).

²¹*Id.*

²²*Id.*

²³Exec. Order No. 12674, § 201(a).

utive branch personnel and replace all previously issued standards-of-conduct regulations.²⁴ Previously issued standards-of-conduct regulations remain in effect until properly modified, amended, or revoked pursuant to the provisions of Executive Order 12674 or the *OGE Standards* insofar as they are not irreconcilable with either the executive order or *OGE Standards*.²⁵ The uniformed services have no exemption from the provisions of this regulation;²⁶ thus, as of February 3, 1993, when the *OGE Standards* became effective, *AR 600-50*—at least to the extent that it is inconsistent with the *OGE Standards*—became obsolete.

The *OGE Standards* are not inflexible and they may be tailored to meet the functions and activities of a given agency.²⁷ Section 2635.105 permits individual agencies to issue supplemental regulations “which the agency determines are necessary and appropriate, in view of its programs and operations, to fulfill the purposes of this part.”²⁸ Supplements must be submitted to the OGE for review and approval prior to issuance²⁹ and must be issued jointly by the agency and the OGE as a supplement to the *OGE Standards*.³⁰ Furthermore, such supplements must consist of additions (e.g., an additional gift exception) to the *OGE Standards*; they may not reiterate or attempt to revoke or negate, the *OGE Standards*’ provisions.³¹

Even though the *OGE Standards* apply to the uniformed services,³² they apply *only* to officers; enlisted members are *not* covered.³³ The discussions accompanying the promulgation of the *OGE Standards* provide little explanation for this exclusion, except for stating that the inclusion of enlisted members would be inconsistent with the definition of “employee” found within Executive Order 12674.³⁴ Nevertheless, the *OGE Standards* provide, “Each agency with juris-

dition over enlisted members of the uniformed services *shall* issue regulations defining the ethical conduct obligations of enlisted members under its jurisdiction.”³⁵ Although supplemental regulations concerning enlisted members are subject to the approval of the OGE—in accordance with the provisions of section 2635.105—the uniform services may impose all statutory and regulatory sanctions against enlisted members failing to comply with those regulations, including sanctions available under the Uniform Code of Military Justice.³⁶

Overview of the *OGE Standards*

The *OGE Standards*, which became effective on February 3, 1993, consist of nine subparts: General Provisions; Gifts from Outside Sources; Gifts Between Employees; Conflicting Financial Interests; Impartiality in Performing Official Duties; Seeking Other Employment; Misuse of Position; Outside Activities; and Related Statutory Authority. The following section of this article provides a brief overview of the first three subparts—which address the subjects of gifts from outside sources and gifts between subordinates and superiors—and examines how the *OGE Standards* differ from the Army’s gift prohibitions found in *AR 600-50*.

A. General Provisions

The general principles of public service outlined in the *OGE Standards* closely mirror those found in *AR 600-50*—public service is a “public trust”;³⁷ loyalty to the Constitution, laws, and ethics must be placed above personal interest;³⁸ public office must not be used for personal benefit or gain;³⁹ preferential treatment may not be given to any person or enti-

²⁴ 57 Fed. Reg. 35,006 (1992).

²⁵ Exec. Order No. 12674, § 502(a).

²⁶ 57 Fed. Reg. 35,043 (to be codified at 5 C.F.R. § 2635.103).

²⁷ *Id.* (to be codified at 5 C.F.R. § 2635.105).

²⁸ *Id.*

²⁹ *Id.* (to be codified at 5 C.F.R. § 2635.105(a)).

³⁰ *Id.* (to be codified at 5 C.F.R. § 2635.105(a)(1)).

³¹ *Id.* (to be codified at 5 C.F.R. § 2635.105(a)(2)).

³² *Id.* (to be codified at 5 C.F.R. § 2635.103).

³³ *Id.*

³⁴ See Exec. Order No. 12674, § 503(b) (“employee” is defined as “any officer or employee of an agency, including a special Government employee”).

³⁵ 57 Fed. Reg. 35,043 (to be codified at 5 C.F.R. § 2635.103) (emphasis added).

³⁶ *Id.*

³⁷ Compare 57 Fed. Reg. 35,042 (to be codified at 5 C.F.R. § 2635.101(a)) with *AR 600-50*, *supra* note 1, para. 1-4b.

³⁸ Compare 57 Fed. Reg. 35,042 (to be codified at 5 C.F.R. § 2635.101(a)) with *AR 600-50*, *supra* note 1, para. 1-4c.

³⁹ Compare 57 Fed. Reg. 35,042 (to be codified at 5 C.F.R. § 2635.101(a)) with *AR 600-50*, *supra* note 1, para. 1-4c.

ty;⁴⁰ independence and impartiality must be maintained;⁴¹ and, any action that is improper or that could reasonably be perceived by the public as an impropriety, must be avoided.⁴² Both regulations recognize that the public's confidence in the government is tied closely to its perception of the integrity of its public officials.⁴³

The major difference between the *OGE Standards* and *AR 600-50* is one of level of detail. The *OGE Standards* are more expansive in explaining its general philosophy of ethics and government service than is *AR 600-50*. The *OGE Standards* also go further than *AR 600-50* by delineating fourteen general principles that "form the basis for the standards contained in this [regulation]."⁴⁴ These principles are designed to guide an employee in determining whether his or her conduct is proper in circumstances or situations not specifically discussed in the *OGE Standards*.⁴⁵

Despite the differences, both regulations clearly find as incongruous with their general philosophies accepting gifts from outside the government in the course of one's duties, accepting gifts from subordinates, or soliciting or giving gifts to a superior. The exchange of such gifts give the impression that a government official's decisions are for sale or that individuals rise through government ranks based on favoritism and not merit. These impressions create an atmosphere of distrust in government and cynicism within the citizenry that both regulations find abhorrent and seek to eliminate.

B. Gifts From Outside Sources

Subpart B, Gifts from Outside Sources, parallels the prohibition found in *AR 600-50*, paragraph 2-2, Gratuities, Reimbursements, and Other Benefits from Outside Sources, on

accepting gifts from persons outside the government. The *OGE Standards* prohibitions state that "an employee may not, directly or indirectly, solicit or accept any gift . . . from a prohibited source; or . . . given because of the employee's official position."⁴⁶ A "prohibited source" is defined as a person or entity doing business with or regulated by the agency.⁴⁷ The primary difference between these two regulations is primarily one of semantics and format, rather than one of substance.

While both regulations initially appear to be clear, the prohibitions contain certain loopholes in the form of exceptions to the definition of a "gift," as well as to their general prohibitions.

The *OGE Standards* defines "gift" as follows:

"Gift" includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.⁴⁸

AR 600-50 prohibits "gratuities" as opposed to "gifts" and, except for interchange of the words "gift" and "gratuity," both regulations' definition of "gift" are virtually the same.⁴⁹

Both the *OGE Standards* and *AR 600-50* specifically exclude the following from their definitions of "gift": snacks and drinks offered as "other than part of a meal;"⁵⁰ cards, trophies, plaques or similar items with "little intrinsic value;"⁵¹

⁴⁰Compare 57 Fed. Reg. 35,042 (to be codified at 5 C.F.R. § 2635.101(a)) with *AR 600-50*, *supra* note 1, para. 1-4c.

⁴¹Compare 57 Fed. Reg. 35,042 (to be codified at 5 C.F.R. § 2635.101(a)) with *AR 600-50*, *supra* note 1, para. 1-4c.

⁴²Compare 57 Fed. Reg. 35,042 (to be codified at 5 C.F.R. § 2635.101(a)) with *AR 600-50*, *supra* note 1, para. 1-4c.

⁴³Compare 57 Fed. Reg. 35,042 (to be codified at 5 C.F.R. § 2635.101(a)) with *AR 600-50*, *supra* note 1, para. 1-4c.

⁴⁴These principles include admonitions against employees; placing private gain above "loyalty to the Constitution, the laws and ethical principle;" accepting gifts from nongovernment sources when it could affect the performance of their duties; "us[ing] public office for private gain;" giving preferential treatment to any person or organization; or, acting in any manner that gives even the appearance of impropriety. Employees also have the affirmative duty to "put forth honest effort in the performance of their duties." Compare 57 Fed. Reg. 35,042 (to be codified at 5 C.F.R. § 2635.101(b)) with Exec. Order No. 12647, sec. 101 54 Fed. Reg. 15159 (1989).

⁴⁵57 Fed. Reg. 35,042 (to be codified at 5 C.F.R. § 2635.101(b)).

⁴⁶Compare 57 Fed. Reg. 35,044 (to be codified at 5 C.F.R. § 2635.201(a)) with *AR 600-50*, *supra* note 1, para. 2-2(1).

⁴⁷57 Fed. Reg. 35,045 (to be codified at 5 C.F.R. § 2635.203(d)).

⁴⁸*Id.* (to be codified at 5 C.F.R. § 2635.203(b)).

⁴⁹*AR 600-50* defines "gratuities" as "[a]ny gift, favor, entertainment, hospitality, meal, transportation, loan, or other tangible item, and any intangible benefits . . . given or extended or on behalf of DOD personnel, their immediate families, or households for which fair market value is not paid by the recipient or the U.S. Government." *AR 600-50*, *supra* note 1, sec. II.

⁵⁰Compare 57 Fed. Reg. 35,045 (to be codified at 5 C.F.R. § 2635.203(b)(1)) with *AR 600-50*, *supra* note 1, para. 2-2a(2)(k).

⁵¹Compare 57 Fed. Reg. 35,045 (to be codified at 5 C.F.R. § 2635.203(b)(2)) with *AR 600-50*, *supra* note 1, para. 2-2c(9)(b).

loans from financial institutions on the same terms given to members of the general public;⁵² favorable discounts, rates or benefits offered to military or government personnel as a whole;⁵³ prizes awarded as a result of random drawings open to the public;⁵⁴ pension or other benefits received from a former employer;⁵⁵ anything accepted under specific statutory authority;⁵⁶ and, anything for which the employee pays market value.⁵⁷

The *OGE Standards* and *AR 600-50* both enumerate exceptions to the general prohibition against soliciting or receiving gifts from prohibited sources.⁵⁸ The exceptions primarily involve situations or circumstances in which the public's potential perception of impropriety is minimal because a prior personal relationship exists between the parties, or circumstances make clear that the gift is not offered to sway the public official in the performance of his or her duties. The major difference between the two regulations in this area is that the *OGE Standards* allow employees to accept any type of gift with a value of under twenty dollars,⁵⁹ while *AR 600-50* provides that DA personnel can accept only "promotional items" with a value of ten dollars or less.⁶⁰

Although the *OGE Standards* provide that a gift accepted in accordance with one of these exemptions will not be deemed to violate the principals of 2635.101(b), it may be prudent for

an employee to decline a gift offered by a prohibited source because of his or her official position.⁶¹ Furthermore, the *OGE Standards* provide that exercising any of these exceptions is inappropriate if one of the following occurs:

(1) the employee is influenced by the gift in the performance of an official act;

(2) the employee requests or coerces the gift;

(3) gifts from the same or different source occur so frequently that they appear improper; or

(4) acceptance of the gift violates any other applicable statute.⁶²

If a public employee improperly receives a gift, the *OGE Standards* require that the employee dispose of the gift in a timely fashion by returning the gift to the donor.⁶³ If the item is perishable (such as flowers or fruit) and cannot be returned practically, the gift may be given to charity or shared in the recipient's office.⁶⁴ The recipient also may pay the donor market value for the gift.⁶⁵ *AR 600-50* requires the recipient to report the gift to his immediate superiors,⁶⁶ but DA legal

⁵² Compare 57 Fed. Reg. 35,045 (to be codified at 5 C.F.R. § 2635.203(b)(3)) with *AR 600-50*, *supra* note 1, para. 2-2a(2)(b).

⁵³ Compare 57 Fed. Reg. 35,045 (to be codified at 5 C.F.R. § 2635.203(b)(4)) with *AR 600-50*, *supra* note 1, para. 2-2a(2)(c).

⁵⁴ Compare 57 Fed. Reg. 35,045 (to be codified at 5 C.F.R. § 2635.203(b)(5)) with *AR 600-50*, *supra* note 1, para. 2-2c(4).

⁵⁵ Compare 57 Fed. Reg. 35,045 (to be codified at 5 C.F.R. § 2635.203(b)(6)) with *AR 600-50*, *supra* note 1, para. 2-2c(3).

⁵⁶ Compare 57 Fed. Reg. 35,045 (to be codified at 5 C.F.R. § 2635.203(b)(8)) with *AR 600-50*, *supra* note 1, para. 2-2b(2).

⁵⁷ Compare 57 Fed. Reg. 35,045 (to be codified at 5 C.F.R. § 2635.203(b)(9)) with *AR 600-50*, *supra* note 1, sec. II (excludes from the definition of "gratuity" anything for which "fair market value" is paid).

⁵⁸ Among the exceptions listed in the *OGE Standards* that specifically do not apply to government contractors are the following:

a. Gifts of \$20 or less (§ 2635.204(a)). Cf. *AR 600-50*, *supra* note 1, para. 2-2a(2)(a), which allows acceptance of promotional items of \$10 or less.

b. Gifts based on a personal relationship (§2635.204(b)). Cf. *AR 600-50*, *supra* note 1, para. 2-2a(2)(j).

c. Awards and honorary degrees (§ 2635.204(d)). Cf. *AR 600-50*, *supra* note 1, para. 2-2c(4).

d. Gifts based on outside business or employment relationships (such as spouse's business associates) (2635.204(e)). Cf. *AR 600-50*, *supra* note 1, para. 2-2a(2)(i).

e. Gifts accepted under specific statutory authority such as gifts from foreign or international groups, pursuant to 5 U.S.C. § 7342 (§ 2635.204(i)). *AR 600-50*, *supra* note 1, does not contain a similar exception; however, nothing in the regulation indicates any prohibition on DA from accepting statutorily permissible gifts.

⁵⁹ 57 Fed. Reg. 35,046-35,049 (to be codified at 5 C.F.R. § 2635.204).

⁶⁰ *AR 600-50*, *supra* note 1, para. 2-2a(2).

⁶¹ 57 Fed. Reg. 35,046 (to be codified at 5 C.F.R. § 2635.204).

⁶² *Id.* at 35,044 (to be codified at 5 C.F.R. § 2635.202(c)).

⁶³ *Id.* at 35,049 (to be codified at 5 C.F.R. § 2635.205(a)(1)).

⁶⁴ *Id.* (to be codified at 5 C.F.R. § 2635.205(a)(2)).

⁶⁵ *Id.* (to be codified at 5 C.F.R. § 2635.205(a)(3)).

