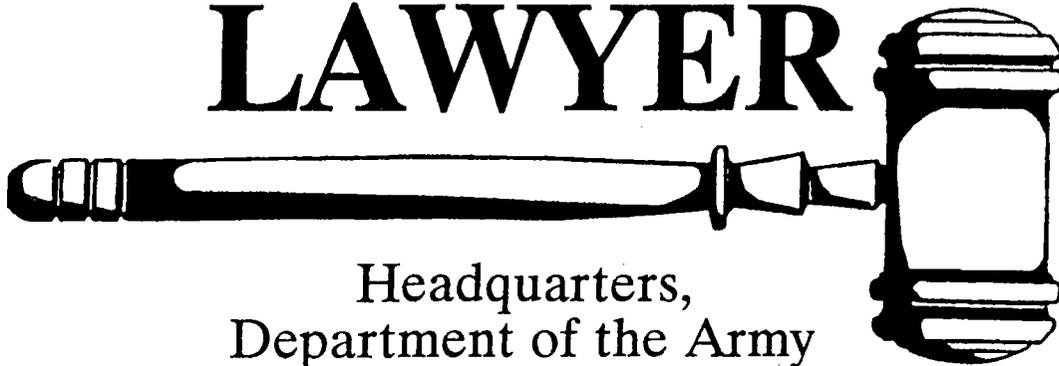


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Editor

Captain John B. Jones, Jr.

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Death and Dying in Army Hospitals: The Past and Future Roles of Advance Medical Directives

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*Vex not his ghost: O, let him pass! He hates him much that would upon the rack of this tough world stretch him out longer.*¹

Introduction

Of the approximately two million Americans who die each year, eighty percent die in hospitals, and perhaps seventy percent of those die after a decision is made to forego life-extending measures.² Given the choice, most Americans do not want their lives hopelessly prolonged by machines. I believe that the soldiers, retirees, and dependents treated in Army hospitals worldwide are no different in this respect.

The medical, ethical, and legal issues surrounding artificial life support are still evolving. Science and medicine have advanced to the point that life often can be prolonged indefinitely. These medical interventions are greeted with skepticism in a variety of quarters. The debate over a person's quality of life and the right to die began in state courts and legislatures. The United States Supreme Court and the United States Congress have now entered the arena. The result is an emotionally charged area of law and medicine with differing guidance from differing jurisdictions. The ultimate result is a challenging and evolving area of law for Army attorneys. To effectively assist patients and clients, Army attorneys will be challenged to remain current and competent with guidance from the Joint Commission on Accreditation of Hospitals (JCAH), conflicts of law between adjoining states, and new developments in the area of advance medical directives.

This article addresses the historical background behind the "right to die" or "death with dignity" movement; the landmark cases in this area; the burgeoning use of living wills or advance directives; the Patient Self Determination Act and its impact on the Army; and the unique challenges and opportunities for Army attorneys to assist both patients and health care providers in the future. The article concludes with a recom-

mendation for passage of a federal statute authorizing a military advance medical directive.

Historical Background

Between 1900 and today, the causes of death have changed dramatically. In the past, influenza, pneumonia, and other communicable diseases were the most common causes of death.³ Today, chronic degenerative diseases such as cancer, heart disease, and strokes are the most common causes of death.⁴ Modern medical technology also has greatly increased the ability of doctors and hospitals to save, and then maintain indefinitely, the lives of patients who in the past had slim prospects for recovery. For almost any life-threatening condition, some intervention can now delay the moment of death. Frequent dramatic breakthroughs—insulin, antibiotics, resuscitation, chemotherapy, kidney dialysis, and organ transplants, to name but a few—have made it possible to arrest many conditions that until recently were regarded as fatal.⁵

Life and death matters that were once the province of fate are now a matter of choice. Moreover, modern technology often renders patients less able to communicate or to direct their course of treatment.⁶ The unappealing thought of being maintained by machines—which determine in varying degrees one's quality of life—has led many to assert that people have a "right to die" or to "die with dignity." This conflict between medical advances and the right to die was brought into sharp focus eighteen years ago with the seminal *Quinlan* opinion.⁷ When Karen Quinlan became comatose in 1975, no state recognized a patient's right to set limits on life prolonging medical efforts.

The Case of *in re Quinlan*

On the night of April 15, 1975, for reasons still unclear, Karen Quinlan ceased breathing for at least two fifteen-minute

¹ THE COMPLETE WORKS OF WILLIAM SHAKESPEARE, KING LEAR act V, sc. III, 1092 (William George Clark & William Aldis Wright eds., Grosset & Dunlap 1911).

² 139 CONG. REC. E882-01 (daily ed. April 1, 1993) (statement of Hon. Calvin M. Dooley).

³ *Deciding to Forego Life-Sustaining Treatment*, PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH 16 (March 1983).

⁴ *Id.*

⁵ *Id.* at 1.

⁶ *Id.*

⁷ *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976).

periods.⁸ On arrival at the hospital, her pupils were unreactive to light and she was unresponsive to noxious stimuli.⁹ Her physicians characterized her condition as a "chronic persistent vegetative state."¹⁰ From the time of her admission to the hospital, Karen was assisted by a respirator. Attempts to "wean" her from the respirator were unsuccessful and then abandoned.¹¹ Several months later, after Karen's doctors refused to discontinue the respirator because they thought to do so would violate accepted medical practice, Joseph Quinlan, Karen's father, petitioned the New Jersey courts for permission to disconnect the respirator. The New Jersey Supreme Court granted the request on the concurrence of her guardian, her attending physicians, and the hospital's ethics committee.¹² The court held

If that consultative body agrees that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn and said action shall be without any civil or criminal liability therefor on the part of any participant, whether guardian, physician, hospital or others.¹³

For a generation following the *Quinlan* decision, civilian communities and health care institutions enacted policies and statutes dealing with orders against resuscitation and withdrawing life support.¹⁴ Those limits are now set out in statutes termed "advance directives."

In general, advance directives are written instructions recognized under various state laws relating to the provision of health care when a person is unable to communicate his wishes regarding medical treatment. The advance directives may either be a written document authorizing an agent or surrogate

to make decisions on another person's behalf (such as a durable power of attorney for health care), or a written statement (such as a living will). Today, advance directives exist to enhance the ability of persons to have their life-sustaining treatment desires carried out if they become unable to make their own medical treatment decisions.

The Case of *Tune v. Walter Reed Army Medical Hospital*

The Army also has struggled with orders against resuscitation and the withdrawal of life support.¹⁵ Until 1985, the Army Surgeon General's position was that "[n]either the 'Directive to Physicians' (State of Texas Natural Death Act) nor any similar directives regarding the withholding or withdrawal of life-sustaining procedures will be accepted or honored by Army Medical Treatment Facility [MTF] personnel."¹⁶ On February 15, 1985, *Army Regulation (AR) 40-3* changed that position with respect to "Do Not Resuscitate Orders."¹⁷ However, *AR 40-3* did not address withdrawal of life support.

Less than two weeks after the change in Army policy, the Army Surgeon General's policy against withdrawal of life support was challenged in United States District Court. The resulting decision is now one of the seminal right to die cases.

On February 21, 1985, Mrs. Martha Tune, the widow of an Army officer, was admitted to Walter Reed Army Medical Center.¹⁸ Initially suspected of having pneumonia, Mrs. Tune was placed on a respirator shortly after admission.¹⁹ Subsequent tests revealed the presence of a malignant form of cancer. She then developed adult respiratory distress syndrome (ARDS) and became respirator dependent. Her malignancy and lung disease created a mortality rate approaching 100 percent. Mrs. Tune requested that she be removed from the respirator. The doctors were unable to comply with her wishes

⁸*Id.* at 653-54.

⁹*Id.*

¹⁰*Id.* at 654.

¹¹*Id.* at 655.

¹²*Id.* at 671.

¹³*Id.*

¹⁴*Deciding to Forego Life-Sustaining Treatment*, *supra* note 3, apps. G, I.

¹⁵This article will not address the specific topics of "Do Not Resuscitate Orders" or "Withdrawal of Life Support." For an excellent article on these topics, see William A. Woodruff, *Letting Life Run Its Course: Do-Not-Resuscitate Orders and Withdrawal of Life-Sustaining Treatment*, *ARMY LAW.*, Apr. 1989, at 6.

¹⁶*Deciding to Forego Life-Sustaining Treatment*, *supra* note 3, at 520.

¹⁷DEP'T OF ARMY, REG. 40-3, MEDICAL SERVICES: MEDICAL, DENTAL, AND VETERINARY CARE, ch. 19 (15 Feb. 1985) [hereinafter *AR 40-3*].

¹⁸*Tune v. Walter Reed Army Medical Hosp.*, 602 F. Supp. 1452, 1453 (D.D.C. 1985).

¹⁹*Id.*

because of Army medical policy. When told by the guardian ad litem that if the respirator was removed she would “very likely quickly die, probably immediately,” she acknowledged and affirmed that she nevertheless wanted to do so, with “no reservations at all.”²⁰ Mrs. Tune then petitioned the United States District Court in the District of Columbia for an order directing that she be disconnected from life support systems. The court found no federal precedent in its circuit or elsewhere determining the rights of competent patients in federal institutions receiving therapy intended merely to prolong life in the face of mortal illness.²¹ The court noted “[that] it is now a well-established rule of general law, as binding upon the government as it is upon the medical profession at large, that it is the patient, not the physician, who ultimately decides if treatment—any treatment—is to be given at all.”²² After reviewing various state interests in preserving life, the court held that competent adult patients of federal medical facilities with terminal illnesses have a right to determine for themselves whether to allow their lives to be prolonged by artificial means, including the right to demand the cessation of life support once begun.²³ On February 28, 1985, the court ordered the removal of life support from Mrs. Tune.²⁴

On 30 August 1985, by letter, the Army Surgeon General implemented policies and procedures for the accomplishment of withdrawal of life-sustaining treatment within the Army Medical Department (AMEDD).²⁵ The procedures were to be published in AR 40-3 at its next “Update” printing. Publishing of this important policy within an Army regulation has yet to occur.

In the decade that followed the *Quinlan* decision, the right to die movement began to grow. By 1983, the President’s

Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research made a decision to go outside their original legislative mandate and prepare a report on “Deciding to Forego Life-Sustaining Treatment.”²⁶ At the time of the report, fourteen states and the District of Columbia had enacted statutory authorization for the formulation of advance directives (also known as living wills or directives to physicians) to forego life sustaining treatment.²⁷ California led the way in 1976 with the passage of its Natural Death Act.²⁸ In addition, by 1983, forty-two states had enacted durable powers of attorney statutes.²⁹

The Case of *Cruzan v. Missouri Department of Health*

The need for advance medical directives, or living wills, was brought into sharp focus in 1990 with the landmark United States Supreme Court case of *Cruzan v. Director, Missouri Department of Health*.³⁰ On the night of January 11, 1983, Nancy Cruzan lost control of her car and crashed.³¹ She was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state.³²

After it became apparent that Nancy Cruzan had virtually no chance of regaining her mental faculties, her parents asked the hospital to terminate the artificial nutrition and hydration procedures. All parties agreed that such a removal would cause Nancy’s death. The hospital refused to grant the parents’ request without court approval.³³ The parents then sought and received authorization from the state trial court for termination. The Supreme Court of Missouri reversed by a divided vote. The Missouri Supreme Court recognized a right

²⁰ *Id.* at 1453.

²¹ *Id.* at 1455.

²² *Id.*

²³ *Id.* at 1456.

²⁴ *Id.*

²⁵ Letter, Dep’t of Army Adjutant General, subject: Surgeon General’s Policy on Withdrawal of Life-Sustaining Treatment (30 Aug. 1985).

²⁶ *Deciding to Forego Life-Sustaining Treatment*, *supra* note 3, “Letter to the President from Morris B. Abram, Chairman” (Mar. 21, 1983).

²⁷ *Id.* at 137, app. D.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Cruzan v. Director, Mo. Dept. of Health*, 110 S. Ct. 2841 (1990).

³¹ *Id.* at 2845.

³² *Id.*

³³ *Id.* at 2846.

to refuse treatment embodied in the common-law doctrine of informed consent, but expressed skepticism about the application in these circumstances. The court rejected the argument that Cruzan's parents were entitled to order the termination of her medical treatment, concluding that "no person can assume that choice for an incompetent in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here."³⁴

The United States Supreme Court granted certiorari to consider whether Nancy Cruzan had a right under the United States Constitution that would require the hospital to withdraw life-sustaining treatment. After a lengthy review of the prior cases involving the right to refuse life-sustaining treatment, the Court noted: "[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse life-saving hydration and nutrition."³⁵ However, the Court held that the United States Constitution does not forbid the establishment of a procedural requirement by Missouri to require that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence.³⁶ The Supreme Court's decision in *Cruzan* compelled many states to enact statutes providing for advance directives and living wills. The clear and convincing standard endorsed by the Court makes it more difficult for a family to refuse unwanted treatment and makes the use of advance directives all the more essential.

Shortly after *Cruzan*, the Army Surgeon General authorized the filing of living wills in health records, outpatient treatment records, and inpatient treatment records. By letter dated November 9, 1990, Brigadier General Blanck, stated as follows:

This decision reverses the 1985 policy which stated that living wills will not be accepted by the Army Medical Treatment Facilities (MTF) for filing in the patient's medical record. The decision to file living

wills (also known as advance directives by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO)) was reached after extensive staffing.³⁷

The Patient Self-Determination Act

Less than six months after the Supreme Court decided *Cruzan*, Senator John Danforth (R. Missouri), a member of the Senate Finance Committee, attached the Patient Self-Determination Act to the Omnibus Budget Reconciliation Act of 1990. The President signed the acts into law on November 5, 1990.³⁸ The Patient Self-Determination Act is the first significant federal legislation concerning the use of advance medical directives to control health care treatment decisions. The purpose of the Patient Self-Determination Act is to inform the public about, and increase the use of, advance directives.³⁹

The Patient Self-Determination Act applies to all health care institutions, including hospitals, skilled nursing facilities, hospices, home care programs, and HMOs that receive Medicare and Medicaid. It requires that all individuals receiving medical care be given written information about their rights under state law—whether statutory or as recognized by the courts of the state—to make decisions about medical care. This includes the right to accept or refuse medical or surgical treatment. They also must be given information about their rights to draft advance directives such as living wills and durable powers of attorney for health care.⁴⁰ The medical facility must provide the information on the patient's admission as an inpatient. The patient's record must then be annotated to reflect whether he or she has executed an advance directive.⁴¹ The health care provider or organization may not condition care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive. The health care organization also must provide education for staff and the community on issues concerning advance directives.⁴²

³⁴ *Id.*

³⁵ *Id.* at 2852.

³⁶ *Id.*

³⁷ Memorandum, to Commanders, U.S. Army Health Services Command; U.S. Army 7th Medical Command; and U.S. Army 18th Medical Command, subject: Placement of Living Will in Outpatient Treatment Records, Health Records, and In Patient Treatment Records (9 Nov. 1990).

³⁸ Pub. L. No. 101-508, 104 Stat. 1388-115 to -117 (1990).

³⁹ The Patient Self-Determination Act: Health Care's Own Miranda, 8 J. CONTEMP. HEALTH L. & POL'Y, 1992, at 455 (citing 136 CONG. REC. E2, 190 (June 28, 1990) (statement of Rep. Levin)).

⁴⁰ 42 U.S.C.A. § 1395cc (f)(1)(A)(i) (West 1994).

⁴¹ *Id.* § 1395cc (f)(1), (2), (3) (West 1991).

⁴² *Id.* § 1395cc(f) (1)(C), (E).

Because the Patient Self-Determination Act applies only to those health care organizations that receive Medicare or Medicaid, it does not directly apply to Army hospitals. However, in 1992, the Joint Commission on Accreditation of Hospitals (JCAH) followed suit, and adopted provisions similar to the Patient Self-Determination Act.⁴³ Because the JCAH accredits Army hospitals, the provisions of the Patient Self-Determination Act apply to all Army hospitals and MTFs.

Army Implementation of Advance Medical Directives

The United States Army Health Services Command went one step further, when, on 15 December 1992, it implemented *Health Services Command Regulation No. 40-33, Implementation of Advance Medical Directives*. The regulation expands the guidance provided in the statute. It affects hospital health care providers, patient administration personnel, and legal assistance personnel. Under the regulation, an advance medical directive is a written document which: (1) sets forth an individual's desire concerning the medical care to be received should that individual become incapable of making health care decisions or (2) gives another person the legal authority to make health care decisions on behalf of a person who has become mentally incapacitated.⁴⁴ Included within this definition are both living wills and durable health care powers of attorney. A living will may specify medical treatment that should be provided as well as that which should not.⁴⁵

Under the regulation, the most important player is the attending physician. The attending physician has the primary responsibility to discuss with the patient, on or prior to admission, information necessary to enable the patient to make treatment decisions that reflect the patient's wishes. The physician annotates this information in the patient admission record on the *Standard Form (SF) 509* (Progress Note).⁴⁶

When requested, the physician will advise patients on the medical aspects of advance medical directives and refer patients to the legal assistance office for legal advice.⁴⁷ The physician also will periodically review the advance medical directive with the patient or the patient's representative, or both. On completion of each review, the physician will document it in three different records.⁴⁸ In keeping with the statutory guidance, the physician should ensure that care is neither conditioned, nor the standard of care compromised, based on the existence or nonexistence of an advance medical directive.⁴⁹ The physician will honor all advance medical directives within the limits of the law. The regulation notes that failure of a physician to comply with an advance medical directive, or to transfer care to another physician, when appropriate, constitutes professional misconduct.⁵⁰

Under normal circumstances, during a patient's admission to an Army hospital, the admission clerk will ask if the adult patient has an advance medical directive. If the patient does have an advance medical directive, the clerk will include a copy in the admissions packet and the patient will retain the original. If the patient does not have an advance medical directive, the admissions clerk will give the patient an information sheet on advance medical directives, advise the patient to read it, and encourage the patient to discuss it with his or her physician or legal advisor if the patient is interested in preparing an advance medical directive.⁵¹ The patient is not required to execute, however, either an advance medical directive or power of attorney for health care.

The Future for Army Attorneys

The future of advance medical directives is a growth area for Army attorneys; attorney involvement is mandated. The *Health Services Command Regulation* states, "The Legal Assistance Office will provide legal advice to patients and to [hospital] staff concerning AMDs."⁵² The regulation also

⁴³ ACCREDITATION MANUAL FOR HOSPITALS xiv, 104 (1992).

⁴⁴ UNITED STATES ARMY HEALTH SERVICES COMMAND, REG. 40-33, IMPLEMENTATION OF ADVANCE MEDICAL DIRECTIVES, para. 4b (15 Dec. 1992).

⁴⁵ *Id.* para. 4e.

⁴⁶ *Id.* para. 5a(2). The physician also should inform the patient of the identity of all physicians with primary responsibility for his or her care, as well as any other health care professionals treating the patient. The physician should indicate in the note that he or she discussed the contemplated course of treatment with the patient, including what the patient is expected to do to assist in the treatment, and that the patient has understood and agreed. For nonroutine (unplanned, unscheduled) admissions, the admitting physician has the responsibility for initial discussions with the patient on whether or not the patient has an advance medical directive.

⁴⁷ *Id.* para. 5a.

⁴⁸ *Id.* para. 5a(4). The physician will document it on *SF 509*, *SF 600* (Chronological Record of Medical Care), and on *Department of the Army (DA) Form 5771* (Master Problem List).

⁴⁹ *Id.* para. 5a(5).

⁵⁰ *Id.* para. 6g.

⁵¹ *Id.* para. 5c.

⁵² *Id.* para. 5d.

indicates that the legal assistance office should prepare advance medical directives for persons who desire them. If requested, legal assistance personnel, whenever possible, will go to the ward to assist nonambulatory patients.⁵³ *Army Regulation 27-3, The Army Legal Assistance Program*, reinforces this concept, stating: "Priority will be given to handling the special needs of clients with life-threatening injuries or illnesses."⁵⁴

Army attorney involvement also will be required to draft information papers on advance medical directives. These papers will be made available in all clinics, nursing units, chaplain's offices, social work services, patient representative's offices, admission offices, and the offices of the judge advocate.

The need for Army attorneys becoming actively involved in providing advance medical directives is critical when one considers that almost every Army installation has an MTF. Whether one calls them clients or patients, dramas of life-threatening injuries and illnesses occur in those MTFs daily.

In fiscal year 1992, fifty-three Army MTFs recorded 3001 deaths.⁵⁵ Even with downsizing, the numbers only decreased slightly. In fiscal year 1993, 2776 deaths were recorded.⁵⁶ These statistics reflect active duty soldiers, retirees, and their dependents; people that Army attorneys are charged with assisting.

Unique Army Challenges

Training hospital staffs and providing assistance to clients regarding advance medical directives will be uniquely challenging to Army attorneys, largely because of two inherent problems and criticisms of advance medical directives and the resulting Patient Self-Determination Act. The first problem is that advance medical directives are creatures of state law, which has resulted in varying interpretations in fifty-one jurisdictions. Since 1976, forty-eight states and the District of Columbia have enacted living will statutes.⁵⁷ Thirteen jurisdictions also authorize the appointment of an agent in the living will statute, usually limiting the powers of the agent to carry out the termination of treatment only when the living will's conditions are met.⁵⁸ Typically, the patient must be in a

⁵³ *Id.* para. 5d(2).

⁵⁴ DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6b(4) (30 Sept. 1992).

⁵⁵ Letter, Dep't of Army, Directorate of Patient Administration Systems and Biostatistics Activities, Subject: Number of Deaths, Worldwide, FY 92-FY 93 (28 Feb. 1994).