⁶⁶ *AR 600-50*, *supra* note 1, para. 2-2d

opinions have recommended disposition of gifts by methods similar to dispositions found in the *OGE Standards*.⁶⁷ The *OGE Standards* provide that an employee need only consult with his or her agency ethics counselor if the propriety or proper disposition of a gift are in question.⁶⁸

The *OGE Standards*' major improvement over *AR 600-50* is one of format—the *OGE Standards*' definition of what constitutes a "gift" and its exclusions are contained in one section. Although this may seem trivial, it simplifies developing a methodology for evaluating a legal question involving a gift. One methodology that naturally flows from the *OGE Standards*' format is as follows:

- (1) Is it a gift? (§ 2635.203)
- (2) Is it from a prohibited source or based on official position? (§ 2365.202)
- (3) Does an exception apply? (§ 2635.204)
- (4) Is use of an exception appropriate (do any of the four subjective limitations apply)? 2635.202(c)
- (5) If it is an impermissible gift, how do you dispose of it? (§ 2635.205)⁶⁹

C. Gifts Between Employees

AR 600-50, paragraph 2-3, Prohibitions Concerning Gifts and Donations, provides the following on gifts between DA employees:

DA personnel will not solicit a contribution from other DOD personnel for a gift to an official superior, make a donation or a gift to an official superior, or accept a gift or donation from DOD subordinate personnel . . . [G]ifts to immediate family members of the official superior are regarded as gifts to the official superior.⁷⁰

Like the prohibition on gifts from outside sources, this prohibition is accompanied by an exception. An employee may give, and an official superior may accept, a "truly voluntary gift or contributions of minimal value . . . on special occasions such as marriage, transfer out of the command, illness, or retirement, if any gift acquired with such contributions is primarily of a sentimental nature."⁷¹ Under no circumstances may the retail value of the gift exceed \$200.⁷²

With a few minor differences, the *OGE Standards* parallel *AR 600-50*'s prohibitions. Subpart C, Gifts Between Employees, prohibits an employee—directly or indirectly—from giving, donating to, or soliciting contributions for, a gift to an official superior.⁷³ It also prohibits an employee from accepting a gift from another employee who is receiving less pay.⁷⁴ Like the prohibitions contained in subpart B, these prohibitions are subject to the *OGE Standards*' definition of "gift" and the subpart's exceptions to these two prohibitions.

Subpart C defines "gift" in the same manner as subpart B does.⁷⁵ The only difference is the recognition that people who work together often enter into mutually beneficial financial arrangements, (e.g., car pools, coffee funds); subpart C's definition of "gift" provides that any benefit received as a result of participation in a mutual arrangement with another employee or other employees is not a "gift" provided that each employee bears his or her fair proportion of the expense or effort involved.⁷⁶

The *OGE Standards* provide exceptions to the prohibition on soliciting or giving a gift to a superior and to the prohibition on receiving a gift from a fellow employee receiving less pay. These exceptions are more extensive than exceptions found in *AR 600-50*.

The *OGE Standards* have one general exception; gifts given on an occasional basis—including any occasion when gifts traditionally are given or exchanged—may be given to an official superior or accepted from a subordinate or other employee receiving less pay.⁷⁷ Such gifts, however, must

⁶⁷Merck, Outline of Instruction, Standards of Conduct, 22d Staff Judge Advocate Course, supp., at 2 (June 1992) (New *OGE Standards of Conduct Rules Compared to AR 600-50*) (available from The Judge Advocate General's School, U.S. Army).

⁶⁸57 Fed. Reg. 35,049 (to be codified at 5 C.F.R. § 2635.205(c)).

⁶⁹See Merck, *supra* note 67, at 9 (developing a similar methodology).

⁷⁰*AR 600-50*, *supra* note 1, para. 2-3a.

⁷¹*Id.*

⁷²*AR 600-50* allows the acceptable limit at \$180. *AR 600-50*, *supra* note 1, para. 2-3a. Recent sources, however, show that this limit—which is tied to the limit of the value of a gift acceptable from a foreign source—has been increased to \$200. See Merck, *supra* note 67, at 3.

⁷³57 Fed. Reg. 35,049 (to be codified at 5 C.F.R. § 2635.302(a)).

⁷⁴*Id.* (to be codified at 5 C.F.R. § 2635.302(b)).

⁷⁵*Id.* at 35,050 (to be codified at 5 C.F.R. § 2635.303(a)).

⁷⁶*Id.*

⁷⁷*Id.* (to be codified at 5 C.F.R. § 2635.304(a)).

have a market value of under ten dollars⁷⁸ or fall under one of the following categories: food or refreshment shared in the same office;⁷⁹ personal hospitality at one's residence;⁸⁰ items given in response to the receipt of personal hospitality (such as a hostess gift).⁸¹ This exception—apparently recognizing that agency *esprit de corps* is promoted when superiors and subordinates occasionally socialize in and outside of the office—did not appear in *AR 600-50*.⁸²

The *OGE Standards* give two other more specific exceptions to these prohibitions. The first allows a superior to accept a gift from subordinates or individuals receiving less pay if given on special and infrequent occasions of personal significance such as marriage, illness, or the birth or the adoption of a child. The second exception allows a commander to accept a gift on occasions that terminate a subordinate-superior relationship such as retirement, resignation, or transfer.⁸³

The *OGE Standards* also provide that employees may make *nominal* and *voluntary* contributions or may solicit a *nominal* and *voluntary* contribution from fellow employees that otherwise would violate the prohibitions set forth in 2635.302(b), if such solicitations or contributions are made on "special, infrequent occasions," or on an "occasional basis," for items such as food and refreshments to be shared in the office among several employees.⁸⁴ This allowance differs from *AR 600-50*—which puts a \$180 cap on gifts—in that the *OGE Standards* fail to address whether a gift is inappropriate or not because the gift is too elaborate or expensive. Instead, the *OGE Standards* provide only that donations for that gift must be "nominal" and "voluntary." Carried to an extreme, in a large command or agency, enough "nominal" donations might be collected to give a departing or retiring commander or agency head a car or cruise; the subpart on gifts between employees technically does not prohibit this. Nevertheless, all employees should be sensitive to the adverse appearance that such a lavish gift might create.

In addition to the above referenced exceptions, under the *OGE Standards*, an employee may accept a gift from another employee receiving less pay if they have a personal relationship and if an official senior-subordinate relationship does not exist.⁸⁵

While the *OGE Standards* on gifts between employees does not lend itself to an easy problem-solving methodology as did the provision on gifts from outside sources, the following methodology has been proposed:

- (1) Is it a gift? (§ 2635.303(a))
- (2) Is it from a subordinate or an employee receiving less pay? (§ 2635.302)
- (3) Does the "occasional basis" exception apply? (§ 2635.304(a))
- (4) Does the "special, infrequent occasion" exception apply? (§ 2635.304(b))
- (5) Are contributions to the gift voluntary and of a nominal amount? (§ 2635.304(c))⁸⁶

New *OGE Standards* Application

Using the criteria of the new *OGE Standards*, would the approach and resolution to the three fact situations at the beginning of this article result in a different outcome?

Example 1

The legal assistance officer who refused the bottle of wine from a grateful client acted correctly under the general philosophy of *AR 600-50*. The regulation states that DA personnel will avoid any action "that might result in or reasonably be expected to create the appearance of . . . using public office for private gain, . . . giving preferential treatment to any person or entity, . . . [and] adversely affecting the confidence of the public in the integrity of the Government."⁸⁷ More importantly, other Army rules and regulations expressly forbid acceptance. Army attorneys are prohibited from accepting "payment or other compensation . . . for providing legal services to persons authorized to receive legal services at the Army's expense."⁸⁸

⁷⁸*Id.* (to be codified at 5 C.F.R. § 2635.304(a)(1)).

⁷⁹*Id.* (to be codified at 5 C.F.R. § 2635.304(a)(2)).

⁸⁰*Id.* (to be codified at 5 C.F.R. § 2635.304(a)(3)).

⁸¹*Id.* (to be codified at 5 C.F.R. § 2635.304(a)(4)).

⁸²This portion of the *OGE Standards* formally legitimizes activities that already are occurring in the Army. For example, even the strictest of command ethics counselors probably would find no objection under *AR 600-50*, *supra* note 1, para. 2-3, if a superior engaged in civilities such as sharing in cakes or cookies brought in for a subordinate's birthday celebration, unless the superior in some way took unfair advantage of the situation.

⁸³57 Fed. Reg. 35,050 (to be codified at 5 C.F.R. § 2635.304(b)).

⁸⁴*Id.* (to be codified at 5 C.F.R. § 2635.304(c)).

⁸⁵*Id.* at 35,049 (to be codified at 5 C.F.R. § 2635.302(b)).

⁸⁶Merck, *supra* note 67, at 4 (developing a similar methodology).

⁸⁷*AR 600-50*, *supra* note 1, para. 1-4f.

⁸⁸DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICE, para. 1-8b (1 Aug. 1984); see also DEP'T OF ARMY, PAMPHLET 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 1.7 cmt. (31 Dec. 1987).

Using the *OGE Standards* methodology for gifts from outside sources, the wine must be returned to the donor.⁸⁹ The wine qualifies as a gift and does not fall under any of the gift exceptions. The legal assistance client is a "prohibited source" because—as a past and potential future client—she has an interest affected by the legal assistance attorney's performance or nonperformance of his duty. Furthermore, the gift was given because of the attorney's official position as a legal assistance officer. Finally, an exception to the prohibition may exist if the value of the wine is under twenty dollars. The use of the exception, however, is inappropriate in these circumstances because accepting the gift is prohibited by other Army rules and regulations. The legal assistance attorney correctly disposed of the gift under the *OGE Standards* by gracefully declining it.

Example 2

An analysis of the Reserve commander's farewell party in light of *AR 600-50* reveals several standards of conduct violations. Under *AR 600-50* permissible gifts to a superior had to meet the following four criteria: the gift had to be purchased with voluntary contributions, the gift's total value could not exceed \$200, the gift had to be of a sentimental nature, and the gift had to be presented on a special occasion. Under these criteria, the farewell party met the last test because the gift was given on an appropriate special occasion—that is, the transfer of a commander out of his Reserve unit. The farewell party, however, fails under the other three tests. First, contributions to a superior's gift must be given voluntarily. The contributions originally were not voluntary because the payment for the party also contained a required and predetermined contribution for the commander's gift and *AR 600-50* considered such contributions to be nonvoluntary donations. Although this error was corrected, two others problems prohibited giving the departing commander a gift saber. *AR 600-50* emphasized the sentimental nature of the gift given. Examples of permissible gifts included an inexpensive plaque or tray, pen and pencil set, or privately prepared photo album. A saber, however, is of questionable sentimental value. Finally, *AR 600-50* provided that in no case will the retail value of such gifts exceed \$200; the value of this gift exceeded \$200. Therefore, to make the gift acceptable, changing the nature and magnitude of the gift provided to the commander upon his retirement became necessary.

The criteria of the *OGE Standards*, however, could lead to a different assessment of the Reserve commander's farewell party. Using the previously discussed methodology on the exchange of gifts between employees,⁹⁰ the saber's "status" first must be determined, and it obviously qualifies as a gift. Secondly, the gift clearly is prohibited because it was given to a commander from his subordinates. Third, the gift must be examined under one of the exceptions to the prohibition. The situation fails to meet the criteria of the "occasional basis" exception, but it does fall under the "special, infrequent occa-

sion" exception. Subordinates may solicit for, and give a gift to, a superior on special and infrequent occasions, such as this event commemorating the termination of the subordinate-superior relationship. The next question concerns the voluntariness of the donations. The new *OGE Standards* offer a more relaxed approach to the inclusion of a gift donation in a meal payment than *AR 600-50* did. Consequently, the party payment—that included a gift donation—now can be considered voluntary and therefore acceptable. The final question examines whether the contributions given toward the purchase of the saber would be "nominal." Unlike *AR 600-50*, the *OGE Standards* do not place any emphasis on the value of the gift, and instead concentrate on the amount each subordinate contributes. Giving the engraved saber as a gift is permissible, unless the Reserve unit is so small, or so few people contribute toward the gift, that the donors would have to give more than a nominal amount toward its purchase. Consequently, unlike the assessment under *AR 600-50*, not only was giving a gift to the reserve commander allowable, but the gift originally selected and the means by which donations for the gift were collected, also were permissible.

Example 3

In the final scenario, a jewelry box is given to an Army recruiter by a recruit's foreign-born parents. Under *AR 600-50* the recruiter's retaining the jewelry box was inappropriate because it created an appearance of impropriety. It might lead a reasonable person to believe the gift was given by the parents in exchange for showing their son preferential treatment in the recruitment process. Unlike the legal assistance officer in the first example, who simply declined the gift, the recruiter accepted the gift in an awkward situation. In accordance with *AR 600-50*, however, he correctly reported the gift to his chain of command and the gift properly was returned.

Using the same methodology used in the first example, under the *OGE Standards*, the jewelry box also should be returned to the donor. First, the jewelry box qualifies as a gift that does not fall under any of the exceptions to this definition. Second, the parents are a "prohibited source" because they have an interest—their son—affected by the recruiter's performance or nonperformance of his duty and the gift was given because of the soldier's official position as an Army recruiter. Third, an exception to the prohibition may exist if the value of the jewelry box is under twenty dollars. This is one circumstance, however, when an exception should not be used. Military recruitment standards have become increasingly more stringent and all branches of the service are facing shrinking manpower requirements, making qualifying for military service more difficult. The jewelry box might appear to some observers as a bribe by the parents to the recruiter to increase the odds of their son's enlistment. The recruiter also was correct under the *OGE Standards* to report the gift and ultimately to return it to the grateful parents.

⁸⁹See *supra* text accompanying notes 68-70.

⁹⁰See *supra* text accompanying notes 85-86.

Conclusion

In the areas of gifts to DA employees from outside sources (other than government contractors), and gifts between employees, the *OGE Standards* do not represent a radical departure from *AR 600-50*. As discussed above, minor differences exist. Enlisted personnel presently are not obliged to adhere to the *OGE Standards*; but the *OGE Standards* require the uniformed services to draft supplements that ultimately

will bring enlisted personnel under its provisions. Other differences—such as no cap on the value of a gift that may be given to a superior—also might be addressed through supplements if they prove to be problematic in the future. Both *AR 600-50* and the *OGE Standards*, however, seek to instill the same principles in government employees—public service as a trust, and loyalty to the Constitution, laws, and ethics always must be placed above personal interest.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Contract Law Note

Contractor Recovers Cost of Complying with Safety Regulation Issued After Award

Under the Permits and Responsibilities clause,¹ a construction contractor must comply with federal, state, and local laws and regulations applicable to its performance on a federal project.² Likewise, unless another contract clause limits compliance to rules that exist at the time of contract award, contractors must observe requirements that arise after contract award at their own expense.³ In *Hills Materials Co. v. Rice*,⁴ the Court of Appeals for the Federal Circuit held that a contractor was entitled to an equitable adjustment for complying with an Occupational Safety and Health Administration (OSHA) regulation that became effective after the contractor submitted its bid.

Hills Materials involved two fixed price contracts for the repair of drainage and sewer lines at a military installation.

The contracting officer awarded one contract in August 1989, and the other in December 1989. Both contracts contained the standard construction contract clauses, including the Permits and Responsibilities clause and the Accident Prevention clause.⁵ In pertinent part, the Accident Prevention clause provides that the contractor must "[c]omply with the standards issued by the Secretary of Labor at 29 C.F.R. (Code of Federal Regulations) Part 1926 and 29 C.F.R. Part 1910"⁶

In October 1989, OSHA published an amendment to 29 C.F.R. 1926, subpart P, which specified standards for trenching activities at construction sites.⁷ The modified standards did not take effect until March 1990. To prevent cave-ins, the amended standards required contractors to taper the sides of their trenches in a more gradual manner than the steeper angle that the regulation had permitted in the past. The contractor, however, had relied on the earlier, more liberal standard when it had formulated its bid. After the effective date of the change, the contracting officer demanded that the contractor "flatten" the slopes of its trenches in accordance with the new

¹GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.236-7 (1 Apr. 1984) [hereinafter FAR].

²See, e.g., Shirley Constr. Corp., ASBCA No. 42954, 92-1 BCA ¶ 24,563; Holk Dev., Inc., ASBCA No. 40137, 90-2 BCA ¶ 22,852; Electronics and Missile Facilities, Inc., ASBCA No. 8627, 1963 BCA ¶ 3979.

³See, e.g., Shirley Constr. Corp., 92-1 BCA at 122,559; Norair Eng'g Corp., ENG BCA No. 3375, 73-1 BCA ¶ 9955.

⁴No. 92-1257, 1992 U.S. App. LEXIS 33968 (Fed. Cir. Dec. 29, 1992), *rev'g* Hills Materials Co., ASBCA No. 42410, 92-1 BCA ¶ 24,636.

⁵FAR 52.236-13.

⁶FAR 52.236-13(b)(2). 29 C.F.R. part 1910 covers general occupational safety and health standards, such as walking or working surfaces, protective equipment, compressed air and gas equipment, and welding. 29 C.F.R. part 1926 regulates construction activities, such as materials handling, hand or power tool use, excavations, concrete and masonry work, and use of explosives.

⁷See 29 C.F.R. §§ 1926.650 to .652 (1992).

regulation. To comply with this order, the contractor excavated more dirt, disturbed more surface area, and replaced more pavement, sidewalks, and planted areas than it had contemplated when preparing its bid. The contracting officer later denied the contractor's claim for the cost of this work, informing the contractor that under the Permits and Responsibilities clause the contractor had to bear the cost of adhering to regulatory requirements effective after award.

On appeal to the Armed Services Board of Contract Appeals⁸ (ASBCA), the contractor initially argued that it was entitled to an equitable adjustment because establishment of the new excavation rules was not a sovereign act.⁹ Specifically, the contractor contended that the OSHA statute,¹⁰ which authorizes the Secretary of Labor to issue safety regulations, does not have general and public application because it exempts nuclear activities from its coverage. The contractor also asserted that the revised OSHA regulations did not apply in states that had adopted their own safety programs. The ASBCA, however, rejected this position and held that the OSHA statute applies to all workers in the United States and that under the OSHA regulation, state safety standards must be both OSHA-approved and as stringent as the federal standards.¹¹

The contractor also contended that the Permits and Responsibilities clause did not bar recovery because the new regulations did not take effect until several months after contract award. The ASBCA again disagreed, finding that the contract did not limit the application of the Permits and Responsibilities clause to requirements that were in effect when the contracting officer executed the contracts.¹²

On appeal, the Federal Circuit reversed the ASBCA and held that the contractor was entitled to the costs associated with complying with the new, more restrictive excavation standards.¹³ The court found the board's determination that the Permits and Responsibilities clause alone governed the contractor's right to recover to be erroneous. The court's decision centered on its interpretation of the Accident Prevention clause. The Accident Prevention clause requires contractors to comply with safety and health regulations issued by OSHA for construction projects.¹⁴ The Government argued that the Accident Prevention clause mandates compliance with postaward changes to the C.F.R. because the clause did not specify a particular version of the regulation. The court, however, found that the term "issued" referred to standards that existed when the contractor submitted its bid and did not include postsubmission changes to the regulation.¹⁵ The court also opined that even if the Government's interpretation was reasonable, the contractor's position was equally reasonable. Accordingly, the court assumed that a latent ambiguity¹⁶ existed and construed the ambiguity against the Government, adopting the contractor's interpretation.¹⁷ The Federal Circuit also dispensed with the Government's sovereign acts defense. In a footnote, it found that the Government had agreed under the terms of the contract—namely the Accident Prevention clause—to assume responsibility for the impact of any changes to the OSHA safety regulations.¹⁸

In light of the Federal Circuit's rationale in *Hills Materials*, the Permits and Responsibilities clause generally will not bar recovery for compliance with regulations adopted after award pursuant to the Clean Air¹⁹ or Clean Water²⁰ Acts. The *Federal Acquisition Regulation* clause that addresses contractual responsibility under these acts provides that the contractor must comply with the acts "and all regulations and guidelines

⁸Hills Materials Co., ASBCA No. 42410, 92-1 BCA ¶ 24,636.

⁹Under the sovereign act defense, "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461 (1925). See *R&B Bewachungsgesellschaft mbH*, ASBCA No. 42213, 91-3 BCA ¶ 24,310; *Old Dominion Sec.*, ASBCA No. 40062, 91-3 BCA ¶ 24,173.

¹⁰29 U.S.C. § 651(b).

¹¹Hills Materials Co., 92-1 BCA at 122,938.

¹²*Id.* at 122,939; see *supra* notes 1-3 and accompanying text.

¹³Hills Materials Co. v. Rice, 1992 U.S. App. LEXIS 33968 at *6.

¹⁴See *supra* note 6 and accompanying text.

¹⁵Hills Materials Co. v. Rice, 1992 U.S. App. LEXIS 33968 at *5.

¹⁶An ambiguity exists when the terms of a contract are "reasonably susceptible of more than one interpretation." *Edward R. Marden Corp. v. United States*, 402 F.2d 701, 705 (Fed. Cir. 1986).

¹⁷*Id.* at *6.

¹⁸*Id.* at *5 n.2.

¹⁹42 U.S.C. § 7401.

²⁰33 U.S.C. § 1251.

issued to implement those acts *before the award of this contract*.²¹ Conversely, contracting officers apparently may rely on the Permits and Responsibilities clause absent some other "saving" clause. Accordingly, the Permits and Responsibilities clause alone likely will govern compliance with amended soil testing regulations imposed after award under the Solid Waste Disposal Act.²² Likewise, a contractor will not recover the costs of complying with safety requirements imposed after award, but not addressed in another clause as they were in *Hills Materials*.²³ The Federal Circuit's decision should prompt legal advisors to scour the contract clauses before advising that a contractor is strictly liable under the Permits and Responsibilities clause for compliance with statutory or regulatory requirements that take effect after award. Attorneys also should be vigilant for a change to the Accident Prevention clause that will resolve the ambiguity discerned by the court in *Hills Materials*. Major Helm.

Criminal Law Notes

Uncharged Misconduct and the Res Gestae Doctrine: An Old Exception for a New Rule.

In May 1992, an amendment to Military Rule of Evidence 404(b)²⁴ imposed a pretrial notice requirement on the Govern-

ment, conditioned upon a prior request by the defense. The Advisory Committee Notes to the amendment²⁵ state that the notice requirement includes "other crimes" evidence intended for use in the Government's case-in-chief, impeachment, or for possible rebuttal.²⁶ The amendment's purpose is "to reduce surprise and promote early resolution on the issue of admissibility."²⁷ Once a defense counsel submits a request for "other crimes" (or uncharged misconduct) evidence,²⁸ a "reasonable and timely response" by the Government becomes a condition precedent to the admission of such evidence.²⁹

A limitation to the amendment exists—that is, the Government's disclosure obligations do not extend to acts which are "intrinsic" to an offense,³⁰ or part of the *res gestae* of a charged crime.³¹ Recognizing when "other crimes" or acts of uncharged misconduct evidence are "intrinsic" to an offense may be important for court-martial practitioners. A recent decision by the Court of Military Appeals (COMA), *United States v. Metz*,³² demonstrates this limitation.

In *Metz*, a court-martial panel convicted the accused of the premeditated murder of his wife by beating and strangulation.³³ The Government presented testimony from neighbors that on the evening of the murder, the accused and his wife

²¹ See FAR 52.223-2(b) (1984) Clean Air and Water (emphasis added). Generally, the FAR requires this clause only for contracts expected to exceed \$100,000. See FAR 23.105(b). Apparently, the "relief" available for a contractor under this clause would not be present during performance of a contract under \$100,000.

²² 42 U.S.C. § 6901; see *Shirley Constr. Corp.*, ASBCA No. 42954, 92-1 BCA ¶ 24,563.

²³ See, e.g., *Norair Eng'g Corp.*, ENG BCA No. 3375, 73-1 BCA ¶ 9956 (contractor was liable for complying with Washington Metropolitan Area Transit Authority safety regulation issued after contract award).

²⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (1984) [hereinafter MCM], now provides as follows:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(emphasis added); see also FED. R. EVID. Rule 404(b). Federal Rule of Evidence 404(b) was amended effective 1 December 1991. The amendment to Military Rule of Evidence 404(b) took place 180 days later, through the operation of Military Rule of Evidence 1102, which makes amendments to the Federal Rules of Evidence applicable to the Military Rules of Evidence 180 days after the effective date of such amendments, unless the President takes action to the contrary.

²⁵ The amendment to Military Rule of Evidence 404(b) also adopted the Federal Advisory Committee Notes. See Fed. R. Evid. 404(b) (Committee Notes).

²⁶ *Id.*

²⁷ *Id.*

²⁸ The rule requires no specific form for the request and sets no specific time limits on its submission, "in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case." *Id.*

²⁹ *Id.*

³⁰ *Id.* In support of this proposition, the Committee Notes cite *United States v. Williams*, 900 F.2d 823 (5th Cir. 1990) (noting distinction between "extrinsic" (i.e. 404(b)) evidence, and "intrinsic" offense evidence).

³¹ BLACK'S LAW DICTIONARY (5th ed. 1979), defines the term "*res gestae*" as, *inter alia* "[t]hings done" or matters that are "so closely connected to occurrence of event in both time and substance as to be a part of the happening." (citations omitted).

³² 34 M.J. 349 (C.M.A. 1992).

³³ The court members sentenced the accused to a dishonorable discharge, confinement for life, total forfeitures, and reduction to the lowest enlisted grade. *Id.* at 350.

had a loud fight.³⁴ Later that same evening, the accused told two witnesses that once, during an argument, he had lifted his wife off the floor by her nose, and that sometimes he had to "rough her up."³⁵

The defense moved *in limine* to suppress the accused's statements concerning the "nose-lifting" and "roughing-up" as uncorroborated admissions.³⁶ The military judge, however, concluded that the accused's statements were not admissions, but acts of uncharged misconduct admissible under Military Rule of Evidence 404(b) "to show identification of Mrs. Metz's possible attacker and on the issue of premeditation or intent."³⁷ At trial, the accused admitted picking his wife up by the nose, but denied physically abusing her.³⁸

The COMA unanimously affirmed. The COMA observed that the "uncharged misconduct doctrine" makes evidence of an accused's other crimes, wrongs, or acts admissible if that evidence is logically relevant to prove a fact in issue other than the accused's character, and if proof of the fact outweighs the evidence's unfairly prejudicial character.³⁹ In *Metz*, evidence that the accused committed the uncharged mis-

conduct, and that the military judge admitted it for a proper purpose, satisfied this "logical relevance" requirement.⁴⁰

Another basis for logical relevancy regarding this evidence was that the uncharged misconduct—and the accused's admissions of the acts—"were part of *res gestae* of the murder and, thus, helpful to place the identity and intent evidence in context."⁴¹ This type of evidence enables the factfinder to see "the full picture," and prevents gaps in the "narrative of occurrences" which might otherwise induce unwarranted speculation on the part of the factfinder.⁴² The COMA stated that *not* permitting revelation of uncharged acts under a *res gestae* theory would provide an inducement for the Government to prefer more charges, to avoid a possible lack of continuity in the evidence received.⁴³

"Res gestae" Evidence

The *Metz* decision does not indicate when *res gestae* evidence is "interwoven"⁴⁴ sufficiently with a charged offense to qualify for admission without an independent theory of logical relevance.⁴⁵ Merely invoking the phrase *res gestae* is insuffi-

³⁴One neighbor testified that she saw the victim at approximately 2000 hours that night and, while the victim appeared to have been crying, she displayed no evidence of facial injury. *Id.*

³⁵When the body of the victim was discovered, it was visibly battered and showed "noticeable nasal trauma." *Id.*

³⁶*Id.* at 351.

³⁷*Id.*

³⁸*Id.* at 350.

³⁹*Id.* at 351. This formulation is not unique to *Metz*. See also EDWARD J. IMWINKELRIED, ET AL., COURTROOM CRIMINAL EVIDENCE § 902 (1987) ("The uncharged misconduct doctrine is that if evidence of an act of uncharged misconduct by the defendant is logically relevant to prove a fact in issue other than the defendant's character and the prosecution need for the evidence outweighs the evidence's prejudicial character, the evidence is admissible").

⁴⁰*Metz*, 34 M.J. at 351. The uncharged misconduct was legally relevant principally because of the "nexus" between the uncharged misconduct and the crime was close in time, place, and circumstance. The evidence suggested that the incidents were part of a continuing course of conduct eventually leading to the victim's death. *Id.* at 352 (citation omitted).

⁴¹*Id.* In the opinion's only footnote, the court observed that the notice requirement in Military Rule of Evidence 404(b) does not apply to *res gestae*, or "intrinsic" evidence.

⁴²*Id.* The court's analysis relied principally on the earlier decision of *United States v. Thomas*, 11 M.J. 388 (C.M.A. 1981). *Thomas* involved allegations of error arising from the admission at trial of evidence of two essentially contemporaneous robberies by the accused, only one of which was charged. Then-Chief Judge Everett's opinion stated:

In the case at hand, the testimony about taking [the victim's] wallet involved an act which occurred in the midst of events which gave rise to the charge that appellant had robbed Winters. In traditional parlance, the taking could be viewed as part of the *res gestae*. Or, observed from the standpoint of avoiding confusion of the court members, the admission of the evidence can be justified in terms of preventing a gap in the narrative of occurrences—a gap which might have induced unwarranted speculation by the members as to what had transpired but had not been revealed to them.

Id. at 393.

⁴³The court stated, "At a time when multiple charges for a single transaction are already common place as a means of meeting the exigencies of proof, we are not anxious to provide added inducement for overcharging." *Metz*, 34 M.J. at 351 (quoting *Thomas*, 11 M.J. at 393. Professor Imwinkelried observed, "The jury is entitled to more than a half-truth. Under the rule of completeness, the jury should know the whole story." E. IMWINKELRIED, *Uncharged Misconduct* § 6:24 (1984) (footnotes omitted).

⁴⁴Other terms which have been used to describe this genre of evidence include "interconnected, intermingled, interrelated, [or] inextricably intertwined . . . with the charged act." IMWINKELRIED, *supra* note 43, § 6:24.