⁵⁶ *Id.*

⁵⁷ Alabama Natural Death Act, ALA. CODE §§ 22-8A-1 to -10 (1990); Alaska Rights of the Terminally Ill Act, ALASKA STAT. §§ 18.12.010 to .100 (1986); Arizona Medical Treatment Decision Act, ARIZ. REV. STAT. ANN. §§ 36-3201 to -3210 (1986); Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, 1987 ARK. CODE ANN. §§ 20-17-201 to -218 (Michie Supp. 1989); California Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1991); Colorado Medical Treatment Decision Act, COLO. REV. STAT. §§ 15-18-101 to -113 (1987 & Brad Supp. 1990); Connecticut Removal of Life Support Systems Act, CONN. GEN. STAT. §§ 19a-570 to -75 (West Supp. 1990); Delaware Death with Dignity Act, DEL. CODE ANN. tit. 16, §§ 2501-2509 (1987); District of Columbia Uniform Determination of Death Act of 1981, D.C. CODE ANN. §§ 6-2421 to -2430 (1989); Florida Life-Prolonging Procedure Act, FLA. STAT. ANN. §§ 765.01 to .17 (1990); Georgia Living Will Act, GA. CODE ANN. §§ 31-32-1 to -2 (Michie 1990); Hawaii Medical Treatment Decisions Act, HAW. REV. STAT. §§ 327D-1 to -27 (Supp. 1990); Idaho Natural Death Act, IDAHO CODE §§ 39-4502 to -4509 (1990); Illinois Living Will Act, ILL. ANN. STAT. ch. 110 1/2, §§ 701-710 (West Supp. 1990); Indiana Living Wills and Life-Prolonging Procedures Act, IND. CODE ANN. §§ 16-8-11-1 to -22 (1990); Iowa Life Sustaining Procedures Act, IOWA CODE ANN. §§ 144A.1 to .11 (1989); Kansas Natural Death Act, KAN. STAT. ANN. §§ 65-28,101 to -28,109 (1985); Kentucky Living Will Act, KY. REV. STAT. ANN. §§ 311.622 to .644 (Michie Supp. 1990); Louisiana Life-Sustaining Procedures Act, LA. REV. STAT. ANN. §§ 40:1299.58.1 to .10 (West Supp. 1991); Maine Rights of Terminally Ill Act, ME. REV. STAT. ANN. tit. 22, § 5-701-14 J (West 1990); Maryland Life-Sustaining Procedures Act, MD. HEALTH-GEN. CODE ANN. § 5-601-14 (1990); Massachusetts: no living will statute, *but see* Health Care Proxy Act, MASS. GEN. L. ch. 201D (West 1991), *Brophy v. New England Sinai Hospital*, 497 N.E.2d 626 (Mass. 1986); Michigan Commission on Death and Dying, MICH. COMP. LAWS §§ 752.1021 to .1027 (1993); Minnesota Adult Health Care Decisions Act, MINN. STAT. ANN. §§ 145B.01 to .17 (West 1991); Mississippi Withdrawal of Life-Saving Mechanisms Act, MISS. CODE ANN. §§ 41-41-101 to -121 (L. Coop. Supp. 1990); Missouri Life Support Declarations Act, MO. STAT. ANN. §§ 459.010 to .055 (West Supp. 1991); Montana Living Will Act, MONT. CODE ANN. §§ 50-9-101 to -104, -111, -202 to -206 (1989); Nebraska: Rights of the Terminally Ill Act, NEB. REV. STAT. §§ 20-401 to -416 (1992); Nevada Withholding or Withdrawal of Life-Sustaining Procedures Act, NEV. REV. STAT. §§ 449.540 to .690 (1989); New Hampshire Terminal Care Document Act, N.H. REV. STAT. ANN. §§ 137-H:1 to 16 (1990); New Jersey Advance Directives for Health Care Act, N.J. REV. STAT. 26:2H-53 (1993); New Mexico Right to Die Act, N.M. STAT. ANN. §§ 24-7-1 to -11 (1986); New York: no living will statute, *but see* Health Care Agents and Proxies Act, N.Y. LAW §§ 2980-2991 (Consol. 1991), *In re Westchester County Medical Center*, 531 N.E.2d 607 (N.Y. 1988); North Carolina Right To Natural Death Act, N.C. GEN. STAT. §§ 90-320 to -323 (1990); North Dakota, Rights of Terminally Ill Act, N.D. CENT. CODE §§ 23-06.4-01 to -14 (1989); Ohio Uniform Rights of the Terminally Ill Act, OHIO REV. CODE ANN. § 2133.01 (Baldwin 1993); Oklahoma Natural Death Act, OKLA. STAT. ANN. tit. 63, §§ 3101-3111 (West Supp. 1991); Oregon Directive to Physicians Act, OR. REV. STAT. §§ 127.605 to .650 (1989); Pennsylvania Advance Directive for Health Care Act, 20 PA. CONS. STAT. § 5401 (1993); Rhode Island Rights of the Terminal Ill Act, R.I. GEN. LAWS § 23-4.11-1 (1993); South Carolina Death with Dignity Act, S.C. CODE ANN. §§ 44-77-10 to -160 (Law. Co-op. 1990); South Dakota Living Wills Act, S.D. CODIFIED LAWS ANN. § 34-12D-2 (1993); Tennessee Right To Natural Death Act, TENN. CODE ANN. §§ 32-11-101 to -110 (1990); Texas Natural Death Act, TEX. HEALTH & SAFETY CODE ANN. ch. 672 (1994); Utah Personal Choice and Living Will Act, UTAH CODE ANN. §§ 75-2-1101 to -1118 (1990); Vermont Terminal Care Document Act, VT. STAT. ANN. tit. 18, § 1801 (1990); Virginia Natural Death Act, VA. CODE ANN. §§ 54.1-2981 to -2992 (Michie 1990); Washington Natural Death Act, WASH. REV. CODE ANN. §§ 70.122.010 to .905 (1991); West Virginia Natural Death Act, W. VA. CODE 55 16-30-1 to -10 (1991); Wisconsin Natural Death Act, WISC. STAT. ANN. §§ 154.01 to .15; Wyoming Living Will Act, WYO. STAT. §§ 35-22-101 to -109 (1988).

⁵⁸ REFUSAL OF TREATMENT LEGISLATION, A STATE BY STATE COMPILATION OF ENACTED AND MODEL STATUTES I (Choice in Dying, Inc., 1992) [hereinafter REFUSAL OF TREATMENT].

"terminal condition," "permanently unconscious," or "persistently vegetative" before the living will may be given effect.

The area of substantive law posing the most controversy concerns the withdrawal of artificial hydration and nutrition. The statutes in certain states specifically prohibit or limit the withdrawal of nutrition and hydration.⁵⁹ While other states require a determination that tube feeding is necessary for "comfort care."⁶⁰ At least fourteen states specifically authorize the removal of life support, but their statutes do not address the withdrawal of artificial hydration or tube feeding.⁶¹ Another problem area is that the number of state laws which limit the applicability of a pregnant woman's advance directive concerning the withdrawal or withholding of life-sustaining treatment during the course of pregnancy.⁶²

While all fifty states recognize durable powers of attorney, thirty-three states and the District of Columbia have durable powers of attorney laws that permit agents to make medical decisions, specifically including decisions to withdraw or withhold life support. Two other states have court decisions, attorney general opinions, or other statutes that indicate that the broad general durable power of attorney also permits agents to make medical decisions, including those to withdraw or withhold life support.⁶³ Twenty states and the District of Columbia have statutory surrogate family decision-making provisions that authorize certain individuals to make treatment decisions on behalf of incompetent patients who have not left written instructions. Most of those provisions are found within the state's natural death or living will acts. Two other states have statutes that have been interpreted through court decisions to allow surrogate family decision making.⁶⁴ Army attorneys must be familiar with the law of their jurisdiction.

The second problem is our mobile society, which is even more profound in the military where individuals move on orders approximately every three years. Thus, a patient may appear at a hospital with another states' form to document their treatment choices. In cases where the patient is compe-

tent, an out-of-state form does not present a problem because the patient can always sign the in-state form provided on admission to the health care facility. In many cases, however, a patient who has signed an out-of-state form will be admitted at a time when he or she lacks the capacity to sign a new form which places the health care provider in a tenuous position. Should the unfamiliar form be honored even though it differs from the form sanctioned by local law? Or should the patient's written wishes be disregarded due to legal technicality?⁶⁵ Military health care professionals often look to Army attorneys to answer these hard questions.

Tools to Provide Assistance

The Choice in Dying organization can provide the best tool to provide current, competent assistance in this area of the law. Entitled "Refusal of Treatment Legislation," it contains a state-by-state compilation of living wills and health care proxy statutes. Each state's section contains both the legislative history and the applicable forms necessary to draft binding advance directives.

Additionally, as part of the information prong of the Patient Self-Determination Act, proactive preventive legal education should take place. Soldiers, retirees, and their dependents must be made aware that the validity of an advance directive will depend on the laws of the jurisdiction in which the member is ultimately hospitalized or treated. They also should be informed that legal offices will produce or update such documents to ensure that the documents conform to the state laws in which the member resides or will be treated.

While currently not in existence, the most appropriate tool to provide assistance in this area would be the enactment of a federal military advance medical directive. The military advance medical directive could be codified at 10 United States Code, § 1044c and be part of the legal assistance authorized the military services.⁶⁶ This statutory relief is needed because military service compounds the issues of uniformity

⁵⁹For examples, see Kentucky Living Will Act, KY. REV. STAT. §§ 311.622 to .644 (Michie Supp. 1990); Missouri Life Support Declarations Act, MO. CODE ANN. §§ 459.010 to .055 (West Supp. 1991); New Hampshire Terminal Care Document Act, N.H. REV. STAT. ANN. §§ 137-H: 1 to 16 (1990); Oklahoma Natural Death Act, OKLA. STAT. ANN. tit. 63, §§ 3101-3111 (West Supp. 1991).

⁶⁰For examples, see Ohio Uniform Rights of the Terminally Ill Act, OHIO REV. CODE ANN. 2133.01 (Baldwin 1993); Oregon Directive to Physicians Act, OR. REV. STAT. §§ 127.605 to .650 (1989); South Carolina Death with Dignity Act, S.C. CODE ANN. §§ 44-77-10 to -160 (Law . Co-op. Supp. 1990).

⁶¹Legal Assistance Items, *Living Wills Update*, ARMY LAW., July 1991, at 35.

⁶²REFUSAL OF TREATMENT, *supra* note 58, at 2.

⁶³*Id.* at 1. For Massachusetts law, see Health Care Proxy Act, Mass.Gen.L.Ch. 201D (West 1991), *Brophy v. New England Sinai Hospital*, 497 N.E.2d 626 (Mass. 1986). For New York law, see Health Care Agents and Proxies Act, N.Y. LAWS §§ 2980-2991 (Consol. 1991), *In re Westchester County Medical Center*, 531 N.E.2d 607 (N.Y. 1988).

⁶⁴See *supra* note 63.

⁶⁵139 CONG. REC. S195-02 (1993).

⁶⁶See *infra* Appendix A (suggested Department of Defense Directive).

and portability. A typical example of this is a soldier stationed in North Carolina, who deploys on an exercise to California, where he is severely injured and evacuated to a medical center in Texas. Furthermore, thousands of military personnel serve overseas where state laws cannot protect their medical wishes. Even with this federal legislation, overseas commanders will still need to be concerned with local nation laws and mores. If, and when, this much needed legislation passes, the resulting Department of Defense Directive should prescribe a form that recognizes the rights of individuals authorized to receive military legal assistance to control some aspects of their own medical care and treatment.⁶⁷

Conclusion

Even though many state laws statutorily make living wills effective only for terminal conditions, exclude pregnant women, fail to address the withdrawal of artificial hydration and nutrition, and may not be technically correct in another state's jurisdiction, an increasing number of competent clients will continue to use advance medical directives. These clients and the staffs of the various MTFs will look to Army attorneys to provide this assistance and Army attorneys should aggressively provide this assistance.

Army attorneys must recognize that hospitals are not the best setting for discussing and preparing written advance directives. Clients need to make choices that are not made in the immediacy of their pain, discomfort, fears, or the press of time. By being proactive and working with hospital staffs, Army attorneys can provide this service prior to most scheduled admissions. Army attorneys must educate both clients and hospital staffs that the written advance medical directive, made when one is competent, provides the "clear and convincing evidence" alluded to in the *Cruzan* decision. This helps eliminate the concern of many clients that advance directives are only binding for those patients with terminal conditions. When drafting advance directives, the client must understand that the Army provides for filing of advance directives in all forms of health records. Once filed, this information can assist physicians, families, and ethics panels at all MTFs, even those outside the United States, in determining the patient's wishes should he no longer be able to effectively make his wishes known.⁶⁸ Finally, federal legislation needs to be adopted. The resulting military advance medical directives will supersede state law and state form requirements and assist the members of our uniquely mobile society.

The future requires that Army attorneys face matters of life and death with sufficient knowledge and compassion needed

⁶⁷ See *infra* Appendix B (suggested form).

⁶⁸ While competent, patients may envision their later incompetence and terminal condition and understand what would be entailed in a decision for or against resuscitation. Such patients may have made firm and explicit verbal or written directives regarding the decision. Such directives should be discussed with the NOK or legal guardian and should be honored unless there is a reason to believe that the patient's choice has changed or would change.

AR 40-3, *supra* note 17, para. 19-7a.

to assist both clients and health care providers. Army attorneys should be proactive and look forward to providing assistance in this growing area of the law.

Appendix A

Draft Department of Defense Directive

Date

Number 6025.XX

SUBJECT: Military Advance Medical Directives

References: (a) Patient Self Determination Act, Pub. L. No. 101-508, 104 Stat. 1388 (1990)

(b) Accreditation Manual for Hospitals, Joint Commission on Accreditation of Hospitals, Current Issue.

A. PURPOSE

This directive establishes policy, prescribes procedures, and assigns responsibility for the effective administration and implementation of military advance medical directives for patients treated in DOD medical treatment facilities (MTFs).

B. APPLICABILITY AND SCOPE

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD) and the Military Departments.
2. Covers DOD MTFs.

C. DEFINITIONS

1. "Advance medical directive" means any writing executed in accordance with the requirements of this provision and may include an advance medical care directive, the appointment of a health care proxy, or both such advance directives and appointment of a proxy;
2. "Attending physician" means the physician who has primary responsibility for the treatment and care of the patient;
3. "Health care provider" means a person who is licensed, certified, or otherwise authorized by state law to administer health care in the ordinary course of business or practice of a profession;

4. "Health care proxy" is an individual eighteen (18) years old or older appointed by the declarant as attorney-in-fact to make health care decisions including, but not limited to the withholding or withdrawal of life-sustaining treatment if a qualified patient, in the opinion of the attending physician and another physician, is persistently unconscious, incompetent, or otherwise mentally or physically incapable of communication;

5. "Life-sustaining treatment" means any medical procedure or intervention, including but not limited to the artificial administration of nutrition and hydration if the declarant has specifically authorized the withholding and withdrawal of artificially administered nutrition and hydration, that, when administered to a qualified patient, will serve only to prolong the process of dying or to maintain the patient in a condition of persistent unconsciousness. The term "life-sustaining treatment" shall not include the administration of medication or the performance of any medical treatment deemed necessary to alleviate pain nor the normal consumption of food and water;

6. "Persistently unconscious" means an irreversible condition, as determined by the attending physician and another physician, in which thought and awareness of self and environment are absent;

7. "Physician" means an individual licensed to practice medicine in any state;

8. "Qualified patient" means a patient eighteen (18) years of age or older who has executed an advance directive and who has been determined to be in a terminal condition or in a persistently unconscious state by the attending physician and another physician who have examined the patient;

9. "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; and

10. "Terminal condition" means an incurable and irreversible condition that, even with the administration of life-sustaining treatment, will, in the opinion of the attending physician and another physician, result in death within six (6) months.

D. POLICY

It is DOD policy that:

1. All military individuals, their spouses, and other adult individuals authorized to receive military legal assistance, have a right to control some aspects of their own medical care and treatment, including but not limited to the right to decline medical treatment or to direct that it be withdrawn, even if death occurs;

2. All DOD MFT personnel recognize that the right of military individuals, their spouses, and other adult individuals

authorized to receive military legal assistance, to control some aspects of their own medical treatment is protected by the Constitution of the United States and overrides any obligation the physician and other health care providers may have to render care or to preserve life and health;

3. Decisions concerning one's medical treatment involve highly sensitive, personal issues that do not belong in court, even if the individual is incapacitated, so long as a proxy decision-maker can make the necessary decisions based on the known intentions, personal views, or best interests of the individual. If evidence of the individual's wishes is sufficient, those wishes should control; if there is not sufficient evidence of the individual's wishes, the proxy's decisions should be based on the proxy's reasonable judgment about the individual's values and what the individual's wishes would be based on those values.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Health Affairs (ASD(HA)) shall ensure that this directive is implemented.

2. The Secretaries of the Military Departments, or designees, shall ensure compliance with this directive, and recommend changes or improvements to the Secretary of Defense through the ASD(HA).

3. The Surgeons General of the Military Departments shall ensure compliance with this Directive in their respective Military Departments' MTFs.

4. The attending physician shall have the primary responsibility to advise patients on the medical aspects of advance medical directives as part of the information necessary to enable patients to make treatment decisions that reflect their wishes.

5. The judge advocate offices will provide legal advice to patients and MTF staffs on advance medical directives.

F. PROCEDURES

1. Information papers concerning advance medical directives will be available in all MTFs, clinics, and offices of the judge advocate.

2. Upon admission, all adult patients will receive information in writing regarding their rights to participate in decisions about their health care, including the right to accept or refuse medical or surgical treatment, and regarding their right to prepare advance medical directives concerning their medical care.

3. If the patient refuses treatment, the attending physician will inform the patient of the medical consequences of such refusal. The attending physician will document the refusal.

4. A patient may revoke an advance medical directive verbally or in writing at any time.

5. Failure of a physician to comply with an advance medical directive or to transfer care to another physician, when appropriate, constitutes professional misconduct.

G. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective within 120 days of signature.

Appendix B

Advance Medical Directive

THIS IS A MILITARY ADVANCE MEDICAL DIRECTIVE PREPARED PURSUANT TO TITLE 10, UNITED STATES CODE, § 1044c AND EXECUTED BY A PERSON AUTHORIZED TO RECEIVE LEGAL ASSISTANCE FROM THE MILITARY SERVICES. FEDERAL LAW EXEMPTS THIS DOCUMENT FROM ANY REQUIREMENT OF FORM, SUBSTANCE, FORMALITY, OR RECORDING THAT IS PRESCRIBED FOR SIMILAR DOCUMENTS UNDER THE LAWS OF A STATE, THE DISTRICT OF COLUMBIA, OR A TERRITORY, COMMONWEALTH, OR POSSESSION OF THE UNITED STATES. UNDER FEDERAL LAW, THIS DIRECTIVE SHALL BE GIVEN THE SAME LEGAL EFFECT AS A SIMILAR DIRECTIVE PREPARED AND EXECUTED IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION WHERE IT IS PRESENTED.

I, [Name] _____,
Social Security Number _____, of [State of Residence] _____, [Initial one appropriate status choice below]:

_____ a member of the United States Armed Forces, currently in [Location] _____, pursuant to military orders, [OR]

_____ a spouse of a member of the United States Armed Forces, currently in [Location] _____, [OR]

_____ a person authorized to receive legal assistance from the military services, being of sound mind and eighteen (18) years of age or older, willfully and voluntarily make known my desire by these instructions that my life shall not be artificially prolonged under the circumstances set forth below. I want this to be legally binding. If I cannot make or communicate decisions about my medical care, those around me should rely on this document for my instructions. I do hereby declare:

I. ADVANCE MEDICAL CARE DIRECTIVE

a. If my attending physician and another physician determine that I am no longer able to make decisions regarding my

medical treatment, I direct my attending physician and other health care providers, pursuant to 10 U.S.C. § 1044c, to withhold or withdraw treatment from me under the circumstances I have indicated below by my signature. I understand that I will be given treatment that is necessary for my comfort or to alleviate my pain.

b. If I have a terminal condition:

(1) I direct that life-sustaining treatment shall be withheld or withdrawn if such treatment would only prolong my process of dying, and if my attending physician and another physician determine that I have an incurable and irreversible condition that even with the administration of life-sustaining treatment will cause my death within six (6) months.
_____ [Signature]

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) that will only prolong the process of dying from an incurable and irreversible condition is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition and hydration will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding or withdrawal of artificially administered nutrition (food) and hydration (water).
_____ [Signature]

(3) I direct that [Add Other Medical Directives, If Any]

_____ [Signature]

(4) I direct that treatment be limited to measures to keep me comfortable and to relieve pain, including any pain that might occur by withholding or withdrawing life-sustaining treatment. In addition, if I am in the condition described above, I feel especially strong about the following forms of treatment [Initial Your Choices]:

- I () do () do not want cardiac resuscitation.
- I () do () do not want mechanical respiration.
- I () do () do not want tube feeding or any other artificial or invasive form of nutrition (food) or hydration (water).
- I () do () do not want blood or blood products.
- I () do () do not want any form of surgery or invasive diagnostic tests.
- I () do () do not want Kidney dialysis.
- I () do () do not want antibiotics.