⁴⁵The fact that the *Metz* decision did not elucidate this point is understandable. In *Metz*, the contested *res gestae* theory of admissibility for the uncharged misconduct was presented as an alternative basis for a finding of logical relevance.

cient, and should be done with caution.⁴⁶ Accordingly, it is necessary to look to other authorities for guidance.⁴⁷

One eminent commentator⁴⁸ says determining whether an act is inseparable may require separate consideration of linguistic,⁴⁹ physical,⁵⁰ and psychological⁵¹ factors. Another commentator has distilled five relationships that prevail when uncharged misconduct evidence is "inextricably intertwined" with a charged act.⁵² First, the uncharged misconduct may have been a necessary preliminary step toward the completion of the charged crime. Second, the uncharged misconduct may be directly probative of the crime charged. Third, the uncharged misconduct may arise from the same transaction or transactions as the charged crime. Fourth, the uncharged misconduct may form a necessary and integral part of a particular witness's testimony concerning the charged crime. Fifth, the uncharged misconduct may "complete the story" of the charged offenses.

Military and federal judicial decisions provide concrete examples of these principles. In *United States v. Peel*,⁵³ a wit-

ness testified that the accused assaulted her by grabbing her throat and pushing her to the floor.⁵⁴ Over strenuous objection by the defense, the military judge permitted the witness to testify that the accused subsequently made her sit on the floor for a period of forty minutes while he threw coins at her face. The COMA noted that this testimony was probably admissible as part of the same transaction as the assault.⁵⁵

In *United States v. Alexander*,⁵⁶ the accused committed indecent acts and indecent liberties with a child under the age of sixteen. His appeal alleged error by the military judge in admitting the victim's statement—made during direct examination—that the accused not only indecently touched her, but also had sexual intercourse with her.⁵⁷ The Army Court of Military Review (ACMR) stated, "when the uncharged misconduct is inextricably related in time and place with the charged offenses, it is generally admissible without the necessity for an appropriate limiting instruction."⁵⁸ The ACMR found the accused's uncharged misconduct in *Alexander* "inextricably bound up with the charged offenses"⁵⁹ and rejected that allegation of error.⁶⁰

⁴⁶The use of the term *res gestae* in this context is subject to strong criticism. See, e.g., L.A. WIGMORE, EVIDENCE § 218 (Chadbourne rev. 1979).

It is sometimes said that such acts are provable as part of the "*res gestae*." But this phrase is unsatisfactory, first because it is obscure and indefinite and needs further definition and translation before either its reason or its scope can be understood, secondly because its very looseness and obscurity lend too many opportunities for its abuse, and thirdly because it has common application to other rules of evidence. . . . The term '*res gestae*' should once and for all be abandoned as useless and confusing. Let it be said that such acts are receivable as 'necessary parts of the proof of an entire deed,' or as 'inseparable elements of the deed,' or as 'concomitant parts of the criminal act,' or anything else that carries its own reasoning and definition with it; but let legal discussion sedulously avoid this much-abused and wholly unmanageable Latin phrase.

Id., see also IMWINKELRIED, *supra* note 43, § 6:25 ("Res gestae has been characterized as a 'mind-numbing Latin phrase'")(footnote omitted).

⁴⁷The most recent and comprehensive treatment of this question is Schuster, "Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence," 42 U. MIAMI L. REV. 947 (1988).

⁴⁸IMWINKELRIED, *supra* note 43, § 6:24.

⁴⁹*Id.* In Professor Imwinkelried's view, acts are linguistically inseparable when the testifying witness cannot practically avoid mentioning the charged act.

⁵⁰*Id.* Physical inseparability may occur when the same proof—an audiotape, for example—provides evidence of both the charged and uncharged acts.

⁵¹*Id.* Psychological inseparability occurs when the introduction of evidence about the charged crime piques the curiosity of the jury about aspects of the transaction to which the uncharged act relates. For example, when a police officer states that he found drugs on the accused without revealing that the search was incident to a separate criminal investigation, the jury likely will want to know why the search was conducted.

⁵²See Schuster, *supra* note 47, at 962.

⁵³29 M.J. 235 (C.M.A. 1989).

⁵⁴*Id.* at 239.

⁵⁵*Id.* (quoting *United States v. Doss*, 15 M.J. 409, 412 n.5 (C.M.A. 1983) (other citations omitted).

⁵⁶27 M.J. 834 (A.C.M.R. 1989).

⁵⁷*Id.* at 837.

⁵⁸*Id.* (citing *United States v. Thomas*, 11 M.J. at 388). In *Thomas*, the COMA drew a distinction "for instructional purposes between uncharged misconduct which is inextricably related in time and place to the offenses charged and uncharged misconduct which lacks this nexus." It is in the latter area that the military judge has a sua sponte duty to instruct. 11 M.J. at 392; accord *United States v. Montgomery*, 5 M.J. 832 (A.C.M.R.), *pet. denied*, 6 M.J. 89 (C.M.A. 1978) (limiting instruction not required for uncharged misconduct admitted as part of the *res gestae*).

⁵⁹*Alexander*, 27 M.J. at 837.

⁶⁰See also *Doss*, 15 M.J. at 409, 412 n.5; *United States v. Owens*, 21 M.J. 117, 123 (C.M.A. 1985).

Practitioners also should consult pertinent federal precedents.⁶¹ Like the decisions discussed above, a determination in the federal courts concerning whether uncharged misconduct is intrinsic or "inextricably intertwined" with a charged crime depends on the specific facts of each case. Generally, however, the federal courts consistently have held that Federal Rule of Evidence 404(b) governs the admissibility of uncharged misconduct that is "extrinsic" to the charged offense, and not evidence "intrinsic" to the offense.⁶²

In a recent example of this rule, *United States v. Ramirez-Jimenez*,⁶³ the defendant was convicted of illegally transporting aliens. When agents of the United States Border Patrol stopped his truck, the defendant gave them a false name, and falsely claimed to be an American citizen.⁶⁴ On appeal, the defendant claimed that admission of testimony concerning his false statements was improper,⁶⁵ and the probative value of that evidence was substantially outweighed by the danger of unfair prejudice.⁶⁶

The Court of Appeals for the Ninth Circuit rejected the defendant's argument, observing that "evidence should not be treated as 'other crimes' evidence when the evidence concerning the ['other'] act and the evidence concerning the crime charged are inextricably intertwined."⁶⁷ The court described the defendant's false statements as "direct evidence" which occurred in the course of the conduct with which he was charged, rather than a "remote and distinct 'bad act.'"⁶⁸ This

evidence could be used to "flesh out" the circumstances surrounding the crime, and permit the jury to make sense of the testimony in its proper context.⁶⁹

Conclusion

Recognizing when uncharged misconduct evidence is part of the *res gestae* of a crime is an old problem with new implications for court-martial practitioners. "Intrinsic" uncharged misconduct evidence is an exception to the notice requirement in Military Rule of Evidence 404(b). Whether an uncharged act is "intrinsic" or "inextricably intertwined" with a charged act depends on the specific facts of each case, but such a relationship occurs in several situations. Generally, when the uncharged misconduct evidence is part of the same transaction, or is related closely in time and place to the charged offense, it will be part of the *res gestae* of the crime. Major O'Hare.

AIDS and Adultery

Introduction

A few months ago, the ACMR decided *United States v. Perez*,⁷⁰ a case involving a married soldier who engaged in unprotected extramarital sexual intercourse while he was infected with the human immunodeficiency virus (HIV).⁷¹ In reversing Perez's special court-martial conviction for assault consummated by a battery and adultery,⁷² the ACMR based its

⁶¹ Military Rule of Evidence 101(b) provides as follows:

[I]f not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the Code or this Manual, courts-martial shall apply:

- (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and
- (2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

⁶² See *United States v. Williams*, 900 F.2d 823 (5th Cir. 1990); see also *United States v. Allen*, 960 F.2d 1055, 1058 (D.C. Cir. 1992) (citing *United States v. Roberts*, 933 F.2d 517, 520 (7th Cir. 1991); *United States v. Foster*, 889 F.2d 1049, 1054 (11th Cir. 1989); *United States v. Randall*, 887 F.2d 1262, 1268 (5th Cir. 1989); *United States v. Towne*, 870 F.2d 880, 886 (2d Cir.), cert. denied, 490 U.S. 1101 (1989)).

⁶³ 967 F.2d 1321 (9th Cir. 1992).

⁶⁴ *Id.* at 1351.

⁶⁵ *Id.* at 1327. The defendant apparently assumed that the testimony encompassed "other crimes" which should have been governed by Federal Rule of Evidence 404(b).

⁶⁶ *Id.*

⁶⁷ *Id.* (citing *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987) (quoting *United States v. Aleman*, 592 F.2d 881, 885 (5th Cir. 1979)).

⁶⁸ Moreover, as was the case in *Metz*, the statements at issue qualified for admission under a noncharacter theory of logical relevance because they were probative of the defendant's consciousness that his conduct was illegal. *Id.* (citation omitted).

⁶⁹ *Id.* The court also concluded that the objection based on unfair prejudice lacked merit. The main prejudice from the admission of the contested testimony would come from the jury drawing a permissible inference that the accused was lying because he knew his conduct was illegal. *Id.* at 1328.

⁷⁰ 33 M.J. 1050 (A.C.M.R. 1991).

⁷¹ Human immunodeficiency virus is the viral agent that attacks the body's immune defense system and causes the usually fatal acquired immune deficiency syndrome (AIDS). AIDS AND THE LAW 28-30 (Harlon L. Dalton et al. eds., 1987).

⁷² UCMJ arts. 128, 134 (1988).

reversal on sufficiency of proof issues. This decision, however, has generated some concern from practitioners about the continued viability of adultery as a court-martial offense. A closer examination of the court's opinion, however, discloses no new restrictions on the scope of adultery.

Elements of Proof

Military law defines adultery as sexual intercourse between the accused and another person at a time when one of them is married to someone else.⁷³ Adultery is a criminal offense under Uniform Code of Military Justice (UCMJ) Article 134—the so-called “general” article. As an Article 134 offense, the following three elements of proof are required for adultery:

- (1) That the accused wrongfully had sexual intercourse with a certain person;
- (2) That, at the time, the accused or the other person was married to someone else; and
- (3) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁷⁴

The proof required for conviction under Article 134 depends upon the nature of the misconduct charged, but the proof must establish every element of the offense.⁷⁵ In particular, proof of the third element must establish that the accused's conduct was directly and palpably prejudicial to good order and discipline, or that it operated to bring the service into disrepute or lower it in public esteem.⁷⁶ Without some proof on this third element, either directly or by inference, the prosecution will fail.

The evidence in *Perez* established that the appellant, Staff Sergeant (SSG) Juanito Perez, tested positive for HIV in 1986. In early 1989, he met Ms. E, the victim, when they both worked in the same office at Fort Devens, Massachusetts. In August 1989, Ms. E transferred to another job at Fort Devens and their work relationship ended. In September 1989, the appellant and his wife of seventeen years separated and they entered into a formal separation agreement. This agreement provided that they each could “conduct individual business and personal affairs without interfering with each other in any way, just as if [they] were not married.” A few weeks later, SSG Perez began dating Ms. E and began a sexual relationship. When they engaged in sexual intercourse, however, Perez did not use a condom, despite Ms. E making them available to him. Instead, he said they were unnecessary because he “had been fixed.” In January 1990, a friend of Ms. E's, knowing she was dating Perez, informed her that Perez was HIV positive.⁷⁷

Perez was charged with aggravated assault and adultery, in violation of UCMJ Articles 128 and 134. He subsequently was tried by a special court-martial.⁷⁸ During the trial, the Government employed an expert witness to prove that Perez was infected with HIV and that HIV could be transmitted to his sexual partner, thereby constituting an assault with a means likely to produce grievous bodily harm. After the Government expert concluded his testimony and was excused, the defense presented an expert who testified that, in his opinion, Perez was incapable of transmitting the HIV virus to Ms. E because Perez had obtained a vasectomy prior to engaging in intercourse with her. The vasectomy, the defense expert said, rendered Perez's semen incapable of carrying the HIV virus. This evidence was unrebutted by the Government. Perez was convicted only of assault consummated by a battery and adultery.⁷⁹

⁷³United States v. Hixson, 22 M.J. 146 (C.M.A. 1986).

⁷⁴MCM, *supra* note 24, pt. IV, para. 62b (1984).

⁷⁵*Id.* pt. IV, para. 60b.

⁷⁶*Id.* pt. IV, para. 60c(2)(a) & (3).

⁷⁷*Perez*, 33 M.J. at 1052.

⁷⁸Article 128 provides as follows:

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

⁷⁹*Perez*, 33 M.J. at 1052.

On appeal before the ACMR, Perez challenged his battery conviction for legal insufficiency and he challenged his adultery conviction for both legal and factual insufficiency. The ACMR agreed and, after setting aside the findings and sentence, dismissed the charges.⁸⁰

In reaching its conclusion, the ACMR first analyzed Perez's battery conviction. The court pointed out that the basis of the alleged battery was the act of sexual intercourse between Perez and Ms. E. The court explained that this act would not support a conviction on an "offer" theory because Ms. E did not have a reasonable apprehension of receiving an immediate unlawful touching at the time of the sex act. Because she did not learn of the infection until long after the act, the evidence was legally insufficient to support a conviction on that theory.

The ACMR then examined Perez's conviction on a theory of assault by battery. The court said, "The government must prove beyond a reasonable doubt that the instrument used was likely to result in harm, making the act an offensive touching."⁸¹ The court explained, "Consensual sexual intercourse itself is not [an] offensive touching, the ability to place the HIV-virus in the body of an unaware victim is the offensive touching."⁸² Because the un rebutted defense testimony was that Perez was incapable of transmitting the HIV virus, the evidence was legally insufficient to support a conviction of assault consummated by a battery.⁸³

Turning to the adultery charge, the ACMR said,

We are not prepared to state a *per se* rule that sexual intercourse with a person not his or her spouse by a married soldier under any circumstances constitutes the offense of adultery The government must prove, either by direct or circumstantial evidence or by inference, that the accused's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit on the armed forces."⁸⁴

The evidence failed to prove this element. The evidence established that the sexual activity took place while the

accused and his wife were separated. The accused and the victim did not have a working relationship and Ms. E was fully aware of the accused's marital status. Additionally, Perez was unable to transmit the HIV virus and all the sexual activity occurred off post and in the privacy of Ms. E's residence—which meant the public was completely unaware of the activity. According to the ACMR, the conduct was not service discrediting, nor did it affect good order and discipline adversely.⁸⁵

The ACMR's opinion does not place any new limitations on the scope of adultery. Nor does the opinion suggest that a separation agreement can be a license to commit adultery, although the existence of such an agreement may be a factor in determining whether an act of adultery is prejudicial to good order and discipline or service-discrediting. The opinion suggests, however, that trial counsel must pay more attention to presenting specific proof of prejudice or service-discrediting conduct when proving an Article 134 offense. Accordingly, trial counsel should plan to call a witness to testify on this element or, at a minimum, be prepared to argue facts that establish the prejudicial effect or service-discrediting aspect of the accused's conduct. Defense counsel, on the other hand, should do exactly what was done in *Perez*—try to ensure that the Government does not put on evidence that proves service-discrediting conduct or prejudice to good order and discipline and certainly to argue that this element is not present in cases in which specific proof is not offered.

Epilogue

The Government intended to appeal the ACMR's decision on the adultery specification to the COMA; however, SSG Juanito Perez died on 6 February 1992. At that time, the ACMR ordered the proceedings abated ab initio.⁸⁶ This effectively means that the case carries no precedential weight.⁸⁷ Because this is not reflected in the published opinion, some counsel likely will continue to cite *Perez* as controlling law.

Counsel also should be aware of the unlikelihood that a vasectomy will prevent the transmission of the HIV virus.⁸⁸ When confronted with this defense in an HIV and aggravated assault case, the best solution for Government counsel is to

⁸⁰*Id.* at 1053-54.

⁸¹*Id.* at 1053.

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.* at 1054.

⁸⁵*Id.*

⁸⁶*United States v. Perez*, CM 9002828 (A.C.M.R. 12 Feb. 1992) (unpub.).

⁸⁷*See United States v. Marcott*, 8 M.J. 531 (A.C.M.R. 1979); *United States v. Beck*, 38 C.M.R. 765 (N.B.R. 1968).

⁸⁸Deborah J. Anderson et al., *White Blood Cells and HIV-1 in Semen From Vasectomized Men*, 338 THE LANCET 573-4 (1991) (letter); Nancy J. Alexander, *Vasectomy and Human Immunodeficiency Virus of Mice and Men*, 55 FERTILITY AND STERILITY 650-1 (1991) (letter).

have an expert available to testify that a vasectomy will not prevent transmission. If an expert is not available, counsel should be prepared to introduce the contents of learned treatises through the opposing side's expert, as substantive evidence under the learned treatise exception to the hearsay rule.⁸⁹ The critical point is that some evidence must be introduced to rebut the testimony of the defense expert, thereby avoiding the failure of proof problem encountered in *Perez*. Major Hunter.

International Law Note

Torture

In *Siderman de Blake v. Argentina*⁹⁰ the Ninth Circuit addressed torture as a violation of international law. After a military coup in 1976, Jose Siderman—an Argentine citizen—was taken from his house, beaten, and tortured on the orders of an Argentine military governor. Siderman eventually was released and made his way to the United States. Siderman and his family filed suit against Argentina in federal district court in 1982. The suit alleged that Siderman's torture, and subsequent expropriation of his family's real estate in Argentina, were violations of international law. The district court, relying on the Argentine government's assertion of sovereign immunity, dismissed the suit. The plaintiffs appealed to the Ninth Circuit. In discussing the jurisdictional provisions of the Foreign Sovereign Immunities Act⁹¹ (FSIA), the court addressed torture in international law. United States courts may exercise jurisdiction in a suit against a foreign government only when the suit falls within a statutory exception to sovereign immunity as provided in the FSIA. In *Siderman de Blake*, however, the petitioner argued that the international law principle of *jus cogens* overcame the presumption of any notion of sovereign immunity.

A *jus cogens* norm of international law is a norm from which no deviation is permitted and differs from a rule of customary international law that depends on the consent of states. *Jus cogens* norms are not based on consent but on the fundamental values of all states.

The Ninth Circuit discussed the war crimes trial at Nuremberg as an example of a *jus cogens* rule. The jurisdiction of the Nuremberg tribunal did not rest on the consent of Germany, but on the nature of the acts that the defendants committed. The court found that the acts charged at Nuremberg violated the fundamental rights of individuals and were violations of a *jus cogens* rule of international law. A rule of inter-

national law that rises to the level of *jus cogens* is supreme over all rules of international law. Therefore, the question for the Ninth Circuit was whether the prohibition on torture had risen to that level.

Twelve years earlier, the Second Circuit held that torture constituted a violation of international law.⁹² In *Siderman* the court took the prohibition a step further and elevated it to the status of *jus cogens*. In describing torture, the court said

The crack of the whip, the clamp of the thumb screw, and, in these more modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being. That states engage in official torture cannot be doubted, but all states believe it is wrong, all states that engage in torture deny it, and no state claims a sovereign right to torture its own citizens Under international law, any state that engages in official torture violates *jus cogens*.⁹³

Despite its stating that official torture violated the rule of *jus cogens*, the Ninth Circuit approved the earlier dismissal of that portion of the suit related to the torture as a violation of *jus cogens*. The Sidermans claimed that because their complaint alleged a violation of a rule of *jus cogens*, the doctrine of sovereign immunity no longer applied. Essentially, they argued that the prohibition against official torture "trumped" the presumption of sovereign equality and immunity from suit. The court held that if a violation of a *jus cogens* principle of international law constitutes a waiver of sovereign immunity the Congress must make it so explicitly through an amendment to the FSIA. Nevertheless, the court found that Argentina implicitly may have waived its immunity by asking the California state courts to assist in serving process on Mr. Siderman in a related criminal action filed in Argentina. The court also found that the expropriation claims fall within one of the statutory exceptions to the FSIA. The court remanded the case for further consideration of the issue of an implied waiver of immunity.

The case is important for the military lawyer concerned with international law. Torture of protected persons specifically is prohibited by the 1949 Geneva Conventions.⁹⁴ Tor-

⁸⁹MCM, *supra* note 24, MIL. R. EVID. 803(18).

⁹⁰965 F.2d 699 (9th Cir.) cert. applied for, 61 U.S.L.W. 3156 (Aug. 20 1992).

⁹¹28 U.S.C. § 1602-11 (1992).

⁹²*Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁹³*Siderman* at 717.

⁹⁴1949 Geneva Convention Relative to Wounded and Sick on Land art. 12; 1949 Geneva Convention Relative to Wounded and Sick at Sea art. 12; 1949 Geneva Convention Relative to Prisoners of War art. 13; 1949 Geneva Convention Relative to Civilians art. 32.

ture of protected persons constitutes a "grave breach" of each of the four Geneva Conventions.⁹⁵ Of course, the Geneva Conventions only apply in wartime and, generally, do not address the relationship of a government to its own citizens. The *Siderman* opinion makes it clear that all official torture is prohibited by international law and, further, is a violation of a *jus cogens* rule. The FSIA, however, does not explicitly address *jus cogens* violations as exceptions to sovereign immunity. Consequently, civil suits based on allegations of official torture by foreign governments may not be brought before United States courts on that basis alone. As the United States military becomes increasingly involved in human rights training abroad, the *Siderman* case provides an excellent review of this rule of *jus cogens*. Lieutenant Colonel Elliott.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys (LAAs) of current developments in the law and in legal assistance program policies. They also can be adapted 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.

Survivor Benefits Note

Gender Considerations

As the military downsizes and the frequency of selective early retirement boards increases, many officers will be making the decision about whether to participate in the Survivor Benefit Plan (SBP). The decision depends on a number of

variables.⁹⁶ One key consideration is whether the retiree is male or female.

Upon retirement, all soldiers, regardless of gender, pay for SBP coverage at the same premium rates.⁹⁷ Females, however, have longer life expectancies than males in identical age groups. The spouse of a female retiree, therefore, is less likely than the similarly situated spouse of a male retiree to outlive the retiree and collect SBP benefits.

The cost-benefit difference between male and female retirees can be quite startling. For the "typical"⁹⁸ forty-two-year-old male retiree with a same-age spouse, the election of maximum SBP coverage⁹⁹ would, on average, result in SBP payments to the spouse worth about sixteen percent more than SBP premiums paid.¹⁰⁰ On the other hand, for the typical forty-two-year-old female retiree with a same age spouse, the election of maximum SBP coverage would, on average, result in SBP payments to the surviving spouse of thirty-six percent less than SBP premiums paid.¹⁰¹

For the typical forty-two-year-old female retiree, maximum SBP coverage does not create an expectation that SBP payout will exceed SBP premiums, unless the spouse is seven or more years younger than the retiree.¹⁰² In contrast, the typical forty-two-year-old male retiree can expect SBP benefits to exceed SBP premiums unless his spouse is seven or more years older than the retiree.¹⁰³

Male retirees who are looking for a financial "safety net" for their spouses will be hard pressed to find any commercial insurance alternative that fills this role better than the SBP. Female retirees, who wish to provide their spouses with financial protection, however, should take a closer look at commercial alternatives to the SBP. Major Peterson.

⁹⁵1949 Geneva Convention Relative to Wounded and Sick on Land art. 50; 1949 Geneva Convention Relative to Wounded and Sick at Sea art. 51; 1949 Geneva Convention Relative to Prisoners of War art. 147; 1949 Geneva Convention Relative to Civilians art. 130.

⁹⁶Discussing all the relevant factors is beyond the scope of this note. Other important factors include, but are not limited to, the comparative health of the retiree and his or her spouse, genetic history affecting their expected lifespans, lifestyle habits such as smoking and drinking habits, and financial situation upon retirement. Officer and enlisted retirees also have different expected lifespans. For more detail on the SBP, see DEP'T OF ARMY, PAMPHLET 360F-539, SBP MADE EASY (1992).

⁹⁷Officers select a base amount between \$300 and total monthly retired pay. They then pay a monthly premium of 6.5% of the base amount, which, upon death, will entitle eligible survivors (usually the spouse) to a monthly payment of 55% of the base amount. Two caveats exist: for small base amounts (up to about \$850), the premium rate is less than 6.5%; for surviving spouses who are age 62 and over, the monthly payment is only 35% (not 55%) of base amount.

⁹⁸This assumes average mortality risks, that the retiree is an officer, and that both spouses are in good health and are nonsmokers.

⁹⁹Assuming that maximum retired pay is about \$2000 a month, a major retiring with 20 years' service would have a little less than \$2000, a lieutenant colonel would have a little more.

¹⁰⁰These calculations are produced with the Department of Defense Office of the Actuary computer program "SBP1993.EXE," available for downloading from the Legal Automation Army-Wide System (LAAWS) Bulletin Board System, Legal Assistance Conference. The calculations are based on present values, using the program's default estimates of annual cost of living adjustments of 5% and investment rates of return of 7.5%.

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.*

Veterans' Affairs Note

VA Home Loan Program Changes

On 28 October 1992, Congress made several significant changes to the Department of Veterans' Affairs (VA) Home Loan Program.¹⁰⁴ The changes include expanded eligibility, a test program for adjustable rate mortgages (ARM), lower fees for certain loans, and a change in how interest rates and VA loan points are set and paid.

For the first time, certain Reserve and National Guard service members are eligible for VA-guaranteed loans. A seven-year test program allows any Reservist or Guard member with six years' service to qualify for a VA loan guarantee. The mandatory funding fee is 0.75 percentage points higher than for traditional VA loans. This translates into a two-percent funding fee on a no-down payment loan.

The VA was the last major loan guarantor without an ARM program. In response, Congress has approved a three-year test of a VA ARM. These loans will have an annual interest rate hike cap of one percent and a lifetime cap of five percent. The loans will be tied to an index to be determined. Adjustable rate mortgages cannot exceed ten percent of all loans guaranteed by the VA in any one test year.

Congress also has authorized a borrower to negotiate the interest rate of, and pay points on, any VA loan. The borrower, however, may not finance any points paid. Both changes first must be authorized by the Secretary of Veterans' Affairs and will be tested until 1995. In addition, the funding fee for

refinancing a VA loan has been reduced to 0.5%. This does not include any origination or other fees charged by the lender. Major Gsteiger.

Tax Note

Tax Consequences of a Payment Under the Homeowners' Assistance Program

The Homeowners' Assistance Program (HAP), originally enacted in the Demonstration Cities and Metropolitan Development Act of 1966,¹⁰⁵ Public Law 89-754, § 1013 is now codified at 43 U.S.C. § 3374. This law authorizes partial financial assistance to eligible military and federal civilian employee homeowners who suffer losses incident to the disposal of their homes because of a drop in local real estate values when a military installation is ordered closed or its scope of operations is reduced.¹⁰⁶

Under this program, a homeowner might elect to sell the home privately and receive a government payment covering part of any loss, or the homeowner may sell the home to the government. In either case, the selling homeowner may have to include a portion of the government payment in his or her gross income.

In Revenue Ruling 76-342,¹⁰⁷ the Internal Revenue Service determined that a portion of the government payment made under the HAP could be included in the taxpayer's gross income. The amount subject to tax varies depending on the homeowner's elected benefit method. When the homeowner sells the home in a private sale, the government payment¹⁰⁸ is

¹⁰⁴Pub. L. 102-547, ___ Stat. ___ (1992) (to be codified at various sections of 38 U.S.C.).

¹⁰⁵Pub. L. No. 89-754, 80 Stat. § 1013 (codified as amended at 42 U.S.C.A. § 3374 (West 1992)); see 32 C.F.R. pt. 239 (1992) (implementing 42 U.S.C. § 3374).

¹⁰⁶For more information on the Homeowners' Assistance Program see CERER-P Information Paper, 23 Nov. 92, subject: Homeowners' Assistance Program (HAP) (distributed to Army legal assistance offices in TJAGSA legal assistance mailout 92-4 in December 1992). The Army Corps of Engineers administers this program.

Generally, benefits may be paid under the program only after the following conditions have been determined to exist:

- (1) A public announcement of a base closure or reduction in the scope of operations of the base has been made; and
- (2) The closure or reduction has caused a substantial drop in real estate market prices in the area of the base; and
- (3) As a result of the closure or reduction, no present market exists for sale of the property on reasonable terms and conditions.

To reach this determination, a survey and economic analysis of the area real estate market is made to ascertain the extent of base closure impact on the market.

In addition to the public announcement, an order to close the base must be made. An announcement, or an order to conduct a base closure study, is not sufficient. An actual closure need not occur to implement the HAP, but a public announcement, an order to close, and the requisite adverse market impact must be present.

The program is available to military members and to civilian federal employees and employees of nonappropriated fund instrumentality (other than temporary employees). In addition, the eligible individual must be—

- (1) an owner-occupant of property improved with a one or two-family dwelling situated at or near the base affected by the closure action; and
- (2) assigned or employed at or near the base ordered to be closed; and
- (3) the owner-occupant of the property at the time of the public announcement of the closure action.

¹⁰⁷Rev. Rul. 76-342, 1976-3 C.B. 22.

¹⁰⁸When the homeowner sells privately, the government will pay 95% of the value of the dwelling prior to the closure announcement, less the fair market value at the time of sale or the sales price, whichever is greater.

includible in the gross income of the homeowner as compensation for services.¹⁰⁹ On the other hand, when the homeowner sells the home to the government under the HAP¹¹⁰ the amount by which the purchase price exceeds the fair market value of the personal residence at the date of sale is includible in the homeowner's gross income. In both cases, the payment is considered compensation related to the homeowner's government employment. Accordingly, the payment is not eligible for the nonrecognition under section 1034 of the Internal Revenue Code, which allows a homeowner to roll over capital gains incident to the sale of his or her personal residence.¹¹¹ Major Hancock.