I realize that if I do not specifically indicate my preference regarding any of the forms of treatment listed above, I may receive that form of treatment.

c. If I am persistently unconscious:

(1) I direct that life-sustaining treatment be withheld or withdrawn if such treatment will only serve to maintain me in

an irreversible condition, as determined by my attending physician and another physician, in which thought and awareness of self and environment are absent. _____
[Signature]

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) for individuals who have become persistently unconscious is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition and hydration will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding or withdrawal of artificially administered nutrition (food) and hydration (water). _____
[Signature]

(3) I direct that [Add Other Medical Directives, If Any] _____

[Signature]

[Option] II. HEALTH CARE PROXY APPOINTMENT

a. If my attending physician and another physician determine that I am no longer able to make decisions regarding my medical treatment, I direct my attending physician and other health care providers pursuant to 10 U.S.C. § 1044c to follow the instructions of [Appoint a Person You Trust Who Will Respect Your Decisions. Do Not Appoint Employees of a Hospital, Clinic, Nursing Home, Rest Home, or Other Licensed Health Care Facility.] _____, whom I appoint as my health care proxy. If my health care proxy is unable or unwilling to serve, I appoint _____ as my alternate health care proxy with the same authority. My proxy will decide any questions about how to interpret or when to apply my Advance Medical Care Directive, including Part I above. My health care proxy is authorized to make whatever medical treatment decisions I could make if I were able, except that decisions regarding life-sustaining treatment must be made by my health care proxy or alternate health care proxy consistent with my desires indicated in the following sections.

b. If I have a terminal condition:

(1) I authorize my health care proxy to direct that life-sustaining treatment be withheld or withdrawn if such treatment would only prolong my process of dying and if my attending physician and another physician determine that I have an incurable and irreversible condition that even with the administration of life-sustaining treatment will cause my death within six (6) months. _____
[Signature]

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition (food) or hydration (water) will be administered to me. I further understand

that if I sign this paragraph, I am authorizing the withholding or withdrawal of artificially administered nutrition and hydration. _____
[Signature]

(3) I authorize my health care proxy to [Add Other Medical Directives, If Any] _____

[Signature]

c. If I am persistently unconscious:

(1) I authorize my health care proxy to direct that life-sustaining treatment be withheld or withdrawn if such treatment will only serve to maintain me in an irreversible condition, as determined by my attending physician and another physician, in which thought and awareness of self and environment are absent. _____
[Signature]

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition (food) and hydration (water) will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding and withdrawal of artificially administered nutrition and hydration. _____
[Signature]

(3) I authorize my health care proxy to [Add Other Medical Directives, If Any] _____

[Signature]

d. My agent shall be guided by my medical diagnosis and prognosis and any information provided by my physicians as to the intrusiveness, pain, risks, and side effects associated with treatment or nontreatment. My agent shall not authorize a course of treatment which he knows, or upon reasonable inquiry ought to know, is contrary to my religious beliefs or my basic values, whether expressed orally or in writing. If my agent cannot determine what treatment choices I would have made on my own behalf, then my agent shall make a choice for me based upon what he believes to be in my best interest.

III. CONFLICTING PROVISION

I understand that if I have completed both an advance medical care directive and have appointed a health care proxy; and if there is a conflict between my health care proxy's decision and my advance medical care directive, my directive shall take precedence unless I indicate otherwise.

[Option] IV. ANATOMICAL GIFTS

[You May Make a Gift of All or Part of Your Body to a Hospital Organ Bank or Storage Facility, Physician or Medical or

Dental School for Transplantation, Therapy, Medical or Dental Evaluation or Research or for the Advancement of Medical or Dental Science. You May Also Authorize Your Agent to Do So or a Member of Your Family May Make a Gift Unless You Give Them Notice That You Do Not Want a Gift Made. Indicate Your Choice(s) in the Space below. Complete Only Item 1, 2, or 3.]. I make this anatomical gift to take effect upon my death as indicated:

1. I give:

- a. My body _____;
Any needed organs or parts _____;
The following organs or parts:

- b. To the following person:
_____;

To any person, tissue bank, or institution authorized by law: _____;

To the following named physician, hospital, tissue bank or other medical institution: _____

- c. For the following purpose(s):
Any purpose authorized by law: _____;
Transplantation: _____;
Therapy: _____;
Medical research and education _____.

2. I authorize my agent for health care decisions appointed earlier in this document to make any decision on organ donation. _____ [Signature]

3. I do not want to make an organ or tissue donation and I do not want my agent of family to do so. _____ [Signature]

V. OTHER PROVISIONS

a. I understand that if I have been diagnosed as pregnant and that diagnosis is known to my attending physician, this advance directive shall have no force or effect during the course of my pregnancy.

b. In the absence of my ability to give directions regarding the use of life-sustaining procedures, it is my intention that this advance directive shall be honored by my family and physicians as the final expression of my legal right to refuse medical or surgical treatment including, but not limited to, the administration of any life-sustaining procedures, and I accept the consequences of such refusal.

c. This advance directive shall be in effect until it is revoked.

d. I understand that I may revoke this advance directive at any time.

e. I understand and agree that if I have any prior directives, and if I sign this advance directive, my prior advance directives are revoked.

f. I understand the full importance of this advance directive and I am emotionally and mentally competent to make this advance directive.

g. If a locality or medical treatment facility fails to recognize the validity of this declaration and refuses to comply with the terms of this declaration, then it is my intention that my body be transferred to a locality that recognizes and will carry out my intentions as set forth herein.

h. The determination that I am incapable of making an informed decision shall be made by my attending physician and a second physician or licensed clinical psychologist after a personal examination of me and shall be certified in writing. Such certification shall be required before treatment is withheld or withdrawn, and before, or as soon as reasonably practicable after, treatment is provided, and every 180 days thereafter while the treatment continues.

i. This advance directive shall not terminate in the event of my disability and I specifically desire it remain effective even if I am in a coma or have Alzheimer's disease or suffer some other mental disability.

VI. NOTICE

This is an important legal document. Before signing it, you should know these important facts:

(a) This document gives your health care providers and/or your designated proxy the power and guidance to make health care decisions according to your wishes when you cannot do so. This document may include what kind of treatment you want or do not want and under what circumstances you want these decisions to be made.

(b) If you named a health care proxy [Part II] in this document and that person agrees to serve as your proxy, that person has a duty to act consistently with your wishes. If the proxy does not know your wishes, the proxy has the duty to act in your best interests. If you do not name a proxy, your health care providers have a duty to act consistently with your instructions or tell you that they are unwilling to do so.

(c) Review this document periodically to make sure it continues to reflect your preferences. You may amend or revoke the declaration at any time. If you decide to revoke it, you should notify any proxy you appointed, recover any copies you gave to anyone, and notify your health care provider. You have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

(d) Your named proxy has the same right as you have to examine your medical records and to consent to their disclosure for purposes related to your health care or insurance unless you limit this right in this document.

(e) If there is anything in this document that you do not understand, you should ask for professional help to have it explained to you.

(f) Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision.

(g) If you choose not to have this document notarized, you should carefully read and follow the optional witnessing procedure described at the end of this form. This document will not be valid unless your signature is properly notarized or witnessed.

(h) Your agent may need this document immediately in case of an emergency that requires a decision concerning your health care. Either keep this document where it is immediately available to your agent and alternate agents, if any, or give each of them a signed copy of this document. You should give your doctor a signed copy of this document and request that a copy be filed in your health and medical records.

[This Directive Will Not Be Valid Unless it Is Notarized or Signed by Two Qualified Witnesses Who Are Present When You Sign or Acknowledge Your Signature].

By signing below, I indicate that I am emotionally and mentally competent to make this advance directive and that I understand its purposes.

Signature: _____ Print Name _____
Date: _____ Social Security No. _____

NOTARY

IN WITNESS WHEREOF, I have hereunto set my hand and affix my official seal on _____, 199__.

Notary Public

My Commission Expires: _____

[Military Notary—Service member on Active Duty]

Subscribed, sworn to and acknowledged before me on _____, 199__ by the declarant, who is known to me to be a member of the Armed Forces of the United States serving on Active Duty. This acknowledgment is executed in my official capacity under the authority granted by Title 10, United States Code, § 1044a, which also states that no seal is required on this acknowledgment.

(Sign) _____
(Print) _____
RANK/COMPONENT _____
OFFICIAL CAPACITY _____

Subscribed, sworn to and acknowledged before me on _____, 199__ by the declarant, who is known to me to be eligible for Legal Assistance under the provisions of 10 U.S.C. § 1044a or regulations of the Department of Defense. This acknowledgment is executed in my official capacity under the authority granted by Title 10, United States Code, § 1044a, which also states that no seal is required on this acknowledgment.

(Sign) _____
(Print) _____
RANK/COMPONENT _____
OFFICIAL CAPACITY _____

[Option] **STATEMENT OF WITNESSES**

[Instead of having this directive notarized, I understand two qualified adult witnesses must see me sign this directive. The following individuals are not qualified witnesses: your health care proxy (or alternate), your physician or health care provider; your spouse; a blood relative; an heir; or any person who has, at the time you sign this document, any claim against your estate].

I declare under penalty of perjury that the person who signed or acknowledged this document is personally known to me to be the principal, that the principal signed or acknowledged this directive in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as proxy by this document, and that I am not the principal's physician or health care provider; the principal's spouse; a person related to the principal by blood or adoption; a person entitled to inherit any part of the principal's estate upon death; nor a person who has, at the time of executing this document, any claim against the principal's estate.

Signature: _____ Signature: _____
Print Name: _____ Print Name: _____
Date: _____ Date: _____
Social Security No. _____ Social Security No. _____

[Option] **ACCEPTANCE OF PROXY APPOINTMENT**

I accept this appointment and agree to serve as agent for health care decisions. I understand I have a duty to act consistently with the desires of the principal as expressed in this appointment. I understand that this document gives me authority over health care decisions for the principal. I understand that I must act in good faith in exercising my authority

under this power of attorney. I understand that the principal may revoke this power of attorney at any time in any manner.

If I choose to withdraw during the time the principal is competent I must notify the principal of my decision. If I choose to withdraw when the principal is incapable of making the principal's health care decisions, I must notify the principal's physician.

Signature: _____ Print Name: _____

Date: _____ Social Security No. _____

(This sample form was provided by LTC George Hancock, Chief, Administrative and Civil Law Division, The Judge Advocate General's School).

Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures

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Introduction

The number of people who remain lost or missing at the end of a conflict is one of the more tragic consequences of war. Because the civil services in the combat area are disrupted and the military forces are embroiled in a fast-moving, chaotic environment, accounting for missing persons in war is especially difficult. In the midst of this chaos, however, the law steps in and imposes duties on the parties to the conflict to protect and account for certain classes of people.¹ This article discusses the identification and reporting requirements of international law for a specific class of protected persons: prisoners of war. It also reviews the procedures used by the United States Armed Forces to account for captured Enemy Prisoners of War.²

The disappearance of prisoners of war is nothing new. In the Korean War, the Communists claimed to have captured

75,000 United Nations and South Korean forces. Only 12,760 (seventeen percent) of these prisoners were returned at the end of hostilities.³ During the Indochina War of 1946-54, 36,979 French Union forces were reported missing in Vietnam, and just 10,754 (28.5 percent) were returned.⁴ The uncertainty surrounding the fate of these victims of war has caused untold misery to their families and friends.

For propaganda purposes, the Communist forces in Korea may have exaggerated the number of captives held. However, without proper identification and reporting of prisoners of war, providing meaningful notification to families and reconciling missing in action lists is extremely difficult. Additionally, until a party to the conflict has received notification about the capture of a service member, working through diplomatic channels to ensure that an individual's rights as a prisoner of war are protected is virtually impossible. In this sense, one may argue that prisoner of war rights are not

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

² The United States Armed Forces use the term Enemy Prisoner of War (EPW) to distinguish between captured enemy combatants (and retained personnel) and American service members in the hands of the enemy who are referred to as Prisoners of War (POW). Each term is used as a general characterization only. Specific records distinguish between captured enemy combatants, who are prisoners of war, and captured medical personnel and chaplains, who are retained.

³ WILLIAM LINDSAY WHITE, THE CAPTIVES OF KOREA 328-29 (1957).

⁴ *Communist Treatment of Prisoners of War: A Historical Survey Prepared for the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws*, 92d Cong., 2d Sess. 15 (1972).

"enforceable" without adequate accounting procedures and proper compliance with those requirements.

The 1949 Geneva Conventions Relative to the Treatment of Prisoners of War (GPW)⁵ sets forth the obligations of a capturing power to account for prisoners of war. Drafted soon after World War II, the GPW focuses primarily on more traditional forms of war with readily identifiable armies in the field. Accordingly, the GPW is intended to provide protection to lawful combatants engaged in an international war or armed conflict.⁶ In today's complicated peacekeeping and peace-making/peace enforcement situations, a recurring issue is whether the GPW applies to persons detained by the military forces when the detained person does not appear to meet the traditional definition of a lawful combatant.⁷ For the United States, most of the concern over this issue is resolved. As a matter of policy, all persons detained by the United States Armed Forces receive prisoner of war protection regardless of whether they are entitled to prisoner of war status under the GPW.⁸ The difference between prisoner of war status and prisoner of war protection is debatable.⁹ However, the scope of this article is limited to those persons who are entitled to prisoner of war status.

This article outlines the legal rights and obligations of prisoners of war, parties to the conflict, and detaining powers as

they relate to identifying and reporting prisoners of war. This article also will examine advances in technology and the current identification and reporting procedures of the United States Armed Forces.

Identification Methods and the Requirements of Article 17 of the GPW

The 1949 Geneva Convention Relative to the Treatment of Prisoners of War contains three basic provisions regarding the identification and reporting requirements for prisoners of war.¹⁰ The obligations and binding effect of these provisions vary. The first of these, Article 17, requires the prisoner to provide "only his surname, first name and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information."¹¹ Prisoners provide this information to the detaining power immediately after capture by allowing the captor to view their identity cards or by answering questions in the prisoners' language. To identify themselves, prisoners only are required to show their cards to their captors; the cards may not be taken from them.¹²

Every party has a duty to "furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card . . ."¹³ This includes not only military personnel, but also those civilians participating in the military opera-

⁵GPW, *supra* note 1.

⁶The GPW states that "the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." *Id.* art. 2. The GPW defines the persons entitled to prisoner of war protection. *Id.* art. 4.

⁷Under the GPW, if any doubt exists as to whether individuals meet this definition or are entitled to prisoner of war status, they "shall enjoy the protection of the present Convention until such time as their status has been determined by competent tribunal." *Id.* art. 5.

⁸DEP'T OF ARMY, REG. 190-8, MILITARY POLICE: ENEMY PRISONERS OF WAR ADMINISTRATION, EMPLOYMENT, AND COMPENSATION, para. 1-5 (Dec. 2, 1985) [hereinafter AR 190-8] states:

Basic United States Policy on the treatment given EPW and other persons requires and directs that-

(1) All persons captured, interned, or otherwise held in United States Army custody during the course of the conflict will be given humanitarian care and treatment from the moment of custody until final release and repatriation . . . This policy applies equally to protecting all detained persons whether—

(a) They are EPW, strictly detained persons, or in any other category.

(b) They are known or suspected of having committed serious offense that could be characterized as war crimes.

⁹One may argue that all of the benefits that accompany prisoner of war status—including the identification and reporting requirements of the GPW—should apply to all persons detained by the armed forces who receive prisoner of war protection as a matter of policy. However, even though the provisions of the GPW are liberally construed, it was intended to protect lawful combatants. Civilians are protected under the GPW, *see supra* note 1. For a discussion of prisoner of war status relating to the issue of confinement *see United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992).

¹⁰Article 17 applies to the questioning of prisoners. *See infra* notes 10-33 and accompanying text. Article 70 lists the information given by the prisoner to his or her family and the Central Prisoner of War Information Agency. *See infra* notes 34-41 and accompanying text. Article 122 requires a national information bureau and describes the information to be reported by the detaining power to the Central Prisoners of War Information Agency. *See infra* notes 42-46 and accompanying text.

¹¹GPW, *supra* note 1, art. 17.

¹²*Id.* art. 18.

¹³*Id.*

tion, providing technical assistance, or otherwise accompanying the armed forces.¹⁴

Identification cards are only required to contain name, rank, serial number, and date of birth. Although this may seem like basic information, something as simple as an EPW's name may cause confusion and identification problems if the EPW comes from a different culture and has a long or complicated name.¹⁵ The Convention also allows a party to place any other information that it wishes on the card and specifically mentions the owner's signature or fingerprints as examples.¹⁶

United States Armed Forces identification cards provide the service member's picture, name, rank, branch of service, social security or service number, date of issue, expiration date, date of birth, height, weight, hair color, eye color, and blood type.¹⁷ The United States is currently in the process of implementing the new Realtime Automated Personnel Identification System (RAPIDS), which adds a bar code to the back of the United States Armed Forces identification cards and allows bar code readers at authorized sites to access information about the service member through the Defense Data Network/Defense Information Systems Network (DDN/DISN).¹⁸ This system has a number of potential applications and will be especially useful for military hospitals in determining eligibility for medical benefits and accessing medical information about the service member and the service member's family.

Advancing technology is providing new identification techniques. With the emergence of deoxyribonucleic acid (DNA) technology as a valid and viable means of identification, the United States is working to establish a new identification card that includes the DNA information of the service member.¹⁹ This testing will provide a tremendous advance in the ability to identify prisoners and the remains of unidentified personnel. Unlike traditional forms of identification—that is, fingerprints and dental records—DNA does not rely on the condition of the remains for a positive identification; any tissue will suffice. Whether other countries will follow the example of the United States Armed Forces in this area is uncertain. However, any improvement in the identification of combatants is an issue that concerns all parties. One also may argue that the parties have a duty to the families of their service members to use the most accurate means of identification possible.²⁰

The detaining power also has an obligation to ensure that all EPWs have identification cards in their possession and, if not, to supply them with new ones.²¹ Because the detaining power is responsible for EPWs from the time they "fall into the power of the enemy," a strong desire exists to ensure that EPWs can demonstrate that they are entitled to prisoner of war status.²² For example, if an EPW escapes, discards his uniform, and is recaptured, it would be difficult for him to prove that he is entitled to prisoner of war status without an identity

¹⁴The GPW, in defining those individuals to be treated as prisoners of war, states:

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card

Id. art. 4.A.

For a discussion of potential issues that may arise concerning civilians accompanying the armed forces, see W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 DICK. J. INT'L L. 393, at 407-09 (1992).

¹⁵Kevin Sullivan, *What's in a Name Can Be a Mouthful—Multicultural Pride Sustains a Megasyllabic Melting Pot*, WASH. POST, Nov. 29, 1993, at A1.

¹⁶GPW, *supra* note 1, art. 7.

¹⁷Dep't of Defense, Form 2 (Active) (Oct. 1993) (United States Armed Forces Identification Card). The expiration date on the card refers only to the expiration date of the service member's enlistment contract. It does not affect his or her status as a prisoner of war because under the GPW, the detaining power is responsible for the prisoner "from the time they fall into the power of the enemy and until their final release and repatriation." GPW, *supra* note 1, art. 5.

¹⁸Memorandum, Edward H. Haldeman, RAPIDS Program Manager, Department of Defense Manpower Data Center, to RAPIDS End-Users, attach. 2 (2 Feb. 1994) (on file with author).

¹⁹Wendy Melillo, *The Cutting Edge—Genetic Record Will Help Identify Unknown Soldiers*, WASH. POST, Jan. 14, 1992, at A5.

²⁰Although Article 17 of the GPW only requires minimal information, one may argue that it implies a duty on the parties to use the most accurate means of identification possible. In the future, a customary international law standard may emerge creating an obligation on the parties to more accurately identify their combatants based on advances in technology, the practice of nations, and the policies set forth in other related treaties—that is, Article 32 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 1, which states, as a "General Principle," "In the implementation of this Section [Missing and Dead Persons], the activities of the . . . [parties] . . . shall be prompted mainly by the right of the families to know the fate of their relatives."

²¹The GPW provides that "[a]t no time should prisoners of war be without identity documents. The detaining power shall supply such documents to prisoners of war who possess none." GPW, *supra* note 1, art. 18.

²²*Id.* art. 5.

card. Accordingly, the United States issues new EPW identity cards to all EPWs regardless of whether they have retained their own government-issued identification cards.²³ A fingerprint card for each EPW also is prepared in duplicate with one copy held at the camp in which the EPW is interned and the other copy forwarded to the Prisoner of War Identification Center.²⁴

The second way in which prisoners are bound to provide the required information is in response to their captors' questions. However, the methods of interrogation that may be employed have limits. The detaining power—in the midst of combat operations—will try to obtain any information or intelligence that might assist it to accomplish its military mission. In spite of this, prisoners of war only are obliged to provide their name, rank, date of birth, and serial number.²⁵ If a prisoner refuses to provide this information or any additional requested information

no physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.²⁶

In addition to the more obvious forms of torture, this provision has been interpreted to include isolating a prisoner from the outside world.²⁷ A violation of this provision may be considered a grave breach under Article 130 of the GPW, subjecting the person committing the offense to the jurisdiction of the courts of all of the parties to the GPW, regardless of where they may go.²⁸

As long as a detaining power is able to determine that a person is entitled to prisoner of war status, it cannot deprive the prisoner of his or her rights under the GPW. However, when the prisoner is capable of identifying himself, but refuses to provide this information or provides false information, the detaining power may impose sanctions. This is not limited to those prisoners who simply provide an alias. It also applies to prisoners who deliberately conceal their rank or claim a rank superior to their actual grade. Appropriate sanctions are limited to "a restriction of the privileges accorded to his rank or status."²⁹ The privileges that may be withdrawn only apply to those special benefits that prisoners would normally receive owing to their rank or status.³⁰

Privileges may not be withdrawn when the prisoner is unable to identify his or herself due to medical reasons. In this situation, the prisoner is entitled to medical care and the medical personnel shall establish the prisoner's identity by

²³DEP'T OF ARMY, REG. 190-8, MILITARY POLICE: ENEMY PRISONERS OF WAR ADMINISTRATION, EMPLOYMENT, AND COMPENSATION (2 Dec. 1985) [hereinafter AR 190-8]. *Army Regulation 190-8* contains reproducible copies of *Department of the Army Form 2662-R, United States Army EPW Identity Card* (May 1982) and procedures regarding its use. *Id.* at 33. This card, which is to be in the EPW's possession at all times, consists of a photograph, separate spaces for first and last names, grade, service number, power served, place of birth, date of birth, signature of bearer, height, weight, color of eyes, color of hair, blood type, religion, left and right index fingerprints, and a space for other marks of identification. All of this information is used for identification purposes only. The EPW is not required to provide his or her place of birth.