Consumer Law Update

The Garnishment Equalization Act Is Alive and Well

In a previous note in *The Army Lawyer*,¹¹² LAAs were alerted to pending legislation that would subject federal pay—including military compensation—to garnishment in the same manner as nonfederal pay. The note explained the significant impact this would have on military members faced with consumer debts. Presently, military pay may be garnished only for child support and alimony.¹¹³ Even though the Senate passed the Garnishment Equalization Act in 1992, the Act did not pass the House before Congress adjourned.¹¹⁴ During January 1993, however, the Act was reintroduced in substantially the same form as the 1992 Senate version and it appears to have strong support.¹¹⁵ When reintroducing the bill, Senator

Craig said, "I am confident that we will indeed see this bill enacted during the 103d Congress."¹¹⁶ Major Hostetter.

Family Law Note

Separation Agreements— Does the Agreement Have a Life After a Divorce?

Occasionally, one party to a separation agreement agrees to give more—or accept less—than he or she otherwise feels is proper or just under the circumstances. The party's willingness to do so usually is motivated by a desire to conclude a separation agreement as a stepping stone toward obtaining a divorce. The party assumes that the unfavorable terms that he or she has accepted will continue only until equitably adjusted by a court exercising its power to modify the terms of the agreement when it enters the final divorce decree at a later date.

Frequently, the client is correct in assuming this approach. Generally speaking, courts retain jurisdiction over continuing orders and can modify their orders on the payment of alimony and other family support issues.¹¹⁷ Careless drafting of a separation agreement, however, can lock a client into either paying or receiving unsatisfactory amounts of alimony indefinitely.

Courts can "acknowledge," "ratify," or "approve" a separation agreement. The court acknowledges the existence of the

¹⁰⁹ See I. R. C. § 82 (Maxwell Macmillan 1991); Treas. Reg. § 1.82-1(a)(5) (Maxwell Macmillan 1991). Treasury Regulation § 1.82-1(a)(5) provides as follows:

Any amount received or accrued from an employer, a client, a customer, or similar person in connection with the performance of services for such employer, client, customer, or similar person, is attributable to employment. Thus, for example, if an employer reimburses an employee for a loss incurred on the sale of the employee's house, reimbursement is attributable to the performance of services if made because of the employer-employee relationship. Similarly, if an employer in order to prevent an employee's sustaining a loss on a sale of a house acquires the property from the employee at a price in excess of fair market value, the employee is considered to have received a payment attributable to employment to the extent that such payment exceeds the fair market value of the property.

¹¹⁰ Under this option, the homeowner receives 75% of the value of the dwelling prior to the closure announcement or the amount of the outstanding mortgage, whichever is greater.

¹¹¹ Rev. Rul. 76-342, 1976-3 C.B. 22. This ruling designates that the amounts received that must be included in gross income as compensation for services are "wages" for purposes of the Federal Insurance Contributions Act and the Collection of Income Tax at Source on Wages, I.R.C. ch. 24, unless specifically excepted. For more information on the nonrecognition provision of section 1034, see Bernard Ingold, *Buying, Selling, and Renting the Family Home: Tax Consequences for the Military Taxpayer After the Tax Reform Act of 1986*, ARMY LAW., Oct. 1987, at 23; Admin. & Civ. L. Div., The Judge Advocate General's School, U.S. Army, JA 266, FEDERAL INCOME TAX ASSISTANCE GUIDE, ch. 9 (1993).

¹¹² Consumer Law Note, "Billwatch—House Bill 643 and Senate Bill 316: Garnishment of Federal Pay," ARMY LAW., June 1992, at 48.

¹¹³ 42 U.S.C. §§ 659-662 (1988).

¹¹⁴ 139 Cong. Rec. S889-02 (daily ed. Jan. 28, 1993) (statement of Sen. Craig).

¹¹⁵ Representative Jacobs sponsored House Bill 214 and it was referred to the Committee on Post Office and Civil Service on January 5, 1993. See 139 CONG. REC. H102-07 (daily ed. Jan. 6, 1993). Senators Craig, Pryor, and Roth introduced Senate Bill 253 on January 28, 1993. The following additional co-sponsors of the Senate bill were added February 4, 1993: Lugar (IN), Kassebaum (KA), Dole (KA), Bingaman (NM), Helms (NC), Kempthorne (ID), Shelby (AL), and Wallop (WY). See 139 CONG. REC. S1492-01 (daily ed. Feb. 4, 1993). When introducing the bill, Senator Craig stated that the proposal had the support of "thousands of local, state, and national organizations and businesses, including the Coalition for Higher Education Assistance Organizations, the National Federation of Independent Businesses, and the U.S. Chamber of Commerce." See 139 CONG. REC. S889-02 (daily ed. Jan. 28, 1993).

¹¹⁶ 139 CONG. REC. S889-02 (daily ed. Jan. 28, 1993).

¹¹⁷ M. SIVERMAN ET AL., FAMILY LAW AND PRACTICE § 52.01(1) (1990).

agreement, and may recognize its validity. Doing so may insulate terms of the agreement not covered or contradicted by terms of the decree from collateral attack.

Courts also can "incorporate" the agreement into the decree. By doing so, the court recognizes that the agreement is valid, including its terms as part of the decree. This usually insulates the terms of the agreement from collateral attack—at least to the extent that the agreement's terms in question are not otherwise covered by the decree.

Finally, the court can "merge" the agreement into the decree. When a separation agreement is merged, it becomes part of the decree and effectively ceases to exist as an independently enforceable document.

"Acknowledged" and "incorporated" obligations continue as *contractual* obligations and are not subject to court-ordered modification absent a showing of fraud or duress.¹¹⁸

A separation agreement that is merged into a divorce decree, however, ceases to exist as a contractual obligation, and the "judgment of divorce then controls the rights, privileges, and obligations of the respective parties."¹¹⁹ Obligations set forth in the agreement become a part of the decree and may be modified by the court.

Failing to specify that a separation agreement will be merged into a divorce decree can leave dissatisfied parties with an enforceable contract that cannot be modified and a court order that can be. Some courts have held that alimony under the court order is modifiable.¹²⁰ Presumably, however, the party adversely affected by the modification of the alimony award can seek specific performance of the separation agreement.¹²¹ Moreover, unless a court specifically states that the divorce judgment is valid and independent of a nonmerged separation agreement, "the separation agreement shall be binding and the divorce judgment is not enforceable or modifiable with respect to that matter."¹²²

Legal assistance attorneys carefully should consider the impact of advising a client on whether or not to specify that a separation agreement will be acknowledged, incorporated, or merged into a subsequent divorce decree. While no "right" answer exists, attorneys who are uncertain on which state's law will govern in a subsequent divorce would be wise to advise the client to merge the agreement into the subsequent divorce decree. Doing so protects the client from incurring an obligation or forfeiting a benefit unintentionally. It also reduces the possibility that a disgruntled client later may allege professional incompetence against an LAA. Major Connor.

¹¹⁸ See *Johnston v. Johnston*, 465 A.2d 436 (Md. Ct. App. 1983); *Knox v. Remick*, 358 N.E.2d 432 (Mass. 1976); *Ballin v. Ballin*, 371 P.2d 32 (Nev. 1962).

¹¹⁹ *Goldman v. Goldman*, 543 A.2d 1304, 1306 (R.I. 1988).

¹²⁰ See, e.g., *Murphy v. Murphy*, 467 A.2d 129 (Del. Fam. Ct. 1983); *Binder v. Binder*, 390 N.E.2d 260 (Mass. App. Ct. 1979) (alimony in divorce decree is modifiable when a duplicate alimony provision in nonmerged separation agreement exists).

¹²¹ See *Andursky v. Andursky*, 554 A.2d 571 (Pa. Super. Ct. 1989).

¹²² See, e.g., *Riffenburg v. Riffenburg*, 585 A.2d 627 (R.I. 1991).

Claims Report

United States Army Claims Service

Claims Policy Note

1993 Table of Adjusted Dollar Value

The table shown on the following page replaces both the 1992 table of adjusted dollar value (ADV) previously printed in *The*

*Army Lawyer*¹ and *Department of the Army Pamphlet (DA PAM) 27-162*.² In accordance with *Army Regulation 27-20*,³ and *DA Pam 27-162*,⁴ claims personnel should use this table only when no better means of valuing property exists.

¹ Claims Policy Note, *1992 Table of Adjusted Dollar Value*, ARMY LAWYER, Apr. 1992, at 77.

² DEP'T OF ARMY, PAMPHLET 27-162, CLAIMS, table 2-1, (15 Dec. 1989) [hereinafter DA PAM. 27-162].

³ DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 11-13c (28 Feb. 1990) [hereinafter AR 27-20].

⁴ DA PAM. 27-162, *supra* note 2, para. 1-39e.

<u>Year Purchased</u>	<u>Multiplier 1992 Losses</u>	<u>Multiplier 1991 Losses</u>	<u>Multiplier 1990 Losses</u>	<u>Multiplier 1989 Losses</u>	<u>Multiplier 1988 Losses</u>
1992	-	-	-	-	-
1991	1.03	-	-	-	-
1990	1.07	1.04	-	-	-
1989	1.13	1.10	1.05	-	-
1988	1.19	1.15	1.10	1.05	-
1987	1.24	1.20	1.15	1.09	1.04
1986	1.28	1.24	1.19	1.13	1.08
1985	1.30	1.27	1.21	1.15	1.10
1984	1.35	1.31	1.26	1.19	1.14
1983	1.41	1.37	1.31	1.24	1.19
1982	1.45	1.41	1.35	1.28	1.23
1981	1.54	1.50	1.44	1.36	1.30
1980	1.70	1.65	1.59	1.50	1.44
1979	1.93	1.88	1.80	1.71	1.63
1978	2.15	2.09	2.00	1.90	1.81
1977	2.32	2.25	2.16	2.05	1.95
1976	2.47	2.39	2.30	2.18	2.08
1975	2.61	2.53	2.43	2.30	2.20
1974	2.85	2.76	2.65	2.52	2.40
1973	3.16	3.07	2.94	2.79	2.66
1972	3.36	3.26	3.13	2.97	2.83
1971	3.46	3.36	3.23	3.06	2.92
1970	3.62	3.51	3.37	3.20	3.05
1969	3.82	3.71	3.56	3.38	3.22
1968	4.03	3.91	3.76	3.56	3.40
1967	4.20	4.08	3.91	3.71	3.54
1966	4.33	4.20	4.03	3.83	3.65
1965	4.45	4.32	4.15	3.94	3.76
1964	4.53	4.39	4.22	4.00	3.82
1963	4.59	4.45	4.27	4.05	3.87
1962	4.65	4.51	4.33	4.11	3.92
1961	4.69	4.56	4.37	4.15	3.96
1960	4.74	4.60	4.42	4.19	4.00

Notes:

Do not use this table when a claimant cannot substantiate a purchase price. Additionally, do not use it to value ordinary household items when the value can be determined by using average catalog prices.

To determine an item's value using the ADV table, find the column for the calendar year the loss occurred. Then multiply the purchase price of the item by the "multiplier" in that column for the year the item was purchased. Depreciate the resulting "adjusted cost" using the Allowance List-Depreciation Guide (ALDG). For example, the adjudicated value for a comforter purchased in 1980 for \$250, and destroyed in 1988, is \$216. To determine this figure, multiply \$250 times the 1980 "year purchased" multiplier of 1.44 in the "1988 losses" column for an "adjusted cost" of \$360. Then depreciate the comforter as expensive linen (item number 88, ALDG) for eight years at a five-percent yearly rate to arrive at the item's value of \$216.

The Labor Department calculates cost of living at the end of a year. For losses occurring in 1993, use the "1992" column. The 1989 multipliers in table 2-1, DA Pamphlet 27-162 were based on midyear statistics and are incorrect. Use these figures instead. Captain Boucher.

Tort Claims Note

Recent Unreported FTCA Cases of Interest

Even though the incident-to-service exclusion to Federal Tort Claims Act (FTCA) liability, based on *Feres v. United States*,⁵ has withstood the test of time, recent cases indicate the federal bench's increasing desire to make inroads into the exclusion. The following synopses of four unreported cases provide insight into current trends. Several of these decisions are being appealed. Because they are subject to reversal or clarification, they should be viewed cautiously. Nevertheless they do alert practitioners to issues that may require more factual investigation or legal research than in the past because of potential changes in the law.

In *Elliott v. United States*,⁶ both David E. Elliott, Jr. and his wife, Barbara, were injured seriously by carbon monoxide from an extremely eroded flue in their quarters at Fort Benning, Georgia. Because David Elliott, an active duty soldier, was on ordinary leave—as distinguished from being off duty or "on pass"—the court held that the incident-to-service exclusion did not apply. The decision rested almost entirely

on *Parker v. United States*,⁷ which involved an on-post collision with a Government-owned vehicle by a soldier on a four-day leave.

*Johnson v. United States*⁸ was a rehearing, by the Federal District Court for the District of Columbia. Johnson, an active duty soldier, donated blood at the Walter Reed Army Medical Center blood bank. Based on a test of the blood, she was informed that she was positive for human immunodeficiency virus (HIV). Upon retest, the first test was found to be in error and she was informed that she was not HIV positive. Because the results of this second test were misfiled, Johnson did not receive this information until after some delay. In the interim, she underwent an abortion to avoid having an HIV-positive child. The incident to service exclusion was held to be inapplicable. Once again, the decision was based on *Parker*, and also on a Ninth Circuit case by the same name—*Johnson v. United States*.⁹ The Ninth Circuit *Johnson* case involved a fatal crash of off-duty soldiers following after-hours drinking in the noncommissioned officers club. The ruling in the District of Columbia's *Johnson* case should be compared to *C.R.S. v. United States*,¹⁰ which also refused to bar an HIV case because of the *Feres* doctrine.

In *Quintana v. United States*,¹¹ Loretta Quintana, a member of the New Mexico National Guard, was injured on weekend training in July 1988. Her claim, based on surgical repair at Kirtland Air Force Base Hospital in January 1989, was held to be barred by the incident-to-service exclusion. She was not on active duty at the time of the surgery, but was receiving incapacitation pay. After citing other cases involving reservists and National Guard members, the decision highlighted that medical treatment rendered to active duty members of the armed forces consistently has been held to be incident to service.

Robert T. Guariglia was in the United States Navy from 1983 to September 1992. In 1987, he was placed on the temporary disability retired list (TDRL). In 1988, he broke his leg while playing ice hockey at an ice arena where he was pro shop manager. In *Guariglia v. United States*,¹² he sued the Government based on the failure of the emergency room personnel at National Naval Medical Center, Bethesda, Maryland, to diagnose and treat properly. The incident-to-service exclusion was applied despite the conflict in various federal circuit decisions concerning the incident-to-service TDRL cases. The *Guariglia* decision states that the Fourth Circuit has clarified that medical treatment of military personnel in military facilities is itself "incident to service" within the meaning of *Feres*. Mr. Rouse.

⁵340 U.S. 135 (1950).

⁶No. 91-55-COL (M.D. Ga. 1992).

⁷611 F.2d 1007 (5th Cir. 1980).

⁸No. 89-2633 (D.D.C. 1993), *reh'g*, 735 F. Supp. ___ (D.D.C. 1992).

⁹704 F.2d 1431 (9th Cir. 1983).

¹⁰761 F. Supp. 655 (D. Minn. 1991).

¹¹No. 91-592 JP (D.N.M. 1992).

¹²No. JFM-92-917 (D. Md. 1993).

International and Operational Law Note

OTJAG International and Operational Law Division

Systematically Incorporating National Security Law in Operational Military Decisions¹

Any discussion of how national security law is systematically incorporated into operational military decisions must recognize that national security law is one of today's most dynamic areas of the law. The very methodology by which we practice national security law in the military is being studied, changed, and—most importantly—expanded. This development should come as no surprise now that we have entered the post-Cold War era. The Army, like other services, is seeking new missions. The discipline of national security law—more commonly referred to as operational law in the military—must either meet the new needs and demands of its clients, or be relegated to a status similar to that of a place kicker on a football team—a critical player, but one called upon to perform only in special situations.

Please do not misinterpret my remarks. It is not my intention to sound Cassandra-like, warning all in earshot of the immediate and inevitable demise of operational law. Quite the contrary. Operational law is alive, robust, and destined for greater things. Operational law came of age during Operations Desert Shield and Desert Storm. These two operations were the ultimate field test of our systemizing national security law into operational military decisions. Let me expand on this last comment and then explain how operational law is preparing to meet the needs of our client today, and hopefully, of tomorrow.

To understand why I believe Desert Shield and Desert Storm represented the ultimate field test of our systemizing national security law in military decisions, one must understand what "systematically incorporating" means in military terms. The words "systematically incorporating" are, in my opinion, synonymous with the military term "doctrine." *JCS Publication 1* defines "doctrine" as "fundamental principles by which the military forces or elements thereof guide their actions in support of national objectives. It is authoritative but requires judgment in application."² Thus—and this is my

point—if one wishes to see if national security law has been systematically incorporated into operational military decisions, one must see if national security law has become part of our doctrine. The answer is clearly "yes." Operations Desert Shield and Desert Storm tested what today has become published doctrine. *Field Manual 27-100, Legal Operations*³ (*FM 27-100*), sets forth the systematic incorporation of operational law into military operations. Let me give you a few examples of this doctrine.

Paragraph 1-9 of *FM 27-100* lists seven functional areas in which the Judge Advocate General's Corps provides legal services. One of the seven areas is operational law.⁴ The stated purpose of operational law is to "increase the effectiveness of United States military forces by assisting commanders to employ them lawfully."⁵ *FM 27-100* states that judge advocates advise commanders and staff on the law of war, international law, and "domestic laws addressing the use of United States forces abroad,"⁶ to include the War Powers Resolution. Our doctrine also calls for us to give advice on operational plans and orders; targets and weapons; the investigation and disposition of alleged war crimes; and the treatment of detainees, enemy prisoners of war, and refugees. In addition, our doctrine also requires us to prepare legal annexes for operation orders and to review and interpret rules of engagements, as well as to provide unit training in the law of war.⁷

Perhaps no clearer example exists of how completely integrated national security law has been incorporated into operational military decisions than the mutual obligations of commanders and lawyers listed in paragraph 4-9 of *FM 27-100*. That paragraph requires commanders to integrate "legal operations plans with and conform them to tactical and operational plans."⁸ The same paragraph requires staff judge advocates to "ensure that legal operations support the commander's overall operation at every stage of its execution." Judge advocates must provide "legal services at the required place and time, usually as far forward as the tactical situation permits."⁹ This is why, during Operation Desert Storm, military lawyers were with the lead infantry and armored brigades

¹This note is based on remarks given at the American Bar Association's Standing Committee on Law and National Security Second Annual Review of National Security Law, October 1992, Washington, D.C.

²DEP'T OF DEFENSE, JOINT CHIEFS OF STAFF PUBLICATION NO. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (1 Dec. 1989).

³DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS (3 Sept. 1991) [hereinafter *FM 27-100*].

⁴The other six functional areas are administrative law, claims, contract law, criminal law, international law, and legal assistance.

⁵*FM 27-100*, *supra* note 3, para. 1-9(g).

⁶*Id.* para. 1-9(g)(1).

⁷*Id.* para. 1-9(g)(1) and (2).

⁸*Id.* para. 4-9.

⁹*Id.*

as they crossed into Iraq during the first hours of the ground campaign.

Our manual also sets out specific guidance for providing legal services in a theater of operations. Each level of command is addressed from the theater level, down to and including separate brigades.¹⁰ An entire chapter is devoted to legal operations in low intensity conflicts.¹¹ The theme that permeates this chapter is that "[a]ll personnel connected with military operations must understand that violations of legal constraints may adversely affect the overall accomplishment of United States policy objectives."¹² Therefore, it provides that commanders "must have immediate access to operational lawyers."¹³ It also states that commanders "must consult their legal advisors throughout the planning and execution process of all LTC [(low intensity conflict)] operations."¹⁴ Finally, this chapter directs that "[c]ommanders must coordinate with their judge advocates when implementing or participating in security assistance programs to ensure compliance with current, sensitive legislative and regulatory requirements"¹⁵ relating to security assistance programs.

In a similar vein, legal support during time of war, during mobilization and the land defense of the Continental United States, as well as legal support for civil affairs and special operations receive individual attention in separate chapters.¹⁶

Surely there can be no doubt that we have systematically incorporated national security law into military operational decisions. That is our doctrine. We successfully tested and practiced that doctrine in Operations Desert Shield and Desert Storm. But what of the future? How is national security law remaining a part of operational military decisions when those decisions are made in the context of a post-Cold War environment?

I would suggest to you that the discipline of operational law, because it is a part of our doctrine, is being used as a vehicle to promote a concept that is the very touchstone of national security law—the promotion of fundamental democratic values throughout the world. We have found a tremendous interest in, and demand for, operational lawyers to provide training on topics such as the law of war, civilian control of the military, and human rights.

Recognizing that the militaries in nondemocratic states have been largely responsible for committing human rights abuses, we are focusing our efforts to promote, strengthen, and assist nations with such histories, and in educating and reforming their military establishments.¹⁷ Our goals, as set forth in the Foreign Assistance Act,¹⁸ are to

- (1) promote a greater respect for internationally recognized standards for human rights;
- (2) foster greater respect for and an understanding of the principle of civilian control of the military, and;
- (3) improve military justice systems and procedures to comport with internationally recognized standards of human rights.

The methodology used to achieve these goals is to "train the trainers." Our plan is teach the military of other countries so that they, in turn, will be able to teach their own military forces, thereby institutionalizing this training within a military force.

In other words, when we teach our doctrine of incorporating national security laws into operational military decisions, we are teaching the national values expressed by that doctrine. We have so institutionalized the concept and practice of applying the rule of law into our operational practice that we are now teaching this doctrine to others. Thus, as our armed forces seek new missions in the post-Cold War era, we in the operational law community are providing operational legal support to our own military, teaching the concept to others and thus achieving the goal of today's and tomorrow's Army to help build nations, rather than destroy them. As Woodrow Wilson said, "America is the only idealistic nation in the world." Part of that idealism is ensuring that our military operations adhere to the rule of law. This is our doctrine. Teaching this doctrine to others is the new mission for us in the operational law community. Colonel Ruppert.

¹⁰*Id.* para. 5-3.

¹¹*Id.* para. 7-1.

¹²*Id.* para. 7-3.

¹³*Id.* (emphasis added).

¹⁴*Id.* (emphasis added).

¹⁵*Id.* para. 7-7(c) (emphasis added).

¹⁶*Id.* chs. 9, 10, 11.

¹⁷ See generally Jeffrey F. Addicott, draft working papers on the role of Army judge advocate generals in the Expanded International Military Education and Training (IMET) Program, at 2, 3, and 5 (on file with Dep't of Army, Office of The Judge Advocate General, ATTN: DAJA-IO, Washington D.C.).

¹⁸ Foreign Assistance Act 1822 U.S.C. § 2347.

Civilian Personnel Law Notes

Drafting Charges: Multiplicity and Lesser-Included Offenses

The Merit Systems Protection Board (MSPB or Board) recently highlighted the skill necessary in drafting proper charges in unusual circumstances. When an Army employee used a government vehicle to put a wounded deer in a restricted area out of its misery, Fort Eustis suspended him for forty-five days for misuse of a government vehicle and conduct unbecoming a federal employee.¹

The employee appealed the suspension to the Board and argued that the charges improperly had been interrelated and that they were multiplicitous because two acts of misconduct were charged for a single offense.² In *Miles v. Department of the Army*, the MSPB held that the employee had engaged in two acts of misconduct. The first offense—misuse of a government vehicle³—was complete when the employee used it to go into a restricted area; the second offense—conduct unbecoming a federal employee—occurred when he used the vehicle intentionally to run over and kill the already wounded deer, a purpose for which the vehicle was not approved.⁴

The issue of multiplicity in *Miles* should be contrasted with the burden of having to prove the charges in another recent Board case, *Weaver v. Department of Agriculture*.⁵

As background to *Weaver*, the Federal Circuit, in *Burroughs v. Department of the Army*,⁶ established the rule that the MSPB is without authority to split a charge into its elements and sustain only a portion of them—that is, approve a

lesser-included offense. While the Board may not save an unproven charge in a decision letter, *Weaver* showed that no similar prohibition exists on an agency deciding official upholding of a lesser-included offense of a charge contained in a proposal letter.⁷

In other words, if an employee is charged with theft in the proposal letter, but during the reply the deciding official receives evidence that the taking was not with the intent to permanently deprive, that evidence must be weighed carefully. The deciding official is free to reject the charge of theft in favor of the lesser-included offense of misappropriation. The Board's review then would consider if the Army proved misappropriation by a preponderance of the evidence. If the deciding official sustains the charge of theft, however, the Board review would require the Army to prove theft. Failure to prove theft would result not only in overturning the charge, but the adverse action as well. Mr. Meisel.

PMRS Performance-Based Cases

The MSPB recently highlighted that, in addition to the difference between step increases and merit increases, subtle distinctions exist between employees on the General Schedule (GS) and those on the Performance Management Recognition System (PMRS).⁸

In *Romero v. Equal Employment Opportunity Commission*,⁹ the Board was reviewing the demotion of a PMRS GM-14 supervisory trial attorney (civil rights) to the GS-13 position of trial attorney for marginal performance.¹⁰ Having previously addressed the issue,¹¹ the MSPB reaffirmed its position

¹Miles v. Department of the Army, No. PH075292032011 (M.S.P.B. Nov. 27, 1992).

²Numerous cases have held that an agency cannot charge the same misconduct twice. See, e.g. *Southers v. Department of Veteran's Administration*, 813 F.2d 1223 (Fed. Cir. 1987).

³31 U.S.C. § 1349(b) provides that an employee who willfully uses or authorizes the use of a passenger motor vehicle owned or leased by the United States for an unofficial purpose shall be suspended for at least one month.

⁴*Miles* No. PH075292032011.

⁵*Weaver v. Department of Agriculture*, No. DE075291048I1 (M.S.P.B. Nov. 23, 1992).

⁶*Burroughs v. Department of the Army*, 918 F.2d 170 (Fed. Cir. 1990).

⁷*Weaver* No. DE0752910408I1.

⁸The General Schedule was created by 5 U.S.C. § 5332. 5 U.S.C. § 5335, provides for periodic step increases for GS employees. The PMRS was established by 5 U.S.C. ch. 54. PMRS employees receive an annual merit increase, tied to the summary rating of the last performance appraisal, under 5 U.S.C. § 5405.

⁹*Romero v. Equal Employment Opportunity Comm'n*, No. DE04329110308 (M.S.P.B. Nov. 9, 1992).

¹⁰Marginal performance is not unsatisfactory performance. The former involves the failure of a noncritical performance element, while the latter centers around the failure of a critical element. To demote or remove a GS employee for marginal performance is inappropriate. See *Colgan v. Navy*, 28 M.S.P.R. 116 (1985).

¹¹See *Hsieh v. Defense Nuclear Agency*, 51 M.S.P.R. 521 (1991).

that, in accordance with 5 U.S.C. § 4302a(b)(5) and (6) and 5 C.F.R. § 430.405, PMRS employees may be removed for anything less than fully successful performance.¹² In *Romero*, the prohibition on the use of "backwards standards"¹³ was found to be inapplicable to PMRS employees.

As to the standards, the Board upheld, as not invalidly vague, subjective performance standards that left to the rater's discretion the number or percentage of untimely submissions by a supervisory attorney that would result in a rating of "fully successful." In other words, despite the intention that standards generally should be as objective as possible, with indicators of quantity, quality, and timeliness, the Board will show deference to agency judgment concerning the level of objectivity for standards for professional employees. Mr. Meisel.

Labor Relations Note

Mandating Employee Participation in TQM Teams

In *American Federation of Government Employees, Local 2612 and U.S. Department of the Air Force, Griffiss Air Force Base, Rome Laboratory*,¹⁴ the Federal Labor Relations Authority (FLRA or Authority) found that a proposal making employee participation in total quality management (TQM) teams "purely voluntary" was nonnegotiable.

The agency had argued that the proposal directly and excessively interfered with its rights to direct employees, assign work, assign employees, and take disciplinary action. According to the agency, the proposal directly violated section 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute.

American Federation of Government Employees, Local 2612 (the union) contended that the proposal constituted an appropriate arrangement under section 7106(b)(3) of the statute because it would alleviate the adverse effects on unit employees regarding management's exercise of the right to assign work and direct employees. The union further claimed that the proposal was designed to prevent the performance of a TQM group as a whole from resulting in "lowering the [performance] rating" of an individual team member.

In dismissing the union's petition, the Authority reiterated that the right to assign work under section 7106(a)(2)(B) includes the right to assign particular duties, including duties that are unrelated or incidental to an employee's position description. The Authority further noted that the subject pro-

posal would preclude management from assigning qualified employees to the TQM team even in situations when, for example, insufficient volunteers existed. Although the Authority agreed that participation in a TQM team assignment could have adverse professional consequences on an employee found to have been critical of his or her supervisor, it nevertheless concluded that the proposal excessively interfered with the Agency's right to assign work.

This decision is noteworthy in light of the recent emphasis on TQM in the Army and the resulting development of TQM teams and programs. Although the program is primarily for the benefit of the individual employees, an essential ingredient is the requirement that participation be broad-based and include a wide cross-section of Department of the Army civilians. The Authority in this decision prevented the union from limiting effective establishment of the TQM program. Individual commands should scrutinize closely any union proposal that might likewise hamper the Army's TQM effort. Major Willson.

Practice Pointer

All Hearings Are Important

Labor counselors engage in a wide variety of practice and employment law, labor relations law, and discrimination law are among the more dynamic of these pursuits. Nevertheless, one of the least glamorous areas—state unemployment compensation hearings—may have lasting effects on these other areas.