²⁴*Army Regulation 190-8* also provides copies of *Department of the Army Form 2663-R, Fingerprint Card* (May 1982). *Id.* at 35.

²⁵GPW, *supra* note 1, art. 17. Part V of the "Code of Conduct" for members of the Armed Forces of the United States provides as follows:

When questioned, should I become a prisoner of war, I am required to give name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

Exec. Order No. 12,633, 53 Fed. Reg. 10,355 (1988) *reprinted in* 10 U.S.C.A. § 802 (1988). Previous versions of the Code of Conduct mirrored the language of Article 17 stating "When questioned, . . . I am bound to give only name, rank, service number and date of birth . . ." This language was changed to the current version in 1977 following the experience of some United States POWs in the Vietnam War who believed the terms "bound to give only" absolutely prohibited them from giving any information beyond that specifically listed.

²⁶GPW, *supra* note 1, art. 17.

²⁷J. PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 163 (Geneva, ICRC 1960); *see also* GPW, *supra* note 1, art. 126.

²⁸The GPW defines grave breaches as

any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile power, or wilfully depriving a prisoner of war of the rights to a fair and regular trial prescribed in this convention.

GPW, *supra* note 1, art. 130.

²⁹*Id.* art. 17.

³⁰For example, officers normally would be exempt from work details. For a list of the privileges that may be withdrawn, *see* PICTET, *supra* note 27, at 159-60.

“all possible means, subject to the provisions of the preceding paragraph [prohibiting torture and coercion].”³¹ In drafting this section, the Delegation had the fingerprint system in mind, provided of course, that the prisoner’s power of origin had previously registered the prisoner’s fingerprints.³² Again, the United States Armed Forces work toward instituting a DNA system of identification represents a major step forward. This is another area where future practices may establish a trend allowing international law to evolve with advances in technology.

Article 17 of the GPW imposes duties on a number of parties. Prisoners are required to identify themselves truthfully by providing the required information in response to their captor’s questions and providing their identity cards on request. The parties to the conflict have a duty to supply their combatants or persons who may be held as prisoners of war with identification cards. Finally, detaining powers may not use coercion of any form in questioning prisoners and if prisoners refuse to identify themselves or provide false information, the only sanctions that the detaining power may impose are restrictions on the prisoners’ benefits and privileges.

Once a detaining power has identified a person as a prisoner of war, it must satisfy other obligations. Not only does the detaining power have a duty to report prisoners of war, prisoners have the right to notify the outside world of their capture.³³

Capture Cards and Article 70 of the GPW

The Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, provided a prisoner the right “to send a postcard to his family informing them of his capture and the state of his health.”³⁴ Article 70 of the GPW added a second right to this provision, entitling a prisoner of war to mail a capture card directly to the Central Prisoners of War Agency.³⁵ This right essentially gave prisoners of war their own private reporting system.

The addition of capture cards to this provision was based on the experiences of the Central Prisoners of War Agency dur-

ing World War II, in which “the Information Bureaux of detaining powers invariably required some time to notify captures and transfers.”³⁶ This demonstrates the unfortunate reality that sometimes a postcard from a prisoner can be more timely than a report from a detaining power. In these situations, the detaining power’s information bureau has failed to operate in a timely fashion and capture cards provide a valuable second source of information on the whereabouts and condition of prisoners of war. Capture cards also may be used to verify the timeliness and accuracy of the reports of the detaining power.

This provision does not excuse the detaining power from the reporting requirements of Article 122, nor does it allow the detaining power to delay reports required under that provision.³⁷ It does require the detaining power to give prisoners of war the opportunity to exercise their rights to contact their families and the outside world in a timely manner. To satisfy this duty, the detaining power is obliged to furnish capture cards, writing materials, and mail the correspondence “[i]mmediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp”³⁸

Although the term “capture card” implies that this is a one-time requirement that may be satisfied during the first week of captivity, this is not the case. Article 70 states that prisoners have the right to contact their families and the Central Prisoners of War Agency “in case of sickness or transfer to hospital or another camp”³⁹ Although stated in terms of prisoner’s rights, this provision also imposes a continuing obligation on the detaining power to account for prisoners in its custody. This duty extends beyond the initial capture report, and requires the detaining power to track the location of each prisoner and allow prisoners to update the appropriate persons of their current address.

The capture card is used to inform the family and Central Prisoners of War Agency of the service member’s capture, address, and state of health. The form of the card is to be “similar, if possible, to the model annexed to the present Convention” The recommended form contains fourteen

³¹ GPW, *supra* note 1, art. 17.

³² PICTET, *supra* note 27, at 164.

³³ GPW, *supra* note 1, arts. 122, 70.

³⁴ Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, 47 Stat. 2021, T.S. 846 [hereinafter GPW 1929]. The GPW replaces GPW 1929 in relations between parties to the GPW; *see* GPW, *supra* note 1, art. 134.

³⁵ GPW, *supra* note 1, art. 70. The GPW provides for a Central Prisoner of War Information Agency and describes its functions. *Id.* art. 123.

³⁶ PICTET, *supra* note 27, at 340.

³⁷ GPW, *supra* note 1, art. 122.

³⁸ *Id.* art. 70.

³⁹ *Id.*

items: (1) power on which the prisoner depends, (2) name, (3) first names (in full), (4) first name of father, (5) date of birth, (6) place of birth, (7) rank, (8) service number, (9) address of next of kin, (10) taken prisoner on: (or) coming from (camp number, hospital), (11) (a) good health (b) not wounded (c) recovered (d) convalescent (e) sick (f) slightly wounded (g) seriously wounded, (12) present address is: [prisoner number and name of camp], (13) date, and (14) signature.⁴⁰ Prisoners are only required to fill in items two, three, five, seven, and eight. If, for example, the prisoner is concerned that his family may suffer repercussions due to his capture or surrender, he is not required to provide his father's name or address of next of kin. The United States version essentially mirrors the form in the annex.

Capture cards are made a priority mail item. They are postage free and are to "be forwarded as rapidly as possible and may not be delayed in any manner."⁴¹ In a United States context, they would be treated as first class mail, the highest priority.

The importance of the right of prisoners of war to report their own capture, state of health, and address cannot be overly emphasized. Because little, if any, trust may exist between the parties to a conflict, capture cards sent from prisoners may be considered more reliable than the report of their captors. A card that comes directly from the prisoner and bears his or her signature will be especially meaningful to the prisoner's family. It also may provide the first notice to the outside world that the prisoner is alive and in enemy hands. Additionally, the prisoner must be able to exercise this right independent of the detaining power's reporting responsibilities so that an effective method exists for verifying the detaining power's report.

Reporting Requirements of Article 122 of the GPW

Article 122 of the GPW requires each party to establish an information bureau to report certain information about the prisoners of war in their custody to the Central Prisoners of War Agency. This requirement also applies to neutrals or nonbelligerents who are detaining combatants of any of the parties to the conflict.

The purpose of the information gathered under this provision is to "make it possible quickly to advise the next of kin

concerned." This provision is expressly subject to Article 17 of the GPW, but requires the detaining power to attempt to obtain information similar to that required in the capture cards of Article 70. Although prisoners are only required to provide their name, rank, date of birth, and service number, the detaining power has a duty to report, if available, the following additional information: father's first name, mother's maiden name, name and address of person to be notified, name of camp and postal address, information regarding transfers, releases, repatriations, escapes, admissions to hospitals, deaths, and information about the prisoner's state of health. Of these items, the only information that the prisoner is not under a duty to provide and may not be readily available to the detaining power is the information about the next of kin. If a prisoner is concerned for the safety of his or her family, the prisoner is not required to provide this information.

Unlike the one-week requirement for capture cards, no specific time limit for reports under Article 122 exists. However, once the required information is gathered, it must be forwarded "within the shortest possible period" to the party's national prisoner of war information bureau.⁴² The information bureau "shall immediately forward such information by the most rapid means to the Powers concerned through the intermediary of the Protecting Powers and likewise the Central Agency . . ."⁴³ The information bureau also must operate "with the necessary accommodation, equipment and staff to ensure its efficient working."⁴⁴ These terms indicate that time is of the essence for these reports.

The broad language of this provision implies a situation-dependent standard. When a relatively small number of prisoners of war are being captured over a long period, the time allowed for reporting should be significantly less than in situations when extremely large numbers are being captured in a shorter period. However, large numbers of EPWs and a high rate of capture does not relieve the detaining power of the obligation to report "in the shortest possible period" using "the most rapid means" and the "necessary accommodation, equipment and staff" to operate efficiently.⁴⁵ This provision imposes a flexible standard that must be interpreted to require the parties to utilize the latest technological advances to speed their reporting procedures. Along with the latest equipment—that is, computers, modems, and facsimile machines—the parties also must have an efficient national information bureau, a

⁴⁰ *Id.* annex IV B.

⁴¹ *Id.* art. 70.

⁴² *Id.* art. 122.

⁴³ *Id.* The information is forwarded from the captor State's information bureau, and not from its military forces in the field. During the 1991 Gulf War, requests by International Committee of the Red Cross (ICRC) delegates in Saudi Arabia to obtain this information from USCENTCOM were declined, as the information was forwarded to Washington in accordance with the procedures established in the GPW.

⁴⁴ *Id.*

⁴⁵ *Id.*

swift means of moving the prisoners of war from the combat area, rapid identification and processing procedures at the prisoner of war camps, and clear lines of communication between the national information bureau, the prisoner of war camps, and the capturing units.

In addition to timeliness, accuracy is a second issue of concern. Article 122 of the GPW requires the parties to report "any enemy person belonging to one of the categories referred to in Article 4, who has fallen into its power." This requirement assumes 100% accuracy in reporting. Given the chaotic nature of war, this requirement will probably never be met. Prisoners can be miscounted during the evacuation phase, diverted to medical facilities, counted again when they are returned to EPW channels, or any one of several other possibilities. Enemy prisoner of war records must be audited and reconciled with assigned internee serial numbers for improved accountability. What level of accuracy must be achieved? Obviously, reporting must be as precise as possible and records—such as the disappearance of eighty-three percent of the prisoners in the hands of the Communist forces in Korea—cannot be tolerated. The parties must ensure that the most accurate means and methods of reporting are used, including up-to-date equipment and a well-designed EPW plan.

Article 122 of the GPW also places the duty to report to the Central Agency on the national information bureau of the detaining power, not on the prisoner of war camps or capturing units. This is consistent with other terms of the Convention that place the responsibility for prisoners of war on the detaining power, not the individuals or military units that captured them.⁴⁶ This allows the capturing units and camps to report via the chain of command to the national information bureau, which can consolidate the reports, clarify any inconsistencies, and make accurate, comprehensive reports to the Central Agency. One national report with all of the required information is better than multiple conflicting reports of questionable accuracy. Accordingly, prisoner of war camps and capturing units should report only to their national information bureau and should not be required to make any official

reports on behalf of the detaining power to third party agencies or inspectors.

The United States Armed Forces Identification and Reporting Procedures for Enemy Prisoners of War

Accounting for prisoners of war from the moment of capture until release, escape, repatriation, or death is a complicated process that can be accomplished in a variety of ways. The United States Department of Defense (DOD) has chosen to designate the Secretary of the Army as the Executive Agent for the administration of the United States Enemy Prisoner of War/Detainee Program.⁴⁷ Under this designation, the Department of the Army is the single service responsible for the entire Enemy Prisoner of War/Detainee Program.⁴⁸ The other services—the Navy, Air Force, and Marines—receive Army support for their EPW requirements. The Department of the Army is responsible for providing "necessary reports, coordination, technical advice, and proper staff assistance . . ." to the DOD and other federal agencies.⁴⁹ The Department of the Army also provides reports through the Department of State to the ICRC and any designated protecting powers.⁵⁰ In addition, the Department of the Army is responsible for training personnel in the proper administration and operation of EPW Camps.⁵¹

To fulfill its reporting responsibilities under the GPW and the DOD directive, Headquarters, Department of the Army (HQDA) operates the National Prisoner of War Information Center (NPWIC), which serves as the central agency for all prisoner of war information.⁵² The NPWIC provides reports and answers inquiries regarding EPWs captured or detained by United States forces, American prisoners of war in the hands of the enemy, and American service members held by neutral parties.⁵³ While the NPWIC is concerned with all of these matters, the present study only examines the function of the NPWIC as it relates to EPWs captured or detained by United States forces.

As the national information bureau, the NPWIC is responsible for providing reports and responding to inquiries from a

⁴⁶The GPW provides: "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the detaining power is responsible for the treatment given them." *Id.* art. 12. See also *id.* arts. 13-16, which specifically impose certain treatment obligations on the detaining power.

⁴⁷DEP'T OF DEFENSE, DIRECTIVE 5100.69, DOD PROGRAM FOR PRISONERS OF WAR AND OTHER DETAINEES, para. VB (Dec. 27, 1972).

⁴⁸AR 190-8, *supra* note 23, para. 1-4.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

variety of official organizations. This flow of information naturally includes the rest of the DOD, the President, Congress, and other federal agencies.⁵⁴ The NPWIC also provides the official United States reports to the Central Prisoner of War Agency in accordance with Article 122 of the GPW. To satisfy all of these information requirements, the NPWIC maintains a constant dialogue with the Prisoner of War Information Center (PWIC) in the theater of operations which, in turn, obtains its information from the EPW Processing Companies at the EPW camps.⁵⁵

The Department of the Army has worked aggressively to improve methods of gathering and exchanging information between capturing units, EPW camps, theater PWICs, and the NPWIC. The information management techniques of the NPWIC have evolved from manual methods, to the Prisoner of War Identification System (PWIS), and the current improved version, PWIS II. The manual method involved EPW processing companies interviewing EPWs, filling out information cards, typing up reports and air mailing them to the NPWIC, which processed these cards and forwarded a report to the Central Prisoners of War Agency operated by the ICRC in Geneva. As organized, the EPW processing companies only could process an average of 190 EPWs per day, per camp using the manual method.⁵⁶ The PWIS was a computer program that assisted the NPWIC in processing the raw data sent in from the EPW camps and improved the speed of compiling the reports of the NPWIC, but its speed was still limited by the EPW camp's processing rates in the theater of operations.

The PWIS II carries the automation one step further, establishing a PWIC in theater equipped with computers and software to enter the data into the program at the EPW camp level and forward it from the EPW camp to the NPWIC. With this version of the program, EPW processing rates improved to an average of 1500 per day, per camp.⁵⁷ Additionally, the bulk of the data processing requirements could be done in theater, which saved the NPWIC a considerable amount of effort and drastically reduced the overall time from the date of capture to

the submission of the report to the Central Prisoners of War Agency.

With the PWIS II, the EPW processing companies and the PWIC gather the information on the EPWs and enter it into the PWIS II system. The information is then electronically transmitted from the PWIC to the NPIC via the defense data network. The NPWIC checks the information and faxes the required report to the ICRC within forty-eight to seventy-two hours after the information was compiled in the theater of operation. The real-time reports generated using the PWIS II system were a first in modern warfare and represent a dramatic improvement in the speed of EPW reporting.

United States forces first used the PWIS II in the Gulf War. Desert Storm was the most difficult type of situation for EPW operations, a high-intensity conflict of short duration with an extremely high capture rate. During the course of the war, United States forces captured 62,456 prisoners and processed an additional 5874 EPWs captured by British and French forces pursuant to transfer agreements with these allies.⁵⁸ In addition, 1492 displaced civilians were evacuated from the combat area through EPW channels. Some of these civilians were suspected EPWs and others were evacuated for their own safety. Of the 85,251 EPWs captured by coalition forces, United States forces processed 69,822 EPWs and civilians.⁵⁹ The vast majority of the EPWs fell into coalition hands during, and in the days immediately following, the 100-hour ground campaign.

The EPW mission in Desert Storm was assigned to the 800th Military Police (MP) Brigade which was composed entirely of Army National Guard and Army Reserve units.⁶⁰ With approximately 7300 troops, the 800th MP Brigade was divided into eight different kinds of EPW units.⁶¹ The EPW Force Structure included: EPW Camps (headquarters unit supervising an MP battalion and several MP companies); MP battalions (one for each camp, acting as an intermediate command and control headquarters supervising the operations of several MP companies); MP Guard Companies (one providing

⁵⁴This information flow is described in *Conduct of the Persian Gulf War*, UNITED STATES DEP'T OF DEFENSE 577-87 (April 1992) [hereinafter *Conduct of the Gulf War*].

⁵⁵*Id.* at 579-80.

⁵⁶*Id.* at 585.

⁵⁷*Id.*

⁵⁸*Id.* at 618. The capturing power retains some responsibility for prisoners transferred to, and detained by, another party to the GPW. If the detaining power fails to fulfill its obligations under the GPW, the transferring power "shall . . . take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with." GPW, *supra* note 1, art. 12.

⁵⁹*Conduct of the Gulf War*, *supra* note 54, at 618.

⁶⁰The operations of the 800th MP Brigade have been described in a report prepared under contract for the Department of the Army: ANDRULIS Research Corporation, United States Army Reserve in Operation Desert Storm, Enemy Prisoner of War Operations: The 800th Military Police Brigade (June 12, 1992) (unpublished monograph, on file with HQDA, ATTN: DAAR-PAE) [hereinafter 800th MP Bde].

⁶¹*Id.* at 8.

security for each camp); MP Escort Guard Companies (furnishing security and accountability for EPWs being moved from the corps holding areas to the EPW camps and between camps); MP Processing Company (recording the identity and status of each EPW during processing and movement); MP Processing Advisory Teams (coordinating and accounting for EPWs transferred between camps, medical channels, and host nation camps), MP Camp Advisory Teams (advising and acting as liaison to host nation EPW camps that receive United States captured EPWs to ensure continued accountability and humane treatment); and the MP Prisoner of War Information Center (theater level unit servicing all camps compiling, managing, and transmitting information on EPW accountability to the NPWIC).⁶²

For Desert Storm, the 800th MP Brigade established two camp areas in Saudi Arabia named Brooklyn and Bronx. Each site was staffed by two EPW camps with a fifth camp structure held in reserve. The two camps that made up Bronx were located in the east to support the United States Marine Corps, with Brooklyn and its two camps in the west supporting the United States Army, British, and French forces.⁶³ Enemy prisoners of war were processed and the official reports from the PWIC to the NPWIC were generated at these theater level camps. However, a number of steps took place prior to this reporting process.

United States Army and Marine Corps forces are trained to handle EPWs on capture in a manner that will protect both the EPWs and the capturing forces.⁶⁴ Enemy prisoners of war are searched and weapons removed. They are allowed to retain any protective gear including helmets, flak jackets, and gas masks. Officers are segregated from enlisted troops and all EPWs are told to remain silent for intelligence purposes and to prevent organized escape attempts that might endanger the EPWs and the capturing forces.

Rapid evacuation from the combat zone also is a priority.⁶⁵ During Desert Storm, Iraqi prisoners were moved to the rear as fast as possible, using the best means available. In most cases, EPWs were marched to unit collection points, moved to division collection points and transported to the corps level temporary holding facilities. Because of the tremendous num-

ber of EPWs, this was a situation-dependent operation with transportation being provided as available. A number of trucks and buses were obtained from Saudi suppliers and specifically used for this purpose. Other EPWs were transported back by convoys returning from resupply missions to units at the front.⁶⁶

Immediately after capture, EPWs are moved to temporary holding facilities for food, water, rest, and transportation to the theater level EPW camps. In the Gulf War, all of the United States, British, and French forces established their own corps level temporary holding facilities. They were located in Saudi Arabia near the border, but outside of the immediate combat area. These temporary facilities were designed to hold EPWs for up to seventy-two hours, and provided food, water, blankets, and access to medical facilities. Most EPWs spent less than twenty-four hours in these holding facilities before being moved to the camps at Bronx or Brooklyn.

Once EPWs arrived at the theater level camps, accountability was easily accomplished. New arrivals were placed in a separate area, given food, water, and shelter pending processing. As soon as possible, EPWs were given showers, physical exams, deloused, photographed, fingerprinted, issued an identity card or wrist band, and provided a change of clothes and a blanket.⁶⁷ The reporting information was gathered during processing and entered into the PWIS II data base. The PWIC then forwarded this information via modem and an electronic mail system to the NPWIC which, in turn, forwarded a report to the ICRC's Central Prisoner of War Information Bureau via facsimile.

Procedures varied between camps and, because of the tremendous numbers—the 403rd Camp received 4000 in one day and 1900 in a single group—some processing short-cuts were taken.⁶⁸ These short-cuts only affected information required by the Army—that is, thumbprints instead of full sets of fingerprints—with one possible exception. Some camps did not issue new EPW identity cards and relied on EPWs retaining their Iraqi military identification cards.⁶⁹ In addition, all of the camps issued wrist bands with identification information and internee serial numbers (ISN). However, for the few EPWs who may have lost their identity cards, at issue

⁶² *Id.* at 11-12.

⁶³ *Id.* at 16.

⁶⁴ DEP'T OF ARMY, FIELD MANUAL NO. 19-40, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES, AND DETAINED PERSONS 2-1 (Feb. 1976).

⁶⁵ *Id.* at 2-3.

⁶⁶ 800th MP Bde, *supra* note 60, at 52.

⁶⁷ *Id.* at 26.

⁶⁸ *Id.*

⁶⁹ *Id.* at 72 n.35.

was whether the wrist band with an ISN satisfied the "identity documents" requirement of Article 18 of the GPW.⁷⁰ The Department of the Army is working to ensure that in the future, EPW camps strictly comply with their policy of issuing identity cards to all EPWs even in operations with extremely high capture rates.

Except for a few surge operations where EPWs received an initial expedited processing with a second follow-up processing later, processing at the EPW camps was a straightforward operation with very few problems. The difficulties in accurately accounting for EPWs appeared in the evacuation process between capture and their arrival at the theater level camps.

The first attempts to account for EPWs began at the temporary holding facilities. Reports on the number of EPWs in custody and the number transferred to medical channels were submitted daily to United States Central Command (CENTCOM). These by-number reports could not be relied on with the same level of confidence as the by-name reports from the PWIC for two reasons: First, these reports were intended to be used for logistical planning only—that is, resupply of food and water and transportation requirements—and second, EPWs followed a variety of evacuation paths and did not always reach the temporary holding facilities.

Although most EPWs were transported to the temporary holding facilities during evacuation, EPWs might be transferred out of the normal evacuation process in two situations. Enemy prisoners of war suffering from wounds or illness were diverted to medical channels and EPWs who died prior to reaching the theater level camps were sent to graves registration units. Once out of the normal EPW handling chain, accurately accounting for these EPWs was much more difficult.

The first of these situations involved EPWs receiving medical treatment. Some seriously wounded EPWs were evacuated from the battlefield through medical channels and after recovery sent directly to the EPW camps, completely bypassing the temporary holding facilities. Others arrived at the holding facilities, were counted, and then diverted to medical channels for treatment. Following treatment, these EPWs were either evacuated to other hospitals, released, or sent to EPW camps. Once in the hands of the medical authorities, EPWs were handled strictly according to their medical needs.

Because the medical care providers were not attuned to the EPW accountability requirements, the EPW units had some difficulty tracking the transfer of EPWs in medical channels. This probably was the most serious challenge to accurate EPW accounting during the Gulf War.

Another challenge to accurate EPW accounting involved EPWs who died of wounds or illness following capture. Although no duty to report enemy dead who are killed in action prior to falling into the hands of the enemy exists, the detaining power does have a duty to report the death of any EPW. This obligation requires "death certificates or certified lists . . . [with] . . . particulars of identity as set out in the third paragraph of Article 17, and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves."⁷¹

The EPW camps were responsible for providing death certificates and reports for EPWs who died following arrival at the EPW camps.⁷² The difficulty arose with those EPWs who died of wounds or illness following capture but prior to reaching the theater level camps. Because EPWs are not actually identified or processed until they reach the theater level camp, obtaining the information necessary to identify EPWs who die immediately after they fall into enemy hands may be extremely difficult. Under current procedures, the dead enemy service member is transported to a graves registration unit bypassing the EPW camp and reporting process. Instead, the enemy service member is treated in the same manner as a United States service member who dies immediately after combat and is reported as killed in action through graves registration channels.⁷³ Whether EPW camps or graves registration units report the death of an EPW who dies in this situation is a policy decision. Regardless of who makes this report, the detaining power must use all possible means to identify dead EPWs and report their death under Article 120 of the GPW.⁷⁴

Although not expressly stated in Article 122 of the GPW, one may argue that the obligation to report an EPW arises immediately on capture. Enemy combatants become prisoners of war from the moment they fall into the hands of the enemy. However, the United States does not report EPWs until they reach the EPW camps at the theater level. This raises the question of how the United States procedure accounts for the gap in time between the moment of capture and processing the EPW for reporting purposes at the theater level

⁷⁰ See Melillo, *supra* note 19.

⁷¹ GPW, *supra* note 1, art. 120.

⁷² All of the eight EPWs who died in United States custody, died as a result of precapture injuries or illness. *Conduct of the Gulf War*, *supra* note 54, at 618.

⁷³ 800th MP Bde, *supra* note 60, at 58.

⁷⁴ The "all possible means" standard proposed is taken directly from the provision in Article 17 of the GPW requiring the detaining power to use "all possible means" to establish the identity of EPWs who are unable to identify themselves due to their physical or mental condition. GPW, *supra* note 1, art. 17.

EPW camps. The delay in United States reporting procedures is the result of competing duties: the obligation to protect the EPWs and the duty to report their capture.⁷⁵ Protecting EPWs is the most important duty under the United States procedures. Gathering, compiling, and forwarding reports takes time. Because the level of danger on the modern battlefield has been redefined by the speed, range, and destructive capability of today's weapons, holding EPWs in the combat area for reporting purposes may jeopardize their safety. The United States policy is to conduct the reporting "as soon as possible," but not at the expense of exposing EPWs to the risks of an unnecessary delay in a combat environment. Under this view, the first duty of a detaining power must be the rapid evacuation of EPWs from the combat area.

The obligation to safeguard EPWs and speed them to the rear will continue to compete with reporting requirements. Until technology provides an instant means of identifying and reporting EPWs at the moment of capture, a balancing test will exist between these obligations. Although protection of EPWs must remain the primary concern, efforts to account for EPWs during the evacuation process also must continue to improve along with advances in technology. A number of possibilities may speed this process. In the future, soldiers may be equipped with visual scanners to read identification cards and immediately report this information with advanced communications techniques. Use of bar code systems may improve EPW processing. Although some of this technology has not yet been fielded, the innovative use of existing computer and communication technology can dramatically improve the speed and accuracy of EPW accounting techniques.

In spite of the challenges presented in Desert Storm, the United States EPW Program achieved a remarkable accuracy rate. Following the war, the ICRC provided the NPWIC with a list of Iraqi EPWs thought to be missing. Only sixty-three of these names remained unaccounted for after a reconciliation of records.⁷⁶ This results in an accountability level of over ninety-nine percent.⁷⁷

Operations Other Than War

The 1991 Gulf War is an example of a mature theater in which all United States EPW assets were involved. All of the units with the primary mission of United States EPW processing currently are found in the United States Army's Reserve

component and may not be mobilized or available in operations other than war or humanitarian operations. If persons entitled to prisoner of war status are captured, the active duty units involved will be required to task organize to fulfill the processing and reporting missions normally conducted by the reserve component EPW units.

As the standard ground combat forces of the United States military, active duty soldiers and Marines may capture a number of EPWs and not have the luxury of a specialized EPW unit trained to operate the PWIS II or interface with the NPWIC. The usual solution is to turn to the MP units because they have some training in the EPW reporting system. However, if a Marine expeditionary unit or similar task organized unit does not have a large contingent of military police, the staff judge advocate must be aware of the requirements of the GPW and actively seek the necessary augmentation to satisfy the reporting requirements that may arise in operations other than war.

Advances in Technology

When a tremendous number of prisoners surrender in a short period, the only efficient and accurate way to process and report their capture is through the use of computers. In situations involving a small number of EPWs captured over a longer time, manual methods may suffice. However, the accuracy of manual methods still cannot compete with computer-based reporting systems.

Given today's technology, is the use of antiquated processing procedures to account for prisoners of war a violation of the law? If the United States had relied on manual methods of reporting in the Gulf War, it would have taken months to process and report the capture of Iraqi prisoners of war. Additionally, the United States military would have had to divert a large number of troops to the EPW processing mission. Without proper training, processing rates and accuracy would have suffered. Although the high capture rates might have provided a justification for some delay, if the United States had not used computer-based reporting techniques along with electronic communication networks, it would not have met its requirements to report "as soon as possible" using "the most rapid means."⁷⁸ The success of the United States EPW reporting in the Gulf War was a direct result of the Department of the Army continually upgrading its reporting methods to keep up with advancing technology.

⁷⁵The GPW devotes two paragraphs to the subject of protecting prisoners through rapid evacuation by stating: "Prisoners of war shall be evacuated as soon as possible after capture, to camps in an area far enough from the combat zone for them to be out of danger"; "Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone." *Id.* art. 19.

⁷⁶800th MP Bde, *supra* note 60, at 59.

⁷⁷*Conduct of the Gulf War*, *supra* note 54, at 618.

⁷⁸GPW, *supra* note 1, art. 122.

For the United States, the current version of the PWIS II has proven to be the best method for accounting for EPWs. However, the law will continue to evolve in this area, and today's method of reporting may be obsolete on tomorrow's battlefield. The standards of speed and accuracy set by the United States EPW reporting in the Gulf War should only be considered the current legal standard. All countries should strive to improve this standard through the increased use of new technology. At a minimum, countries should establish similar computer-based information bureaus to meet their responsibilities under the Geneva Convention and respond to the needs of their own government agencies.

Conclusion

Accounting for people who become missing during war will continue to be a tremendous challenge. The law not only requires the parties to a conflict to identify prisoners of war and report their capture and condition, it also requires the parties to continually improve their methods of accounting for prisoners to keep up with advancing technology. If a party to a future conflict cannot accurately report the capture of prisoners of war in a timely fashion, it has failed to live up to its legal obligations under the GPW.

A Question of "Intent"—Intent and Motive Distinguished

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*"When I use a word, Humpty Dumpty said, in a rather scornful tone, it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things..."*¹

Statutory construction is inherent in a lawyer's daily life. If law is to be something other than an evershifting morass of interpretation, stability in statutory meaning must exist. Unfortunately, *United States v. Huet-Vaughn*,² seems to indicate that "intent" is susceptible to significant confusion.

In *Huet-Vaughn*, Captain Yolanda M. Huet-Vaughn, an Army reserve medical doctor, was charged with desertion with intent to avoid hazardous duty and shirk important service in violation of the Uniform Code of Military Justice (UCMJ).³ Captain Huet-Vaughn sought to defend herself by

presenting evidence that she had absented herself because of her belief that the forthcoming war with Iraq would be unlawful. During this contested trial before members, Captain Huet-Vaughn requested the right to testify and to bring fifty-one witnesses to corroborate her testimony to the effect that

she was a conscientious objector and that the dictates of her conscience, religion, philosophy, and beliefs caused her to refuse to mobilize with the rest of her unit to Southwest Asia in support of Operation Desert Storm. Specifically, she wanted to testify that she had a good-faith belief that war crimes would be committed and that she believed she was authorized under the Nuremburg Principles and Law of Land Warfare, to refuse to participate.⁴

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¹ LEWIS CARROLL, THROUGH THE LOOKING-GLASS 106-09 (Schocken Books ed. 1987) (1872).

² 39 M.J. 545 (A.C.M.R. 1994).

³ See UCMJ art. 85 (1988). Article 85 penalizes absence without leave with intent to either avoid hazardous duty or shirk important service. The accused was apparently charged with both. *Huet-Vaughn*, 39 M.J. at 547.

⁴ *Huet-Vaughn*, 39 M.J. at 548-51.

Granting the government's motion *in limine*, the military judge characterized the defense evidence as solely evidence of "motive," rather than evidence of "intent," and excluded the evidence.⁵ Captain Huet-Vaughn was convicted. On appeal, the United States Army Court of Military Review (ACMR) held—in a confusing opinion—that her evidence of "motive" was relevant to establish her "intent" and reversed the desertion conviction.⁶ Because the appellate opinion can be read as potentially permitting those who disagree with major operational decisions to interpose that opposition as a defense to desertion, the case is significant.⁷

Legislative History

Not only is the legislative history of Article 85 silent on the question of how to define "intent" for purposes of Article 85,⁸ so too, is the *Trial Judiciary's Benchbook*.⁹ "Intent" is addressed only in the context of "long desertion," absence without leave coupled with the intent to remain away permanently.

Discussing the nature of intent in desertion, Colonel Winthrop, author of the seminal nineteenth century treatise on military law, espoused what legal commentators have echoed ever since, that intent "is best understood in considering the acts and occurrences from which it may be presumed, its existence being in general a matter of inference from the circumstances of the particular case."¹⁰

In short, neither Winthrop nor Article 85's specific legislative history shed light on how to define "intent" for our purposes.

The Meaning of "Intent"

"In the popular mind, intent and motive are not infrequently regarded as one and the same thing. In law, however, there is

a clear distinction between the two."¹¹ The use of legal terms of art in a colloquial manner often causes confusion. "Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such a result."¹²

Intent has been defined further as "a design, resolve, or determination with which a person acts. Being a state of mind, intent is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. It presupposes knowledge."¹³ More narrowly defined, specific intent is "[i]n criminal law, the intent to accomplish the precise act which the law prohibits."¹⁴ Put somewhat differently, intent exists when "a person who acts (or omits to act) intends a result of his act (or omission) when he consciously desires that result or when he knows that that result is practically certain to follow from his conduct."¹⁵ Because evidence of intent is relevant to prove or disprove a specific intent element, evidence of intent always is admissible on the issue of specific intent to accomplish a criminal act. Evidence of motive, however, is only admissible if it tends to make the element of intent more or less probable.

Given the above definitions, determining one's specific intent when the means and the end for the commission of a crime are one and the same is easy. The difficulty arises when one alleges more than one intent:

A person often acts with two or more intentions. These intentions may consist of an immediate intention (intent) and an ulterior one (motive), as where the actor takes another's money intending to steal it and intending then to use it to buy food for his needy family. It may be said that, so long as the defendant has the intention required by the definition of the crime, it is immaterial

⁵The military judge did, however, allow Captain Huet-Vaughn to tell the members, in a very limited manner, her reason for refusing to mobilize. *Id.* at 550.

⁶Affirming a conviction for the lesser-included offense of absence without leave.

⁷Despite the ACMR's attempt to clear "muddied waters" and eviscerate the probable results of its opinion, the ACMR arguably has either redefined the meaning of "intent" for Article 85, merged motive into intent for admissibility purposes, or created an affirmative defense of justification by means of moral, religious, or political persuasion.

⁸*See, e.g.*, REPORT OF THE COMM. ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE, S. REP. NO. 486, 81st Cong., 2d Sess. 317 (1949), reprinted in 2 INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950, at 1321, 1449-50 (1985).

⁹DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK (1 May 1982).

¹⁰WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 637-38 (2d ed. 1920).

¹¹United States v. Huet-Vaughn, 39 M.J. 545, 552 (A.C.M.R. 1994).

¹²BLACK'S LAW DICTIONARY 712 (6th ed. 1990).

¹³*Id.*

¹⁴*Id.*

¹⁵WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 196-200 (1972).

that he may also have had some other intention.¹⁶

Recognizing that the "second intent" is really motive is the cause of much debate. When specific intent is an element of an offense, evidence of intent is absolutely admissible. The questionable evidence is that of motive. Admissibility depends on the type of motive evidence in issue. Motive, as compared with intent, is

the cause or reason that moves the will and induces the action. An inducement, or that which leads or tempts the mind to indulge a criminal act . . . [m]otive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such a result . . . [d]esign, resolve, or determination with which a person acts. Being a state of mind, intent is rarely susceptible of direct proof, but must ordinarily be inferred from the facts . . . [i]t includes those consequences which represent the very purpose for which an act is done . . . regardless of desire.¹⁷

In *United States v. Kastner*,¹⁸ the United States Court of Military Appeals (COMA) clarified the issue of whether motive evidence of a good or innocent purpose negates a specific intent with the following analysis:

In equating "a wholly innocent purpose" with an absence of criminal intent, we exemplified the difficulty in applying the ancient maxim, *Actus non facit reum, nisi mens sit rea* (The act itself does not make the actor guilty, unless the mind is guilty), for motive is not a substantive element of any crime recognized by the common law. "A bad motive does not make an otherwise innocent act criminal. Conversely, a good

or laudable motive does not make an otherwise criminal act innocent." It is the intent, not the motive that determines the criminality of the act. "[T]here is no distinction of greater importance in the criminal law." The correct test is objective, not subjective: Is the accused's conduct, objectively viewed, a violation of established law? Thus, the killing of a bad man with the intention of benefiting the community is not a defense to unlawful homicide, though it may well be a factor in mitigation.¹⁹

In *United States v. Tilton*,²⁰ the ACMR excluded the appellant's psychiatric testimony that when he robbed a bank he did so with the intent to commit suicide rather than to rob the bank. The ACMR opined that "the appellant's reason for planning the robbery was to get himself killed related to motive, rather than to intent, so the psychiatrist's testimony was properly limited."²¹

In view of the distinction between intent and motive, when an offense contains an element of specific intent, use of motive evidence is only admissible to prove or disprove the issue of intent. The key factor, however, is that the motive evidence must be relevant.²²

Intent as a Practical Matter

Statutory interpretation perforce is constrained, at least initially, by the literal terms of the statute. In *United States v. Stewart*,²³ the accused was charged with violating 18 U.S.C. § 2155 by having attempted to destroy an aircraft engine "with intent to injure, interfere with, or obstruct the national defense. . . ." ²⁴ Focusing on the plain meaning of the statute, the COMA held that although Stewart may have intended to destroy the engine, no direct evidence existed that he had intended "to injure, interfere with, or obstruct the national defense." Indeed, the accused's evidence suggested that

¹⁶ *Id.* at 206.

¹⁷ BLACK'S LAW DICTIONARY 712 (6th ed. 1990). Criminal motive is something in the mind or that condition of the mind which incites to action or induces action, or gives birth to a purpose. Distinguishable from intent—which represents the immediate object in view—motive is the ulterior intent.

¹⁸ 17 M.J. 11 (C.M.A. 1983).

¹⁹ *Id.* at 13-14 (citations omitted).

²⁰ 34 M.J. 1104 (A.C.M.R. 1992).

²¹ *Id.* at 1107. The testimony was admitted however, for the limited purpose for establishing the appellant's state of mind at the time, which was suicidal.

²² MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 401 (1984) (defining relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence). Military Rule of Evidence 402 prescribes that relevant evidence is generally admissible and irrelevant evidence is not admissible.

²³ 42 C.M.R. 19 (C.M.A. 1970). See also *United States v. Johnson*, 15 M.J. 676 (A.F.C.M.R. 1983). But see *United States v. Vega*, 39 M.J. 79, 81 (C.M.A. 1994).

²⁴ 18 U.S.C. § 2155 (1988).

Stewart had acted to avoid another Mediterranean cruise. The facts suggest that although Stewart had planned to destroy the engine, he had no desire whatsoever to harm the national defense and expected the damage to be discovered and repaired.²⁵ In context, *Stewart* appears to stand for the proposition that "intent" means not only what one intends in the English sense but also incorporates what one reasonably might expect. This conclusion may shed light on the *Huet-Vaughn* scenario.

Under Article 85, absence without leave plus "intent to avoid hazardous duty or shirk important service" is desertion.²⁶ Consider the following three scenarios:

(1) Assigned to a rifle company about to go into action, the accused experiences such overpowering fear that he runs to the rear without conscious recognition of the consequences of his action. The company advances into combat as he runs.

(2) Faced with both a family emergency and a known forthcoming combat deployment, the accused absents himself without leave to go home to render immediate financial aid to his family. He reasonably expects to be able to return to deploy with his unit. He attempts to do so but is unavoidably detained in return transit and misses the deployment. He returns to his home station while his unit is in combat abroad.

(3) The accused has been alerted for deployment overseas as part of what everyone expects to be combat operations. Believing the deployment and likely combat to be politically and practically inadvisable, the accused determines to make a political statement, with resulting publicity, by absenting herself and chaining herself to the doors of a nearby church while proclaiming her refusal to deploy.

All three scenarios share the absence without leave elements necessary for a desertion offense, but what about the intent necessary to create desertion? In scenario one, the accused has no intent whatsoever; his fear has deprived him of the ability to form an intent. He has no conscious knowledge of the combat consequences of his actions. In scenario two, the accused intends absence without leave but has no intent to avoid hazardous duty or shirk important service. Further, at no time does the accused knowingly take action that he believes could have the effect of "avoid[ing] hazardous duty or shirk[ing] important service."²⁷ The third scenario presents a different result, however. Although the reason for the accused's action in chaining herself to the church is to alert the public to the perceived error of the National Command Authority, to do so she must necessarily avoid hazardous duty or shirk important service. Her "intent" need not encompass a desire to avoid hazardous duty or shirk important service; for her to intend an action that has that known or reasonably predictable result is sufficient. Her *motive* is to alert the public; her *intent* is desertion to effect her motive.

Motive as Evidence of Intent

In assessing motive evidence for relevancy when specific intent is in issue, counsel must determine whether the alleged motive evidence tends to prove or disprove specific intent. Motive evidence that merely tells "why" the crime happened²⁸ without making intent more or less probable is inadmissible unless it raises or substantiates a recognized defense. In *United States v. Montour*,²⁹ for example, the United States Court of Appeals for the Second Circuit held that the appellant's attempt to show lack of specific intent, by offering testimony from a witness regarding appellant's good purpose, "mistakenly assumes that a good motive is evidence of lack of specific intent. It was well within the judge's discretion to exclude . . . testimony"³⁰ Similarly, in *Northeast Women's Center, Inc. v. McMonagle*,³¹ the United States Court of Appeals for the Third Circuit held that the district court did not err in rejecting a justification defense proffered by defendants and in precluding evidence of defendants' motives unless defendants showed the specific relevance of this evidence.