In *Baldwin v. Rice*,¹⁵ an Air Force electrician had worked for seven months prior to February 1990, when, as a result of a hand injury, he was restricted to light duty. Absent without leave (AWOL) charges and an allegation of reporting for work with alcohol on his breath subsequently were filed. He refused to take a breathalyzer test and shortly thereafter, during the probationary period in March 1990, the employee was discharged. The employee filed an equal employment opportunity complaint that eventually wound up in federal district court in December 1991.

At a pretrial proceeding, the former employee introduced into evidence the decision of an administrative law judge (ALJ) of the California Unemployment Appeals Board. At the May 1990 hearing for unemployment compensation benefits, the ALJ heard testimony from the former employee and his supervisor, and made a specific finding—the odor on the

¹²Both marginal and unsatisfactory summary ratings are below the fully-successful level.

¹³Backwards performance standards inform employees of what they should not do, and fail to inform them what is necessary to attain acceptable performance. See *Willson v. Department of Health and Human Servs.*, 770 F.2d 1048 (Fed. Cir. 1985); see also *Eibel v. Department of the Navy*, 857 F.2d 1439 (Fed. Cir. 1988).

¹⁴*American Federation of Government Employees, Local 2612 and U.S. Department of the Air Force, Griffiss Air Force Base, Rome Laboratory*, 46 F.L.R.A. No. 56 (1992).

¹⁵*Baldwin v. Rice*, 144 F.R.D. 102, 60 Fair Empl. Prac. Cas. (BNA) 153 (E.D. Cal. 1992).

electrician's breath was caused by his mouthwash and not by an alcoholic beverage.

Despite agency objections that the unemployment compensation findings would be unduly prejudicial and would tend to confuse the court, a United States magistrate ruled that the findings were highly relevant, but should not be given final or preclusive effect under the principles of *res judicata* or collateral estoppel.

Labor counselors should be involved in their installation's handling of unemployment compensation cases. Each state has differing statutes, regulations, and case law with which the

representative must become familiar. All states, however, recognize that an employee fired for misconduct should not be entitled to unemployment compensation.¹⁶ The effort expended in contesting unwarranted unemployment benefits may result not only in saving taxpayer dollars, but also in precluding adverse evidence in other forums. Mr. Meisel.

Share This Information with the Rest of the Team

Be sure to pass these Labor and Employment Law Notes to the rest of the labor-management team. Share this information with your civilian personnel officer and your equal employment opportunity officer.

¹⁶The definition of "misconduct" itself varies state-by-state and is not synonymous with the term as used in the *Federal Personnel Manual* or Army regulations.

Regimental News From the Desk of the Sergeant Major

Sergeant Major John A. Nicolai

Court Reporting Information

The Judge Advocate General's Corp (JAGC) faces a growing shortage of qualified court reporters. I encourage all legal noncommissioned officers (NCOs) and specialists meeting the prerequisites to consider applying for this specialized training. Additional skills increase a soldier's versatility and, as the Army undergoes reorganization and downsizing, versatility and expanded capability will be the key to our future successes in the JAGC.

Army court reporters are trained at the Naval Justice School, Newport, Rhode Island. Approximately twenty Army students make up part of the three classes held annually. This represents about six percent of the total enlisted student body. The court reporting course is open to all enlisted components of the JAGC—active, Reserve component, and National Guard. Additionally, one two-week course is designed specifically for the Reserve component.

To qualify for attendance, applicants must score at least a twelfth-grade level in English reading comprehension and composition; successfully type forty net words-per-minute; have nine months' retention on active duty upon completion of the course; be interviewed by the chief legal NCO of the command; and have a clerical score of 110 or higher. Applicants must be high-school graduates and qualified in military occupational specialty 71D. Qualifications can be found in

Department of the Army Pamphlet 351-4, table 9-6, and *Army Regulation 611-201*.

When an applicant reports for his or her interview, I expect the chief legal NCO to be candid in his or her assessment concerning the applicant's capability to pass the course and, more importantly, to be an effective court reporter. The focus of this interview should be on the applicant's written or oral communicative skills. We are doing a disservice to our soldiers and the JAGC by recommending a soldier who likely will have difficulty passing the course. Applications must be processed through the chain of command, including the command's reclassification authority, who in turn will forward the application to United States Army Personnel Command (PERSCOM). Waivers of the prerequisites will be handled on a case-by-case basis.

The formal application must include the following:

- a. Statement of interview and recommendation from the chief legal NCO.
- b. Hearing test.
- c. Typing test (administered by the Education Center).
- d. Statement from the commander (verifying height, weight and physical training qualification of the applicant).

e. Copy of 2A and 2-1.

f. TABE-D test.

g. RETAIN worksheet (from reenlistment office or post reclassification authority).

The course is taught jointly by Army and Navy representatives and consists of five weeks of intense training. During the first week, Army students receive computer training, typing tests, a basic grammar test, grammar and word usage classes, and familiarization in closed microphone reporting. On the fifth day Army, Navy, and Coast Guard students are combined to form one class for the remainder of the course. Live dictation for transcription is performed daily. Each transcript is evaluated and followed by a one-on-one counselling session. Because many students have displayed common grammatical deficiencies, basic grammar is now part of the training. The grammar classes principally include fundamentals of speech, spelling, dictionary use, punctuation, subject and verb agreement, and correct use of pronouns.

Chief legal NCOs must be active in the application process. The Office of The Judge Advocate General (OTJAG) liaison personnel at PERSCOM must be kept informed of pending applications so they can monitor class dates, status of applicants, and follow-on assignments. Upon submission of the application, the chief legal NCO should forward a copy of the application to Commander, PERSCOM, ATTN: TAPC-EPM-A, (SFC Ray/SFC Darbasie), 2461 Eisenhower Avenue, Alexandria, Virginia 22331-0454.

Questions concerning the course should be directed to the Naval Justice School, Paralegal Division, ATTN: Army Representative, (SFC Debra Hunt), 360 Elliot Street, Newport, Rhode Island 02841-1523, DSN 948-3808/4408. Questions concerning application procedures should be directed to the OTJAG Liaison to PERSCOM, (SFC Ray/SFC Darbasie), DSN 221-9661.

Guard and Reserve Affairs Item

*Judge Advocate Guard and Reserve Affairs Department,
TJAGSA*

Improper Wear of the Army Uniform

Occasionally, members of the National Guard and Army Reserve wear the Army uniform in inappropriate situations. These circumstances typically involve the promotion of commercial or political interests. Moreover, opinions by the Office of the Judge Advocate General reveal that this has been a persistent problem. An information paper prepared by the Standards of Conduct Office, Office of The Judge Advocate

General, defines the times and circumstances when wearing the Army uniform is prohibited. The information paper will be distributed at the remaining academic year (AY) 1993 on-site training programs (on-sites), the Reserve Component Workshop, and all AY 1994 on-sites. Copies may be requested through the Guard and Reserve Affairs Department, ATTN: JAGS-GRA (MAJ Sposato), Charlottesville, VA 22901-1781, or by fax at (804) 972-6386.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE

courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course. Active duty service members must obtain quotas

through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

- 17-21 May: 36th Fiscal Law Course (5F-F12).
- 17 May-4 June: 36th Military Judges Course (5F-F33).
- 18-21 May: 93 USAREUR Operational Law CLE (5F-F47E).
- 24-28 May: 43rd Federal Labor Relations Course (5F-F22).
- 7-11 June: 118th Senior Officer Legal Orientation Course (5F-F1).
- 7-11 June: 23rd Staff Judge Advocate Course (5F-F52).
- 14-25 June: JA Officer Advanced Course, Phase II (5F-F58).
- 14-25 June: JA Triennial Training (5F-F57).
- 12-16 July: 4th Legal Administrators Course (7A-550A1).
- 14-16 July: 24th Methods of Instruction Course (5F-F70).
- 19 July-24 September: 131st Officer Basic Course (5-27-C20).
- 19-30 July: 132nd Contract Attorneys Course (5F-F10).
- 2 August 93-13 May 94: 42nd Graduate Course (5-27-C22).
- 2-6 August: 54th Law of War Workshop (5F-F42).
- 9-13 August: 17th Criminal Law New Developments Course (5F-F35).
- 16-20 August: 11th Federal Litigation Course (5F-F29) (formally conducted in October/November).
- 16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).
- 23-27 August: 119th Senior Officer Legal Orientation Course (5F-F1).

30 August-3 September: 16th Operational Law Seminar (5F-F47).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

July 1993

1-4: NIBL, Western Mountains Bankruptcy Law Institute, Jackson Hole, WY.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1993 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
North Carolina**	28 February of succeeding year
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually

Jurisdiction	Reporting Month
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially

Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the January 1993 issue of *The Army Lawyer*.

*Military exempt

**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within 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 being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

- AD A239203 Government Contract Law Deskbook Vol 1/ JA-505-1-91 (332 pgs).
- AD A239204 Government Contract Law Deskbook, Vol 2/ JA-505-2-91 (276 pgs).
- AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
- AD A248421 Real Property Guide—Legal Assistance/JA-261-92 (308 pgs).
- AD B147096 Legal Assistance Guide: Office Directory/ JA-267-90 (178 pgs).

- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
- AD A246325 Soldiers' and Sailors' Civil Relief Act/JA-260(92) (156 pgs).
- AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).
- AD A244032 Family Law Guide/JA 263-91 (711 pgs).
- AD A241652 Office Administration Guide/JA 271-91 (222 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).
- AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).
- AD A259022 Tax Information Series/JA 269(93) (117 pgs).
- AD A256322 Legal Assistance: Deployment Guide/JA-272(92)
- *AD A260219 Air Force All States Income Tax Guide—
January 1993
- Administrative and Civil Law**
- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- *AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).
- AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).
- AD A255064 Government Information Practices/JA-235(92) (326 pgs).
- *AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

- AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).
- AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine and Literature

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

Criminal Law

- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
- *AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).
- AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).
- AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).
- AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).
- AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).
- AD A233621 United States Attorney Prosecutors/JA-338-91 (331 pgs).

Reserve Affairs

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

The following CID publication also is available through DTIC:

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

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander

U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *AR 25-30* is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) *Units organized under a 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 DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. 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.)

(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 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, 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) *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 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *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 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. 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 Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

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 Baltimore USAPDC at (301) 671-4335.

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

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DoD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

- 1) Active duty Army Judge Advocates;
- 2) Civilian attorneys employed by the Department of the Army;
- 3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;
- 4) Active duty Army legal administrators, noncommissioned officers, and court reporters;
- 5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;
- 6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS);
- 7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Officer
 Attn: LAAWS BBS SYSOPS
 Mail Stop 385, Bldg 257
 Fort Belvoir, Va. 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 805-3988, or DSN 655-3988 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\ prompt. 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/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip[space]xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *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>
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review Article.
505-1.ZIP	June 1992	Volume 1 of the May 1992 Contract Attorneys Course Deskbook.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys Course Deskbook.
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, Nov. 1991.
93CLASS.ASC	July 1992	FY TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY TJAGSA Course Schedule; ASCII.
93CRS.EN	July 1992	FY TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	<i>The Army Lawyer/ Military Law Review Database (Enable 2.15). Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.</i>
CCLR.ZIP	September 1990	Contract Claims, Litigation, Litigation, & Remedies
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook
FSO_201.ZIP	October 1992	Update of FSO Automation Program
JA200A.ZIP	August 1992	Defensive Federal Litigation, Part A, Aug. 92
JA200B.ZIP	August 1992	Defensive Federal Litigation, Part B, Aug. 92
JA210.ZIP	October 1992	Law of Federal Employment, Oct. 92
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations, July 92

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction	JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text, May 92
JA235-92.ZIP	August 1992	Government Information Practices, July 92. Updates JA235.ZIP.	JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, Mar. 92
JA235.ZIP	March 1992	Government Information Practices	JA337.ZIP	July 1992	Crimes and Defenses Deskbook, July 92
JA241.ZIP	March 1992	Federal Tort Claims Act	JA4221.ZIP	May 1992	Operational Law Handbook, Disk 1 of 2
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Update, Sept. 92	JA4222.ZIP	May 1992	Operational Law Handbook, Disk 2 of 2
JA261.ZIP	March 1992	Legal Assistance Real Property Guide	JA509.ZIP	Oct 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, & Remedies Course held Sept. 92
JA262.ZIP	March 1992	Legal Assistance Wills Guide	JAGSCHL.ZIP	Mar 1992	JAG School Report to DSAT
JA267.ZIP	March 1992	Legal Assistance Office Directory	ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook. Aug. 92
JA268.ZIP	March 1992	Legal Assistance Notarial Guide	V1YIR91.ZIP	January 1992	Section 1 of the TJAGSA's Annual Year in Review for CY 1991 as presented at the Jan 92 Contract Law Symposium
JA269.ZIP	March 1992	Federal Tax Information Series	V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide	V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.	YIR89.ZIP	January 1990	Contract Law Year in Review—1989
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References			
JA275.ZIP	March 1992	Model Tax Assistance Program			
JA276.ZIP	March 1992	Preventive Law Series			
JA281.ZIP	March 1992	AR 15-6 Investigations			
JA285.ZIP	March 1992	Senior Officers' Legal Orientation			
JA285A.ZIP	March 1992	Senior Officers' Legal Orientation Part 1/2			
JA285B.ZIP	March 1992	Senior Officers' Legal Orientation Part 2/2			
JA290.ZIP	March 1992	SJA Office Manager's Handbook			
JA301.ZIP	July 1991	Unauthorized Absence—Programmed Text, July 92			
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992			

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA), having a bona fide military need 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 Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions concerning 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, SFC Tim Nugent, COMM (703) 805-2922, DSN 655-2922, or at the address in paragraph a, above.

Mrs. Cheryl S. Fields
U.S. Army Chemical and Biological Defense Agency
Aberdeen Proving Ground, Maryland 2101-5423

DSN 584-1288
Commercial (410) 671-1288 or 671-2289

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System

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. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 274-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address below.

Copies Available

Item Description

2	Decisions of the Comptroller General of the United States, March 1992, vol. 71, pp. 289-342
2	Decisions of the Comptroller General of the United States, April 1992, vol. 71, pp. 343-381
2	Decisions of the Comptroller General of the United States, May 1992, vol. 71, pp. 383-420
2	Decisions of the Comptroller General of the United States, June 1992, vol. 71, pp. 421-445

6. Errata

a. *The Role of the Military in Emerging Democracies*, an international law note printed in the December 1992 issue of *The Army Lawyer*, incorrectly identified the hosts of a conference for the emerging democracies of Central and Eastern Europe as the "European Community." The conference, however, was organized, planned, and run by the European Command—specifically, COL Jim Burger, LTC Dick Ketter, and the Office of the Legal Advisor, European Command.

b. *Using the Uniformed Former Spouses' Protection Act to Collect Child Support*, a family law note printed in the January 1993 issue of *The Army Lawyer*, incorrectly listed the address for the Army's designated agent for service. The correct address is:

Defense Finance and Accounting Center
Indianapolis Center
ATTN: DFAS-IN-DGG, MAIL STOP 22
8899 East 56th Street
Indianapolis, IN 46249-0160

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By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

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