²⁵ *Stewart*, 42 C.M.R. at 22.

²⁶ UCMJ art. 85 (1984).

²⁷ *Id.* Had he intended to go home while knowing that the consequences of his action would unavoidably make him miss the deployment, his intent would have been to miss the deployment *because* he wanted to assist his family. Although one could plausibly rephrase this as, "his intent was to help his family with the result that he must miss the deployment," this is the same as the prior statement.

²⁸ Usually, the "why" type of motive evidence is evidence of good motive.

²⁹ 944 F.2d 1019 (2d Cir. 1991).

³⁰ *Id.* at 1028 (citation omitted).

³¹ 868 F.2d 1342, 1350 (3d Cir. 1989).

When evidence of motive neither makes intent more or less probable, nor raises or substantiates a cognizable defense, the judge should admit the evidence only as extenuation and mitigation during sentencing. Otherwise, the evidence would have the potential effect of inserting jury nullification into the process. "[J]ury nullification . . . would be irresponsible as well as unlawful and certainly should not be encouraged."³² Using somewhat similar reasoning, in *Koefoot v. American College of Surgeons*,³³ the district court held that the limited relevance of motive evidence, and the concomitant danger of misleading the jury, suggests that the quality and quantity of motive evidence must be limited at trial.

The Meaning of Intent

In *United States v. Vega*,³⁴ the COMA found that pleading guilty to sabotaging a United States Air Force KC-135 refueler aircraft by cutting wires³⁵ was not inconsistent with appellant's unsworn testimony that he never intended to harm the United States.³⁶ In arriving at its conclusion, the COMA noted

In *United States v. Johnson*, we concluded that "Congress used the term 'intent' in § 2155(a) to mean knowing 'that the result is practically certain to follow,' regardless of any desire, purpose, or motive to achieve the result." We held that "§ 2155 would be satisfied if someone acted when he knew that injury to the national defense would be the almost inevitable result, even though the reason for his action had nothing to do with national defense."³⁷

The COMA further relied on *United States v. Kabat*,³⁸ in which nuclear war protestors claimed that their damage to missile sites was motivated by their religious beliefs and a desire to avoid worldwide nuclear destruction, rather than to harm the United States. In *Kabat*, the majority held "that the 'specific intent' required by § 2155 is only the intent to interfere with what may commonly be taken as the country's activities of national preparedness and not the intent to act to what one subjectively believes to be to the detriment of the United States."³⁹

At least in the desertion context, a soldier has the intent necessary "to avoid hazardous duty or shirk important service" when the soldier intentionally absents himself with the knowledge that the absence will result in avoiding hazardous duty or shirking important service. As noted by the COMA, specific intent of this type of desertion cannot be proved merely by establishing absence from a unit and that the unit is engaged in or soon will be engaged in hazardous duty or important service.⁴⁰ Instead, the intent element is usually inferred by the factfinder from the circumstances surrounding the absence.⁴¹ Generally, the intent element is satisfied when the court determines, on the basis of substantial evidence, that when the desertion is alleged to have occurred, the accused had unlawfully absented himself, the duty or service was imminent, and as a consequence of this absence, the accused either avoided it or had reasonable cause to know that he would do so.⁴²

In effect, the law of desertion incorporates an unspoken legislative rebuttable presumption.⁴³ When a normal person would understand that the result of her absence without leave would cause her "to avoid hazardous duty or shirk important

³²United States v. Shroeder, 27 M.J. 87, 90 (C.M.A. 1988). The COMA also noted that there is "[n]o requirement that the military judge allow questions or argument which are obviously designed to induce 'jury nullification.'" United States v. Smith, 27 M.J. 25, 29 (C.M.A. 1990). See Robert E. Korroch & Michael J. Davidson, *Jury Nullification: A Call For Justice or An Invitation To Anarchy*, 139 MIL. L. REV. 131 (1993).

³³652 F. Supp. 882, 889 (N.D. Ill. 1986).

³⁴39 M.J. 79, 81 (C.M.A. 1994).

³⁵In violation of 18 U.S.C. § 2155 (1988), as incorporated by UCMJ art. 134 (1984).

³⁶*Vega*, 39 M.J. at 81.

³⁷*Id.* (citations omitted).

³⁸797 F.2d 580 (8th Cir. 1986).

³⁹*Id.* at 587. See *United States v. Komisaruk*, 885 F.2d 490, 492 (9th Cir. 1989) (affirming the district court's refusal to admit evidence of appellant's personal disagreement with national defense policies to establish a legal justification for violating federal law or as a negative defense to the government's proof of the elements of the charged crime).

⁴⁰United States v. Apple, 10 C.M.R. 592 (C.M.A. 1953).

⁴¹United States v. Taylor, 9 C.M.R. 19 (C.M.A. 1953).

⁴²United States v. Shull, 2 C.M.R. 83, 88-89 (C.M.A. 1952).

⁴³See, e.g., FED. R. EVID. 301 incorporating the "Thayer Bursting Bubble" presumption which shifts only the burden of production or going forward.

service," that element will be established until the accused comes forward with evidence that she did not realize that this consequence would occur.⁴⁴ In such a case, evidence of the accused's motive *might* be relevant on the question of intent. Should the accused's evidence, however, be that she knew the consequences of her acts but that they merely were the results of her true "intent," her evidence merely is motive evidence and irrelevant and thus inadmissible on the merits.

The Personal Hardship Cases

A number of reported cases involve an accused's attempt to introduce motive evidence to negate the intent element inherent in desertion. These cases typically tend to involve a personal crisis during which a soldier left the unit temporarily to take care of an emergency and was unable to return in time to deploy. Courts have been willing to admit evidence of personal hardship or tragedy because that evidence may either negate intent or raise or support a defense.

When the soldier is able to prove that his or her personal crisis was overwhelming and fully intended to return as soon as the problem was resolved, courts often have found that the accused lacked the requisite intent for desertion with intent to avoid hazardous duty or to shirk important service. In *United States v. Cline*,⁴⁵ the COMA held that an accused's testimony that his absence was motivated by combat fatigue and a genuine misunderstanding of his superior's orders, reasonably raised an inference that he was guilty only of the lesser-included offense of absence without leave. In *United States v. Guthrie*,⁴⁶ a soldier on leave in the United States from a tour in Korea, absented himself from shipment to Europe to temporarily work the family farm during his father's serious illness. The Army Board of Review found those facts sufficient to negate specific intent to shirk important service. In *United States v. Perry*,⁴⁷ the Army Board of Review held that specific intent to desert to shirk important service was negated by the accused's testimony that he fully intended to return in time to mobilize to Europe. The accused explained that he absented himself temporarily in hope of saving his marriage and that he would have reported on time had he not lost his plane ticket.

Courts generally have been unpersuaded, however, when the evidence of personal problems was less than onerous.

These cases are hard to classify. On the one hand, the accuseds actually may have lacked the necessary intent; they may have failed to appreciate the consequences of their absences. On the other hand, some of the cases might best be regarded as aberrational and based on the leniency of the author judges. The courts often have been clear on the distinction between intent and motive.

In *United States v. Gonzalez*,⁴⁸ a Marine Corps reservist absented himself without authority and failed to move with his unit to Saudi Arabia. The appellant claimed that he absented himself because he had a urinary tract infection and wanted to ensure that he received adequate medical treatment. The Navy-Marine Corps Court of Military Review (NMCMR) held

Notwithstanding its relevance to intent, an understandable or even laudable motive is never a defense to desertion as long as all the elements of the offense are clearly established. . . . If he actually intended to avoid embarkation by his absence for whatever underlying reason, it matters little just what, or how benign, his motivations may have been.⁴⁹

In support of its holding, the NMCMR cited *United States v. Kim*,⁵⁰ in which the ACMR held that an appellant's actual motivation for leaving his unit is unimportant, if as a consequence of that unauthorized absence, the appellant had reasonable cause to know that he would avoid important service.⁵¹

"Justification"

In support of her position that evidence of her moral, religious, and political opposition to war crimes was relevant, Captain Huet-Vaughn argued that the specific intent element in her prosecution could be negated because she had a good

⁴⁴However, in *United States v. Herrin*, 40 C.M.R. 960, 964 (N.M.C.M.R. 1969) the Navy Board of Review opined that appellant's testimony that he knew he would ultimately be apprehended and thus returned to duty, did not negate a specific intent to remain away permanently. The significance of *Herrin* is that the accused's *intent* could stand distinct from the likely consequences.

⁴⁵9 C.M.R. 41 (C.M.A. 1953).

⁴⁶12 C.M.R. 299, 300-01 (A.B.R. 1953).

⁴⁷10 C.M.R. 387, 389-90 (A.B.R. 1953).

⁴⁸39 M.J. 742 (N.M.C.M.R. 1994).

⁴⁹*Id.* at 747.

⁵⁰35 M.J. 553 (A.C.M.R. 1992).

⁵¹*Id.* at 555.

purpose in refusing to mobilize with her unit. This argument fails because desertion with the intent to avoid hazardous duty or to shirk important service does not include a defense of "good purpose."⁵² Rather, the court's sole focus appropriately is whether the accused intended to avoid hazardous duty or to shirk important service.⁵³

To the extent that Captain Huet-Vaughn meant to raise a defense of "justification" to her desertion, that effort likewise is doomed to failure. Both the United States Supreme Court and the COMA have unequivocally ruled that an individual's beliefs alone, however well meaning, provide no defense to a charge of desertion or unauthorized absence. As stated by the Court in *United States v. Reynolds*,⁵⁴ "[t]o allow the scruples of personal conscience to override the lawful command of constituted authority would in effect . . . permit every citizen to become a law unto himself."⁵⁵

Should Public Policy Concerns Dictate a Change in the Law?

Appellate courts occasionally have used or permitted motive evidence on behalf of the accused in personal tragedy cases. Although these cases are best considered aberrational under present law, they do raise a question of public policy. Should motive be taken into account in some fashion for these or other cases?

In cases such as *Huet-Vaughn*, a general justification defense could be created whereby individuals would be exonerated of their conduct if their conduct was driven by their moral, religious, or political motive and beliefs or by the needs of family members. This defense would be difficult to create in a limited form, however, and consequently would carry an unacceptable risk of permitting numerous service-members to refuse important duty in hopes of avoiding subsequent criminal convictions.

Rather than creating a new defense, a new absence without leave variation to Article 86⁵⁶ could be added that would pun-

ish absence without leave *during* hazardous duty or important service. This would omit the need for the prosecution to prove the accused's specific intent as is currently required for desertion. Less onerous than desertion, this absence offense would be less stigmatizing for the accused, who could be given a punishment less severe than that accorded desertion, although more severe than that for simple absence without leave. This approach would work, however, only when the offense was specifically pleaded. To make it generally useful, the new offense would have to be a lesser-included offense of the present offense of desertion with intent to avoid hazardous duty or to shirk important service. That could only be accomplished by providing that *motive* evidence of a specified type would be admissible to negate the desertion offense.

The best solution is to recognize motive evidence for what it is—mitigation and extenuation material—and put an end to unnecessary merits related litigation. Sentencing is the appropriate forum for the admission of an individual's moral, religious, or political views or personal or family needs. Whether this evidence will be persuasive ultimately rests with the factfinder.

Conclusion

In *United States v. Figueroa*,⁵⁷ the Army Board of Review held that

The underlying motive or reason for appellant's actions must not be confused with the mens rea involved in the wrongful dispositions or with specific intent. Underlying motives or purposes, however good, are not a defense to crime, provided of course the essential elements of the crime, including knowledge and intent, are present.⁵⁸

This remains the law. To the extent that *United States v. Huet-Vaughn* suggests otherwise, the ACMR is mistaken. If all that the *Huet-Vaughn* appellate court meant was that motive evidence could be relevant to specific intent, the

⁵² In *United States v. Kastner*, 17 M.J. 11, 14 (C.M.A. 1983), the COMA previously rejected the so-called "innocent purpose" doctrine. In *United States v. Roark*, 31 C.M.R. 64, 65 (C.M.A. 1961), the court created the innocent purpose doctrine where an accused claimed that he stole his barracks mate's money to teach him a lesson, not for the purpose of stealing. The COMA found that when one does not possess a criminal intent, he or she could not be guilty of the crime charged. Therefore, whether one's purpose was innocent, good, or bad, is irrelevant.

⁵³ See *United States v. White*, 766 F.2d 22, 24 (1st Cir. 1985).

⁵⁴ 98 U.S. 145 (1879). The COMA adopted this language in *United States v. Wilson*, 41 C.M.R. 100 (C.M.A. 1969).

⁵⁵ See also *United States v. Noyd*, 40 C.M.R. 195 (C.M.A. 1969) (a soldier is obligated to obey all lawful orders, not merely those compatible with his or her conscience).

⁵⁶ UCMJ art. 86 (1984).

⁵⁷ 39 C.M.R. 494 (A.B.R. 1967).

⁵⁸ *Id.* at 497. See *United States v. Fleming*, 23 C.M.R. 7 (C.M.A. 1957).

ACMR was surely correct. Unfortunately, determining from the ACMR's opinion how that legal truism could have applied to the facts of *Huet-Vaughn* is difficult. Absent facts not apparent in the opinion, at best the ACMR seems to have gone through the motions of an unnecessary reversal. At worst, the ACMR has dangerously confused motive and intent. In such a case, the following words of Judge (now Justice) Stevens, in a case involving burning of draft records, ought to be heeded

One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Appellant's professed unselfish motivation, rather than a justification actually identifies a form of arrogance which organized society cannot tolerate.⁵⁹

⁵⁹United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971).

Operation Safe Removal: Cleanup of World War I Era Munitions in Washington, D.C.

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Introduction

The United States Army has developed, tested, trained with, and stored chemical weapons for over seventy-five years.¹ For many of those years, chemical weapons and related training material often were disposed of after use in ways that would be unacceptable today, to include burial and dumping at sea. To date, the Army has identified 215 potential burial sites of chemical warfare material (CWM) at eighty-two locations in thirty-three states, the United States Virgin Islands, and the District of Columbia.² Chemical warfare material includes chemical agent identification kits, which may contain small quantities of chemical agent, such as mustard; and CWM bur-

ial sites with or without explosives, to include discarded vials with agent residue and munitions, which may contain both explosives and chemical agent.³ Buried CWM poses an ongoing threat of soil and groundwater contamination, which could degrade human health and the environment. As a result, the Army has embarked on a mission to cleanup these potential burial sites.⁴

Army lawyers soon may face the challenge of addressing legal issues associated with clean-up activities, either on installation or private property.⁵ Although the Program Manager for Non-Stockpile Materiel is the executive agent for the overall mission, installation commanders continue to be

¹ See THE CHEMICAL WARFARE SERVICE IN WORLD WAR II (Reinhold Pub. Co. 1948); LEO BROPHY ET. AL., THE CHEMICAL WARFARE SERVICE: FROM LABORATORY TO FIELD, DEP'T OF THE ARMY (1959).

² Non-Stockpile Chemical Materiel Program, *Survey and Analysis Report*, at i (Nov. 1993) [hereinafter *Survey and Analysis Report*]. "Of the 82 locations, 48 are DOD installations and 34 are formerly used defense sites (FUDS)." *Id.*

³ *Id.* at 2-6:

Munitions that may be found at these potential burial sites include 4.2-inch and Stokes mortar rounds, aerial bombs, rockets and projectiles, and containers of agent in both 55-gallon drums and ton containers. Potential chemical agents in these munitions and containers include blistering agents [mustard (H) and lewisite (L)], nerve agents (GA, GB, and VX), blood agents [hydrogen cyanide (AC) and cyanogen chloride (CK)], and choking agent [phosgene (CG)]. Many burial sites also contain other hazardous substances, such as white phosphorus (a screening smoke).

⁴ The executive agent for this mission is the Program Manager for Non-Stockpile Chemical Materiel, United States Army Chemical Materiel Destruction Agency (USACMDA). This agency will become part of the Chemical and Biological Defense Command (CBDCOM) in the summer of 1994. The CBDCOM is a major subordinate command of the United States Army Materiel Command (AMC).

⁵ In the past two years, suspected chemical munitions and material have been discovered on private property in Washington, D.C., as well as on a number of military installations, to include Fort Richardson, Alaska, Fort Devens, Massachusetts, and Aberdeen Proving Ground, Maryland.

responsible under law for clean-up activities that may take place on their installations.⁶ The Army also may task a local installation to support a clean-up mission that is being conducted in the local community. This circumstance occurred in Washington, D.C., during the winter of 1993.

On 5 January 1993, a construction crew reported to municipal authorities that they had uncovered several buried munitions while digging a utility trench for a house under construction in the exclusive Spring Valley residential development, located in northwest Washington, D.C.⁷ Shortly thereafter, the Emergency Operations Center for the Military District of Washington (MDW) received a request for assistance from the Washington, D.C., Office of Emergency Preparedness. The 67th Explosive Ordnance Disposal (EOD) Unit was dispatched to the site and examined the munitions. They decided that the munitions could contain chemical warfare agent. Consequently, they called the Technical Escort Unit (TEU)⁸ at Aberdeen Proving Ground, Maryland, for help. The TEU arrived later that day and examined the visible munitions.

The TEU determined that the munitions dated from World War I and were designed to deliver chemical agent payloads.

Munitions initially recovered included three 75mm projectiles and eleven Livens projectiles.⁹ No evidence of chemical agent contamination was detected.

The Initial Response

On 7 January, the Department of the Army (DA) designated Brigadier General (BG) George E. Friel, Commander of the Chemical and Biological Defense Agency,¹⁰ as Service Response Force Commander/On-Scene Coordinator to direct and coordinate all response and remediation activities.¹¹ Arriving at the site on 7 January, BG Friel determined that the presence of the above described munitions in the Spring Valley residential neighborhood presented an imminent and substantial danger to public health and welfare. Based on an initial hazard analysis, he devised and recommended to city officials an emergency evacuation plan, to be implemented by civil authorities. The TEU continued to dig out munitions from the area surrounding the utility trench, safely store the munitions on site, and prepare the munitions for transport.

On 8 January, a SRF Staff and Operations Center was established in a newly constructed house within 150 yards of the burial site. The house was leased from the developer.¹²

⁶See DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL QUALITY: ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 1-25(a) (4), (5), (8) (23 Apr. 1990) [hereinafter AR 200-1]; DEP'T OF ARMY, PAMPHLET 50-6, NUCLEAR AND CHEMICAL WEAPONS AND MATERIEL: CHEMICAL ACCIDENT OR INCIDENT RESPONSE AND ASSISTANCE (CAIRA) OPERATIONS, para. 2-d (17 May 1991) [hereinafter DA PAM. 50-6].

⁷Homes in this area are priced in excess of \$500,000. Two United States Senators lived within 150 yards of the munition site. I was also encouraged to hear from several sources that a number of "environmental lawyers" lived in the neighborhood.

⁸DA PAM. 50-6, *supra* note 6, para. 2-6a states the following:

The TEU of AMC [Army Materiel Command] has the mission of providing DOD with a worldwide capability for responding to, neutralizing, and disposing of chemical agents, munitions, and other hazardous materials resulting from a CAI [chemical accident/incident]. This mission may also involve escorting those items while in transit to safe storage or disposal areas.

⁹Memorandum, Selection of Response Action, Service Response Force Commander (2 Feb. 1993) [hereinafter Administrative Record]. Chemical warfare material—such as certain munitions recovered at Spring Valley—are classified as nonstockpile chemical material (NSCM). The 215 potential CWM burial sites are located on active military installations and FUDS. Spring Valley is an example of a FUDS. Typically, CWM are recovered during range clearing operations, during cleanup of chemical burial sites, during miscellaneous construction and remediation activities, and from research and development testing.

The quantity of recovered CWM is continually changing as additional items are discovered. Currently, 1593 chemical munitions and submunitions, including mortar cartridges, artillery projectiles, bombs, Livens projectiles, and World War II (WWII) German traktor rockets have been recovered. In addition, 704 submunitions (containing incapacitating agents) and approximately 4759 containers of chemical agent [including chemical agent identification sets (CAIS), unidentified glass bottles, and a small quantity of bulk containers] have been recovered.

Survey and Analysis Report, *supra* note 2, at 4-1 to 4-2. Potential chemical agents in recovered CWM include blistering agents, mustard (H) and lewisite (L), nerve agents (GB) and (VX), blood agents, hydrogen cyanide (AC) and cyanogen chloride (CK), and choking agent, phosgene (CG). *Id.* at 2-6, 4-1, 4-2. The USACM-DA is the executive agency tasked with the mission to destroy all stockpile and nonstockpile chemical warfare material. This agency has a commander/director and two executing program managers, the Program Manager for Chemical Demilitarization (PMCD) and the Program Manager for Non-Stockpile Chemical Materiel (PMNSCM).

¹⁰This unit was redesignated as the CBDCOM on 1 October 1993. The CBDCOM has oversight of the demilitarization of stockpile and nonstockpile chemical material, appropriate installation and restoration projects, and chemical treaty compliance. The CBDCOM also is responsible for all nonmedical basic and applied chemical and biological defense research, development, and acquisition in the DA. The TEU falls within the CBDCOM.

¹¹The Service Response Force (SRF) is a DA-level emergency response force established to respond to a chemical accident or incident (CAI). The SRF's mission is to respond to a CAI and execute emergency operations. For purposes of the National Contingency Plan (NCP), the SRF Commander becomes the On Scene Coordinator (OSC) once he or she assumes control for operations at the CAI location. DA PAM. 50-6, *supra* note 6, paras. 2-7a, 2-9, 2-10.

¹²The house was not finished inside, so conditions were relatively austere. At first, there were no bathroom facilities, heat, or telephones. Telephones were quickly installed, and later augmented by the Army and the Federal Emergency Management Agency. Heat also was provided, toilet fixtures installed by the contractor, and meals provided by MDW.

Additional TEU teams and staff personnel from Aberdeen Proving Ground traveled to Washington, D.C., that weekend. By the early morning hours of 11 January, the SRF Staff and Operations Center was staffed and functioning, to include two judge advocates from the Test & Evaluation Command (TECOM), Aberdeen Proving Ground.¹³

The emergency response effort was called Operation Safe Removal. The SRF's mission was as follows:

[to] mitigate hazards on site, protect the public, and develop a plan for the final disposition of all munitions and associated materials found. When the overall situation is clearly no longer an emergency, the SRFC [SRF Commander] will pass control of the event to the Army Corps of Engineers (COE) for final resolution.¹⁴

Before proceeding with any further description of the operation, a brief look at the events that occurred during World War I is necessary to understand why Army munitions were located on the site.

Historical Perspective

In the early 20th century, much of the area surrounding and including the Spring Valley residential neighborhood was rural and belonged to the American University and private landowners—mostly farmers. During World War I, the American University became a center for chemical warfare research, development, testing, and training. On invitation by the University, the federal government used over 150 acres of university and private land for research, testing, and training in all aspects of chemical warfare. The area became known as the "American University Experiment Station." In 1919, the experiment station, including all chemical warfare equipment, stocks, and personnel, was transferred to Edgewood Arsenal, Maryland.¹⁵

In 1986, the United States Army Toxic and Hazardous Materials Agency (USATHAMA)¹⁶ was tasked to investigate

Army archives for any relevant information on the nature and extent of any chemical agent or munition burials that might have occurred at Camp American University.¹⁷ The USATHAMA concluded "there was no evidence to confirm rumored *large scale* burials of munitions (thousands of items)." The report did indicate that the burial of CWM may have taken place in two specific areas.¹⁸

The two suspected burial sites were visible in a 1927 aerial photograph, which depicted two areas that were marked by double-ringed trenches. Although terrain features have changed greatly since 1927, one trench complex, visible in the photograph, appeared to correspond to the spot where the munitions were recovered in Spring Valley. Based on the historical evidence available in the USATHAMA report, the photograph, and the recovery of munitions at the site, BG Friel and his staff were able to estimate where the two concentric rings of trenches were located in relation to the recovered munitions. He surmised that the munitions were located in a burial pit that adjoined the concentric rings of trenches. Historical evidence indicated that the burial pit contained small quantities of laboratory or experimental materials.¹⁹

Based on his appraisal of the situation, BG Friel and his staff established a campaign plan to recover all munitions and possible CWM from the site, and to remove all potentially hazardous substances from the former trench area. This campaign plan was communicated to every member of the SRF staff, as well as to the public. During the course of Operation Safe Removal, BG Friel repeatedly explained his intent, progress to date, and operation plans to community residents during a public meeting held every night in the Spring Valley community center.

Authority of the Army to Conduct Environmental Cleanup

The authority—and duty—for the Army to conduct environmental clean-up operations at Spring Valley derived from the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)²⁰ and the National Contingency

¹³Legal support was provided by the Deputy Staff Judge Advocate, TECOM, who served as the SRF legal advisor, and the author, who served as the SRF environmental legal advisor. We were detailed to the SRF's special staff section.

¹⁴Operation Plan, Headquarters, CBDA (7 Jan. 1993).

¹⁵Jeffery Smart (Command Historian, CBDCOM), *Summary of USATHAMA Investigations Conducted in 1986* (25 Jan. 1993); Memorandum for Record, Dr. James Williams, Camp American University Historical Search (29 Oct. 1986) [hereinafter USATHAMA Investigations].

¹⁶This agency has since been reorganized and is now called the Army Environmental Center.

¹⁷USATHAMA Investigations, *supra* note 15.

¹⁸*Id.*

¹⁹The proceeding is based on my recollection of BG Friel's statements at a number of public meetings at the Spring Valley Community Center over the course of Operation Safe Removal.

²⁰The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-9675 (1992). Title 10 U.S.C.A. § 2701(c)(1) (1994) provides that the Secretary of Defense will carry out all response actions under the CERCLA and the Defense Environmental Restoration Program (DERP) with respect to releases of hazardous substances from military facilities and facilities and sites which had been owned, leased to, or otherwise possessed by the United States at the time of the release.

Plan.²¹ The CERCLA provides broad authority for the federal government to undertake response actions necessary because of uncontrolled releases or threats of release of hazardous substances into the environment. Two types of response actions exist: removal and remedial actions.²² Removal actions—such as Operation Safe Removal—are designed for short-term abatement of hazards presented by a release. These may include providing bottled water to affected residents, fencing the affected area, temporarily evacuating and housing threatened individuals, and cleaning up or removing released hazardous substances.²³ Remedial actions—which address long-term, permanent remedial activity at the site—focus on activities to restore environmental quality. Actions may include installing clay caps over a contaminated area, excavating and treating contaminated soil, and groundwater pumping and treatment.²⁴

To fulfill its CERCLA responsibilities, the Army has the authority to conduct response actions outside of installation boundaries when the installation is reasonably construed to be the major source of the release.²⁵ Beyond this, the Department of Defense (DOD) has the responsibility to take all action necessary with respect to releases of hazardous substances—as defined by the CERCLA—when either the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of the DOD.²⁶ Additionally, the DOD serves as the removal response authority with respect to incidents involving DOD military weapons and munitions.²⁷ Consequently, the Army

had a duty to respond to the scene as the removal response authority. This is the source of authority that led to BG Friel's designation as SRF Commander and On-Scene Coordinator.²⁸

Role of the Legal Team

The judge advocates on the SRF staff were members of a larger legal team that delivered legal services and advice to the SRF and the DA.²⁹ After arriving on site and becoming acquainted with the munition burial site and the SRF staff, the on-scene legal advisors were called on to address a variety of legal issues.³⁰

The operation illustrates how a single mission can require an interdisciplinary approach to provide adequate legal services to a commander and staff. In this case, the legal disciplines included environmental law, operational law, claims, administrative law, and procurement law.

Legal Issues and Their Resolution

The Duty to Report to the National Response Center

The CERCLA provides that any person in charge of an off-shore or on-shore facility—as soon as he or she has knowledge of any release of a hazardous substance in reportable quantities—will immediately notify the National Response Center.³¹ A release need not be contemporaneous, and includes abandoned or buried hazardous materials.³² Release

²¹The National Contingency Plan (NCP) is located at 40 C.F.R. pt. 300 (1992). The NCP states that the "DOD will be the removal response authority with respect to incidents involving DOD military weapons and munitions or weapons and munitions under the jurisdiction, custody or control of DOD." *Id.* § 300.120(c). Under the NCP, the On-Scene Coordinator directs all response efforts and coordinates all other efforts at the scene of a release of a hazardous substance. *Id.* § 300.120(a).

²²ENVIRONMENTAL LAW HANDBOOK 476 (Government Institutes, Inc., 11th ed. 1991).

²³40 C.F.R. § 300.5 (1992); ENVIRONMENTAL LAW HANDBOOK, *supra* note 22, at 476.

²⁴40 C.F.R. § 300.5 (1993).

²⁵This authority derives from § 120 of the CERCLA and the DERP, 10 U.S.C.A. §§ 2701-2710 (1992). *See also* AR 200-1, *supra* note 6, para. 9-8.

²⁶40 C.F.R. § 300.175(b)(4) (1993).

²⁷*Id.* § 300.120(c) (1993). In essence, the Army executed the lead agency functions that usually are performed by the Environmental Protection Agency (EPA) when responding to a nonmilitary chemical accident. DA PAM. 50-6, *supra* note 6, para. 2-12.

²⁸*See* 40 C.F.R. § 300.120(a) (1993); DA PAM. 50-6, *supra* note 6, paras. 2-9, 2-10.

²⁹The legal team included: the Environmental Law Division, United States Army Legal Services Agency; the Office of the Army General Counsel; the Office of the Command Counsel, United States Army Materiel Command; the International and Operational Law Division, Office of The Judge Advocate General; the United States Army Claims Service; the Office of the Staff Judge Advocate, Military District of Washington; the Baltimore District Office of the Army Corps of Engineers; and the Office of the Chief Counsel/Staff Judge Advocate, United States Army Test & Evaluation Command.

³⁰On arriving at Spring Valley, the SRF's legal advisors contacted the other Army legal offices and informed them of our situation which helped to set the stage for ongoing coordination and assistance. We also contacted the Office of Corporate Counsel for the District of Columbia and the Department of Justice. Later events required us to work closely with both on specific questions.

³¹42 U.S.C.A. § 9603(a) (1993).

³²Release means: "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant). . . ." *Id.* § 9601(22) (emphasis added).

also means threat of release.³³ Based on these definitions, the munitions located in the pit constituted a release.³⁴ The question was whether the munitions met the CERCLA definition of "hazardous substance" and whether a reportable quantity was present.

The CERCLA defines "hazardous substance" expansively, to include "any hazardous waste having the characteristics identified under or listed" pursuant to the Resource Conservation Recovery Act (RCRA).³⁵ The recovered munitions qualified as a reactive (unlisted) hazardous waste because of their explosive characteristic.³⁶ Munitions containing mustard agent or phosgene also contained listed hazardous constituents.³⁷

The next question was whether the munitions constituted a reportable quantity. The NCP provides thresholds to report the release of listed and unlisted hazardous substances.³⁸ Historical information indicated that mustard gas, lewisite and phosgene were tested in the Spring Valley area. These substances are included in the NCP list of extremely hazardous substances.³⁹ Determining the reportable quantity includes the entire waste—munition casing and all, and not just the contaminant.⁴⁰ The one-pound reportable quantity threshold mandated an immediate report to the National Response Center (NRC).⁴¹

The duty to report should not be taken lightly. The NCP states in part, as follows:

Any person in charge of a vessel or an off-shore or an onshore facility shall, *as soon as he has knowledge of any release* (other than a federally permitted release or application of a pesticide) of a hazardous substance from such vessel or facility in a quantity equal to or exceeding the reportable quantity determined by this part in any 24-hour period, immediately notify the National Response Center. . . .⁴²

The person "in charge" is not defined by statute or regulation. Courts generally have held that the term extends to persons who occupy positions of responsibility.⁴³ In the context of a military organization, this term is not restricted to SRF or installation commanders.⁴⁴ In one case, a relatively low-ranking supervisor of a facility was determined to be "in charge," because he was in a position to detect, prevent, and abate a release of hazardous substances. He was convicted for failing to expeditiously report a release.⁴⁵ Even a day's delay in reporting can subject a person to criminal penalties.⁴⁶

³³40 C.F.R. § 300.5 (1993).

³⁴See ENVIRONMENTAL LAW HANDBOOK, *supra* note 22, at 475.

³⁵See 40 C.F.R. § 300.5 (1993); ENVIRONMENTAL LAW HANDBOOK, *supra* note 22, at 472.

³⁶40 C.F.R. § 261.23 (1992) states that a solid waste that exhibits the characteristic of reactivity is a hazardous waste. Reactivity includes the capability of detonating if subjected to a strong initiating source or if heated under confinement. Many of the recovered munitions contained some amount of explosives, albeit degraded, and therefore had the potential of detonating.

³⁷*Id.* § 261, app. VIII (1992).

³⁸Unlisted hazardous substances have the reportable quantity of 100 pounds. *Id.* § 302.5(b) (1993).

³⁹Mustard gas and lewisite have a reportable quantity of one pound. Phosgene's reportable quantity is ten pounds. *Id.* pt. 355, app. A.

⁴⁰"The reportable quantity applies to the waste itself, not merely to the toxic contaminant." *Id.* § 302.5(b).

⁴¹The decision to notify the NRC was made early in the operation. Initial notification was made by telephone. Individuals can notify the NRC 24 hours a day, by calling (800) 424-8802. *Id.* § 302.6. The NRC is located at Headquarters, United States Coast Guard. The NRC is the national communications center and is continuously staffed for handling activities related to response actions. The NRC acts as the single point of contact for all pollution incident reporting. *Id.* § 300.125. The NRC's incident notification system includes the Army Operation Center in the Pentagon. Consequently, commanders or their staff should notify their Major Command (MACOM) as soon as possible. Army lawyers also should directly notify their MACOM and HQDA through technical channels. A call directly to the Environmental Law Division would ensure that proper notification is accomplished and facilitate speedy resolution of high priority legal challenges. In other words, you can get a lot of help fast while preventing unpleasant surprises by communicating within technical channels.

⁴²*Id.* § 302.6.

⁴³United States v. Carr, 880 F.2d 1550 (2d Cir. 1989) (The appellant, a supervisor of maintenance at Fort Drum, New York, directed work crews to improperly dispose of some paint cans. He was convicted of failing to report the release of hazardous substances to the appropriate agency.).

⁴⁴However, when a chemical accident or incident occurs on a federal facility, the commander of the facility will be responsible for remedial operations. DA PAM. 50-6, *supra* note 6, para. 14-3b.

⁴⁵*Carr*, 880 F.2d at 1550. Criminal penalties may be imposed for failing to expeditiously report a release or submitting any information known to be false or misleading, to include a fine and imprisonment for three years. 42 U.S.C.A. § 9603 (1992).

⁴⁶See *In re Genicom*, No. CERCLA III-006, EPCRA Appeal No. 92-2, EPA, 1992 TSCA LEXIS 350 (15 Dec. 1992) (Cyanide from a wastewater treatment plant was released into the local river. Releases on 11 and 30 October 1990 were not reported until 6:00 pm, 31 October 1990.). See also *United States v. Baytank*, 934 F.2d 599 (5th Cir. 1985).

The duty to report is intuitive for certain types of releases, such as a leaking one-ton container of mustard agent in a chemical stockpile storage yard.⁴⁷ Discovering and beginning to recover buried munitions on a military installation does not, however, immediately suggest to most people, including lawyers, that a reportable release may exist.

When must a report be made? For instance, given that the Army has identified 215 potential CWM burial sites, should the NRC be notified of each one? I think not. To date, these sites are only *potential* burial sites. In contrast, several munitions were recovered at Spring Valley and determined to have the potential for both energetics (they could blow up) and chemical agent. In light of this information, the SRF Commander *knew* hazardous substances were in the pit, with the potential for many more as recovery operations proceeded to excavate the site.

Although a report to the NRC may overstate the quantity of the release, these errors may be corrected at a later time.⁴⁸ The best policy is, "if in doubt, report." If only two items out of a group of suspicious looking material turn out to be a hazardous substance, no harm is done. The NRC can be informed that the release did not exceed the reportable quantity. Lawyers seeking a "second opinion" before advising their commander to report a release should immediately contact their MACOM or the Environmental Law Division for guidance.⁴⁹

Reimbursement to Evacuees

Because of the proximity of the munitions to the residential and business community, businesses and persons living within

a 300-meter radius of the burial site were advised to leave their premises during removal operations.⁵⁰ Two families, whose houses were located immediately adjacent to the pit, were advised that it would be unsafe to return to their homes even during nonoperating hours. As a result, a large number of people were displaced, and inquired about reimbursement for expenses incurred.

The United States Army Claims Service advised that claims submitted for such reimbursement would not be cognizable under military claims law.⁵¹ In this case, no negligence by the United States or its employees was evident. In addition, no physical impact on any potential claimant or property existed. Any claims submitted would not be payable.

The removal of the munitions was authorized by the DERP⁵² and the CERCLA.⁵³ The DERP charges the Secretary of Defense with the responsibility to "carry out . . . all response actions with respect to releases of hazardous substances from . . . each facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances."⁵⁴

The buried munitions constituted a release under the CERCLA. Accordingly, the Army's recovery action fit the CERCLA definition of "removal."⁵⁵ Removal is broadly defined to include actions needed to prevent or minimize damage to public health or the environment, to include installing security fencing or other measures to limit access, and "temporary evacuation and housing of threatened individuals. . . ."⁵⁶

⁴⁷In September 1993, an estimated 100-gallon spill from a one-ton container of mustard was discovered at Tooele Army Depot, Utah. The leak occurred around a corroded plug. The release was discovered during a routine visual inspection of the containers. The leak produced a 10-by-12-foot pool on the ground. The depot promptly notified the NRC, the State of Utah, and the Army Operations Center. See National Research Council, *Recommendations for the Disposal of Chemical Agents and Munitions*, at 42 (1994).

⁴⁸In re Holly Farms Food, No. CERCLA-III-007, 1992 TSCA LEXIS, LEXIS 38 (27 July 1992).

⁴⁹The offices of the staff judge advocate for the United States Army Forces Command (FORSCOM), the United States Army Training and Doctrine Command (TRADOC), and the Office of the Command Counsel for the United States Army Materiel Command (AMC) have environmental lawyers on their staffs who can provide immediate advice on this matter.

⁵⁰People were asked to remain away from their homes only during the hours when removal operations were underway.

⁵¹The Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 2671-2680 (1993) provides the primary waiver of sovereign immunity for torts, and makes the United States liable to the same extent as a private individual under state law, with certain exceptions. The FTCA requires damage to property or personal injury caused by the negligent or wrongful act or omission of a United States Government employee acting in the scope of employment. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 4-3 (28 Feb. 1990) [hereinafter AR 27-20]. In this case, there was no negligent or wrongful act by the United States or its employees. Neither would there be cognizable claims under the Military Claims Act (MCA), 10 U.S.C.A. § 2733 (1993), which requires that a claim be presented within two years after it accrues. Under the MCA, a claim for personal injury, death, or loss of real or personal property is payable when the loss is caused by negligent or wrongful acts of DA employees acting in the scope of their employment or is incident to the noncombat activities of the DA. AR 27-20, *supra* note 51, paras. 3-3, 3-6.

⁵²10 U.S.C.A. §§ 2701-2710 (1992).

⁵³42 U.S.C.A. §§ 9601-9675 (1992).

⁵⁴10 U.S.C.A. § 2701(c) (1993).

⁵⁵"The terms 'remove' or 'removal' mean the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment. . . ." 42 U.S.C.A. § 9601(23) (1993).

⁵⁶*Id.* See also AR 200-1, *supra* note 6, para. 9-4(i), 9-4(p); 40 C.F.R. § 300.415(e) (1993) (The NCP authorizes the lead agency to request that the Federal Emergency Management Agency conduct a temporary relocation or state/local officials conduct an evacuation.).

In the exercise of his discretion, the Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health) (DASA (ESOH)) authorized the use of funds from the Defense Environmental Restoration Account (DERA) to pay for removal operations at Spring Valley. He also determined that DERA funds would be used to reimburse Spring Valley residents for reasonable expenses associated with the evacuation from their homes during removal activities.⁵⁷ Defense Environmental Restoration Account funds also were used to reimburse Spring Valley businesses for necessary and reasonable expenses incurred incident to their temporary evacuation.⁵⁸

The decision to authorize payment of reimbursement expenses opened a Pandora's box of pragmatic questions on how to implement the policy.⁵⁹ This largely fell on the Environmental Law Division and the Army Corps of Engineers to work out. On 25 January, the Baltimore District of the Corps of Engineers announced their provisional policies for reimbursing certain expenses incurred by residents evacuated from the Spring Valley area during Operation Safe Removal. The policy stated that certain expenses would be reimbursed, to include the actual cost of hotel rooms, verified by receipts (up to a maximum reimbursement rate of \$150 per day) and the actual cost of meals (up to fifty dollars per person per day). Costs exceeding fifty dollars per day had to be substantiated by written receipt.⁶⁰ Other costs would be reviewed on a case-by-case basis.⁶¹ To protect against fraud, a list of per-

sons who lived in the evacuation area and were affected by the operation was prepared (to verify the identity of any person requesting reimbursement).

Requests by Governmental Entities for Funding

Requests for federal funds was not restricted to private citizens. Very early in operations, representatives from the District of Columbia requested federal money to pay for their expenses incurred, which included providing fire department and hazardous material (HAZMAT) support, as well as overtime for police and other District employees.

The CERCLA provides that a local government affected by a release or threatened release may apply for reimbursement for expenses in carrying out temporary emergency measures to protect human health and the environment. Reimbursement may not supplant local funds budgeted for response, and the amount of reimbursement may not exceed \$25,000 per response.⁶² As legal advisors to the SRF, we had the unpleasant task of explaining this to certain local officials. They were pleased with the initial information, until we informed them about the \$25,000 cap. This was a political question that would be elevated to higher levels and we passed this development along through legal technical channels for resolution.⁶³ Certain monies eventually were paid to the District of Columbia for services provided during the emergency operation.⁶⁴

⁵⁷This decision was made on 13 January 1993. Although reimbursement was authorized for the Spring Valley operation, this does not mean that DERA funds will be used to reimburse displaced persons in the future. The decision to use DERA funds will be made on a case-by-case basis.

⁵⁸Telephone Interview with LTC James Currie, Chief, Litigation Branch, Environmental Law Division (23 Mar. 1994).

⁵⁹The NCP authorizes temporary relocations of persons and businesses when necessary to protect public health or welfare during a response action, 40 C.F.R. § 300.415(e) (1993). The CERCLA and the NCP do not, however, characterize economic harms that result from the release of hazardous substances as response costs. As a result, courts have not allowed plaintiffs to recover under the CERCLA diminished property values, economic loss, or medical or personal injury expenses resulting from a release. See *Exxon Corp. v. Hunt*, 475 United States 355, 359 (1986); *Artesian Water Co. v. New Castle County*, 851 F.2d 643 (3d Cir. 1988); *Piccolini v. Simon's Wrecking*, 686 F. Supp. 1063 (M.D. Pa. 1988); *Wehner v. Syntex Corp.*, 681 F. Supp. 651 (N.D. Ca. 1987). As a result, sifting through each reimbursement request was necessary to determine if it was payable as a response action, and if so, whether it was reasonable.

⁶⁰SRF Public Affairs Office, Community/Media Advisory, *Request for Reimbursement* (26 Jan. 1993).

⁶¹Requests for reimbursement were limited only by the imagination and conscience of the requestor. Requests included reimbursement for exotic tropical fish (deceased) due to absence from the home; loss of business revenues from a home business; the need for new clothes; and reimbursement for a family's flight to California to stay with family members for the duration of the operation. All requests were evaluated on an ad hoc, case-by-case basis. The only guidelines were the stated policy and a desire to reimburse for only "reasonable" expenses. The relative affluence of the affected persons did nothing to dampen the ardor of many to craft creative requests for government reimbursement. The *Joint Travel Regulation* provided guidance as to what would be considered as a reasonable expense for food and lodging.

⁶²42 U.S.C.A. § 9623 (1993); 40 C.F.R. § 310.05(c) (1993). This limitation, however, only applies to expenditures from the Superfund under the CERCLA and does not apply to DERA expenditures to reimburse local governments.

⁶³The SRF legal advisors informed the Environmental Law Division (JALS-EL) of this development. They took the action and coordinated a response with the Office of the Army General Counsel and the DASA (ESOH). It was determined that paying local governments for support services from DERA funds was possible. This may be done through an interagency agreement or cooperative agreement under the DOD and state memorandums of agreement (DSMOA). 10 U.S.C.A. § 2701(d) (1993); 57 Fed. Reg. 28,835 (29 June 1992); AR 200-1, *supra* note 6, para. 9-4(q).

⁶⁴The DOD involves state and local governments in environmental restoration of DOD installations and FUDS. To expedite the environmental cleanup, cooperative agreements are used to specify the support that state and local governments will provide to assist in the cleanup and the reimbursements that will be paid for this support. These agreements are called "DSMOA regarding State/Territorial support services to DOD for activities funded under the ERD [Environmental Restoration Defense appropriation]." When a DSMOA is signed, a state or territory becomes eligible to receive a minimum of \$50,000 per year, or up to one percent of the estimated total costs for all environmental work funded under the DERP in that state or territory since October 17, 1986. 57 Fed. Reg. 28,835 (1992).

Normally, emergency services are not reimbursable.⁶⁵ State and local governments, as part of their inherent police powers, are expected to provide for the protection, safety, and health of their communities. Emergency services normally are not reimbursable between different agencies of the federal government. The rationale is that emergency services between one department of the federal government and another—being for the common good of the government—do not require reimbursement to the department rendering such aid.⁶⁶

Posse Comitatus

Interest initially existed in using soldiers and DA personnel to secure the munitions burial site during the weekend, to man road blockades to prevent entry near the site by members of the public, and to patrol the immediate neighborhood, requesting residents to leave their homes during evacuation hours. The Posse Comitatus Act⁶⁷ provides for criminal penalties for members of the federal armed forces who perform criminal law enforcement functions. The Act prohibits soldiers and DOD civilians who are under the direct command and control of a military officer from enforcing federal, state, or local law.⁶⁸ We advised the SRF that soldiers and DA personnel were not prohibited from taking appropriate action to defend themselves or prevent the loss or wanton destruction of federal property. But the responsibility to secure the site and control ingress and egress through the neighborhood must remain the responsibility of civil authorities. Neither could DA personnel augment the police force by manning road barricades or assist in law enforcement activities, such as conducting street patrols. Soldiers did provide information to residents about the nature of the hazard and the need for the emergency evacuation of homes near the area.

An NDA is an area established by a DOD official on non-federal lands located in the United States, its possessions, or its territories for the purpose of safeguarding classified defense information or protecting DOD equipment or material.⁶⁹ Establishing an NDA temporarily places the land under the control of the DOD and results only from an emergency event. The senior DOD representative at the scene will define the boundary, mark it with a physical barrier, and post warning signs.⁷⁰ Persons intruding into an NDA may be apprehended or detained, and are subject to criminal penalties.⁷¹

The SRF dismissed the possibility of declaring an NDA for several reasons. First, it was inappropriate for the situation. National defense areas typically are used to secure crash sites of military aircraft in an effort to recover and secure classified information. It seemed a stretch to use NDA authority to secure buried munitions when civil authorities were able to secure the site. Second, an NDA is limited to the immediate area where the classified material or government property to be protected is located. While this could encompass the area around the pit, it would not extend to the hazard area in the surrounding neighborhood. Third, imposing an NDA and using it to temporarily exclude residents from their homes near the munition site could constitute a taking of property without due process of law.⁷² This could result in paying compensation to all affected residents. Finally, declaring an NDA would usurp the appropriate role of civil authorities to secure the site and to ensure that the public was not in the hazard zone during munition recovery operations.⁷³

⁶⁵Other limited exceptions to this rule exist, to include 15 U.S.C.A. § 2209 (1993) (allows local fire services to submit claims for reimbursement of costs above normal operating expenses incurred for fighting fires on property under the jurisdiction of the federal government) 57 Fed. Reg. 38,507 (25 Aug. 1992). The Stafford Act, 42 U.S.C.A. § 5121 (1993), also provides for cost sharing by the federal government. The Stafford Act provides cost sharing for public assistance programs after the President declares a major disaster. This includes temporary housing assistance, emergency work, mortgage/rental assistance, disaster and unemployment assistance. All of these examples were 100% federally funded for Hurricane Andrew.

⁶⁶3 Comp. Gen. 269 (1923).

⁶⁷18 U.S.C.A. § 1385 (1993); DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT (1 Aug. 1983).

⁶⁸See DEP'T OF ARMY, PAMPHLET 27-21, LEGAL SERVICES: ADMINISTRATIVE AND CIVIL LAW HANDBOOK, para. 3-4 (15 Mar. 1992).

⁶⁹See 50 U.S.C.A. § 797 (1993); DEP'T OF DEFENSE DIRECTIVE 5200.8, SECURITY OF DOD INSTALLATIONS & RESOURCES (25 April 1991); and DA PAM. 50-6, *supra* note 6, para. 5-4b.

⁷⁰50 Fed. Reg. 46,542 (1985).

⁷¹50 U.S.C.A. § 797 (1993).

⁷²See U.S. CONST. amend. V; *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

⁷³State and local governments, to include the District of Columbia, have inherent police powers, which include the obligation to provide for the health, safety, and welfare of their inhabitants. See U.S. CONST. amend. X; *American Land Co. v. Zeiss*, 219 U.S. 47 (1911); *Williams v. Arkansas*, 217 U.S. 79 (1910); *South Ridge Baptist Church v. Industrial Commun. of Ohio*, 911 F.2d 1203 (6th Cir. 1988).

Voluntary Evacuation

On 7 January, BG Friel determined that munitions removal could not safely be conducted unless all residents were excluded from the hazard area during recovery operations. As a result, he asked the District of Columbia to evacuate the houses within a 300-meter radius of the burial pit area where the munitions were discovered.⁷⁴ The evacuation was conducted on a voluntary basis from 5 to 8 January, from 11 to 15 January, and from 21 to 30 January. The hours of evacuation were from 0800 until 2100.⁷⁵

Civil authorities and BG Friel asked local residents to honor the evacuation hours.⁷⁶ Most residents fully cooperated, knowing that the sooner operations were concluded, the sooner that they would be able to return safely to their homes. Nevertheless, there was some grumbling about the hours of operation, and some residents were seen sneaking back into their homes or were known to refuse to answer the door when local police knocked on the door, asking all persons to leave the area for the day. Whenever a member of the public was seen in the hazard area, all recovery operations were stopped. Occasionally, residents would ask for access to their homes during operational hours. For true needs—such as gaining access to medication—operations were suspended, and the residents would be escorted to their homes. Operations resumed after the area was determined to be clear.

Determining the Hazard Area

The hazard area was determined by a risk assessment and hazard analysis that estimated the downwind hazard in the

event of an accidental release of chemical agent—that is, mustard, adamsite, lewisite, or phosgene—during recovery operations.⁷⁷ Recovery operations consisted of TEU personnel excavating the area in and around the utility trench where the munitions were initially discovered. To avoid disturbing buried munitions, much of the digging had to be done by hand.⁷⁸ As munitions were uncovered, they were carefully removed by hand, assessed, and stored in a sandbag bunker that had been constructed at the site. These munitions were evaluated and placed into special containers suitable for shipment by military aircraft.⁷⁹ Solid filled munitions were designated for destruction. Liquid filled munitions—which could contain water, substances other than lethal chemical agent, such as smoke, or World War I era chemical agent or its chemical by-products—were designated for shipment to a chemical surety storage site.

Safety of the TEU personnel working in the hazard area remained a top priority. To protect personnel working in the potentially contaminated area, an Emergency Personal Decontamination Station was established at the outset of recovery operations. The TEU Commander selected Level D protection, which is the level of protection required for personnel working in areas in which agent-filled items are handled and low-level monitoring is being performed with negative results.⁸⁰ Army medical personnel were on hand throughout operations,⁸¹ as well as local police, ambulance, and fire fighters/HAZMAT teams.

In addition to establishing the hazard area, the burial pit was subject to continuous air monitoring by several devices.

⁷⁴The 300-meter radius was based on a risk and hazard assessment that predicted the effects of the maximum credible event, which was determined to be an accidental explosion of a Livens projectile filled with 28 pounds of phosgene. Based on this calculation, residences that were located more than 300 meters from the pit were determined to be in a “no effects” area, and were considered safe.

⁷⁵The evacuation and its hours were a contentious issue. Recovery operations were not conducted on weekends or over the Presidential Inauguration weekend to allow residents time to be home. The days and hours of operation were discussed frequently by BG Friel with the residents during the public meeting held after every day of operation. Hours of operations were established after a general consensus was reached. Hours of operation were later modified to allow residents to return to their homes by 1800.

⁷⁶Throughout the operation, community meetings were conducted every evening at the Spring Valley Community Center. These meetings were attended by interested members of the public. Brigadier General Friel and the Commander of the Technical Escort Unit briefed the progress achieved during each day of operation and laid out his plans for future operations. The public was invited to ask questions. These meetings also provided an excellent opportunity for the SRF staff to catch up on the progress achieved in the pit that day and to hear the commander’s intent. Information provided the public was candid and “real time.” This forum established an atmosphere of trust and provided an excellent opportunity for BG Friel to solicit community feedback, dispel rumors, and ask for their cooperation.

⁷⁷See DA PAM. 50-6, *supra* note 6, para. 3-4c(3).

⁷⁸By the end of Operation Safe Removal, the pit had been dug to about 10 feet in depth and about 30-feet-by-30-feet square. The excavated area was directly in front of a partially constructed house. A step out the front door would send a person into the pit where all recovery operations took place. The pit extended from the front door to the cul de sac in front of the house. At the close of operations, the pit was determined to be clear of any metal through magnetometer (metal detector) readings, and filled in.

⁷⁹Munitions recovered from the site were evaluated by visual inspection and were placed into a warming box that allowed air monitoring equipment to test for chemical agent. The warming box was used to warm “nonslashing” munitions to a temperature at which two chemical agents—mustard and bromobenzylcyanide—would melt. The chemical agent of special concern was mustard, a World War I era agent that is still in the stockpile of many nations. Mustard freezes at about 58 degrees Fahrenheit. At higher temperatures, it gives off a vapor that is detectable by air monitoring equipment. Mustard (H) is a blistering agent that can result in carcinogenesis and is extremely persistent when isolated from the sun, wind, and rain. See *Chemical Stockpile Disposal Program Final Programmatic Environmental Impact Statement*, vol. 1, 2-5 (Jan. 1988).

⁸⁰DA PAM. 50-6, *supra* note 6, app. F-1d. Level D specifies the protective gear that operating personnel must wear when working in and around agent filled items, to include a protective apron, a protective mask in the slung position, protective boots and gloves, and unimpregnated underwear or explosive handler’s coveralls.

⁸¹See *id.* para. 6-4.

Technical escort unit personnel used handheld continuous air monitoring systems (CAMS) inside the pit, which could detect a sudden release of chemical agent if the concentration of agent was at a high enough level to constitute an immediate health hazard.⁸² For more precise detection, a real time analytical platform was used to continuously monitor air inside the pit.⁸³ It could detect down to "no detect levels," and provided near real time detection of agent vapors.⁸⁴ Confirmation of these devices was provided by the depot area air monitoring system (DAAMS), a chemical agent detection instrument used at the Army's chemical stockpile sites.⁸⁵

All recovered munitions were placed inside a "warming box," which raised the temperature of the munitions and their contents. The rise in temperature enhanced the ability of agent monitoring equipment to detect the presence of chemical agent—such as mustard—which remains frozen below fifty-eight degrees Fahrenheit. A portable isotopic neutron source (PINS)⁸⁶ was used to determine which munitions had the potential for containing chemical agent.

Securing an Emergency Executive Order to Evacuate

After two weeks of removal operations, considerable frustration was settling in among neighborhood residents and SRF personnel concerning work stoppages caused by a few persons who refused to honor the evacuation area. This threatened to

extend operations another week, causing considerable hardship on the great majority of residents who complied with the hours of evacuation. As a result, BG Friel asked his legal advisors to prepare a draft declaration of emergency and to staff the request with the legal staff for the District of Columbia. Access to LEXIS on our portable computer allowed us to research the District of Columbia Code and to draft an emergency order. Earlier informal coordination with the District of Columbia Office of the Corporation Counsel also paid dividends, as we were able to discuss the matter with an attorney for the District of Columbia and fax her our draft on Saturday. The Mayor issued an Emergency Executive Order on 26 January 1993.⁸⁷ The SRF coordinated this action with the Army Operation Center.⁸⁸

Status of the Recovered Munitions Under the RCRA

One of the legal issues that demanded an answer early in the operation was the status of the recovered munitions. Two theories were available. One theory, advanced by some members of the staff, would consider any item that could contain chemical agent as exclusively chemical surety material (CSM).⁸⁹ Under this theory, the laws and regulations controlling the transport and storage of hazardous wastes do not apply. Instead, all suspected chemical material could be stored and transported as chemical surety material, in accordance with Army regulation.⁹⁰ This approach ignores federal

⁸²The CAMS is a point monitor designed to determine and indicate the hazard from nerve or blister agent vapors in the air. *Id.* para. 13-4j.

⁸³*Id.* para. 13-4h.

⁸⁴The device is designed to analyze an air sample in ten minutes. If agent is detected, it gives off an alarm. *See id.* para. 13-4h.

⁸⁵The DAAMS analyses are based on gas chromatography technology. Air is drawn into a tube that traps agent molecules. The agent molecules are then drawn into the gas chromatograph, which detects if agent is present. The DAAMS usually takes an air sample over an eight-hour period. The DAAMS sampling tube is analyzed in a laboratory. It was used to confirm that there were no agent readings in the pit. *See id.* para. 13-4e; *Safety Report for the Johnston Atoll Chemical Agent Disposal System, Operational Verification Tests 1 & 2*, UNITED STATES ARMY CHEMICAL MATERIEL DESTRUCTION AGENCY 17-18 (Sept. 1993).

⁸⁶Fact Sheet, Service Response Force Public Affairs Office. The PINS uses neutron radiation to identify chemical elements inside of a container or munition without intrusion and can detect chlorine, sulfur, and nitrogen. Most World War I era chemical agents contain chlorine (to include mustard), while explosives typically contain sulfur and nitrogen. A chlorine signature from the PINS was considered to be a positive detection of chemical agent.

⁸⁷The Mayor of the District of Columbia declared a public emergency in the Spring Valley Community. Mayor Order No. 93-7, subject: Emergency Executive Order (Jan. 26, 1993) (essentially a word-for-word copy of the draft that we provided to the District of Columbia). In an effort to relieve the emergency, an emergency evacuation area of about 300 meters was established around the munitions disposal area between 0800 to 1800. All persons not associated with the emergency response force were directed to leave and remain away from the evacuation area during the designated times.

⁸⁸I was later advised that I should have notified the International and Operational Law Division, OTJAG, which represents The Judge Advocate General in the Army Operations Center. An action of this type, with inherent political and policy ramifications, is something the leadership within the Office of The Judge Advocate General should know about through technical channels at the earliest opportunity.

⁸⁹*See* DEP'T OF ARMY, REG. 50-6, NUCLEAR AND CHEMICAL WEAPONS AND MATERIEL: CHEMICAL SURETY (12 Nov. 1986) [hereinafter AR 50-6]. This regulation defines chemical surety material as follows:

Chemical agents and their associated weapons systems, or storage and shipping containers that are either adopted or being considered for military use.

"Chemical agent" is defined as: A chemical compound used in military operations to kill, seriously injure, or incapacitate persons through its chemical properties. Excluded are RDTE [research, development, test, and evaluation] dilute solutions, riot control agents, chemical defoliants and herbicides, smoke, flame and incendiaries, and industrial chemicals.

Id. at 43.

⁹⁰*Cf. id.* ch. 4 ("Transportation of Chemical Surety Materiel").

and state laws regulating the storage, transport, and disposal of solid and hazardous wastes. Unfortunately, this line of reasoning assumes that munitions buried in the ground for over seventy years are not discarded material (waste). In my view, shipping the recovered material without a manifest and storing or treating the material off site without an appropriate permit would have exposed the SRF Commander and his staff to allegations of environmental noncompliance. This theory also ignores the definition of CSM as chemical agents "that are either adopted or being considered for military use."⁹¹ A casual look at any of the recovered munitions, encrusted as they were with years of rust and corrosion, would resolve any doubt about the possible military utility of these antiques.

The second theory analyzes the problem in the context of federal law and regulations that govern the generation, storage, transport, and treatment of solid and hazardous wastes.⁹² Resource Conservation and Recovery Act regulations define solid waste as any discarded material that is not otherwise excluded from the definition. Discarded material is any material that is either abandoned,⁹³ recycled, or inherently waste-like.⁹⁴ Common sense suggests that munitions buried in a pit and forgotten for over seventy years have been abandoned and are inherently waste-like. Having determined that the munitions satisfied the definition of solid waste, the next question was whether the munitions are considered a hazardous waste.

⁹¹ *Id.* at 43.

⁹² Solid Waste Disposal Act, as amended by RCRA, 42 U.S.C.A. §§ 6901-6992k (1992).

⁹³ Materials are abandoned by being disposed of, burned, or incinerated. 40 C.F.R. § 261.2(b) (1992).

⁹⁴ *Id.* § 261.2(a)(2).

⁹⁵ *See id.* §§ 261.31 to 261.32.

⁹⁶ *See id.* pt. 261, app. VIII. Appendix VIII includes mustard gas and phosgene in the list of hazardous constituents. The EPA Administrator has the duty to list a solid waste as a hazardous waste if it contains any of the toxic constituents listed in appendix VIII and concludes that "the waste is capable of posing a substantial or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed. . . ." *Id.* § 261.11.

⁹⁷ These states include Indiana, Kentucky, Maryland, Oregon, and Utah. *See* IND. CODE ANN. § 13-7-8.5-3 (1992) (adds nerve and mustard agents to the list of hazardous waste); KY. REV. STAT. ANN. § 224.50-130(2) (1992) (lists nerve and mustard agents as hazardous wastes); MD. REGS. CODE tit. 26, § 13.02.17 (1989) (lists waste nerve and mustard agents as acute hazardous wastes); OR. ADMIN. R. 340-135-110, 340-135, app. A (1991) (lists nerve and mustard agents as hazardous wastes); UTAH ADMIN. R. 315-2-10(e) (1993) (lists residues from demilitarization, treatment, and testing of nerve and other chemical agents as hazardous wastes).

⁹⁸ *See* 40 C.F.R. §§ 261.20 to 261.24 (1992).

⁹⁹ The characteristic of reactivity is described, in part, as a representative sample that normally is unstable and readily undergoes violent change without detonating; reacts violently with water; when mixed with water it generates toxic gases, vapors, or fumes; is readily capable of detonating if subjected to a strong initiating source or if heated under confinement; is readily capable of detonating at standard temperature and pressure; or is a forbidden explosive, a Class A explosive, or a Class B explosive, as defined by regulation. *Id.* § 261.23.

¹⁰⁰ *Id.* § 261.23(8); 49 C.F.R. §§ 173.50 to 173.53 (1992).

¹⁰¹ *See also* Memorandum, Office of the Assistant Secretary of the Army, Installations, Logistics and Environment, subject: Application of the Resource Conservation and Recovery Act (RCRA) Hazardous Waste Management Requirements to Conventional Explosive Ordnance Operations—Interim Policy and Guidance (1 Nov. 1993) ("When a decision to discard is made, the conventional explosive ordnance materiel will be designated a hazardous waste.").

¹⁰² In 1984, the DA agreed with the EPA that M55 chemical rockets (which carried GB and VX nerve agents) were reactive hazardous wastes. The determination to classify the rockets as a waste was based on the Army's determination that the rockets had no further military strategic value, were obsolete, and were only stored for disposal. The rockets were determined to be hazardous waste because they "were determined to be subject to corrosion, explosive sensitivity, leakage and propellant destabilization. . . ." This created the potential for spontaneous detonation that would increase over time. MITRE Corp., *Assessment of the U.S. Chemical Weapons Stockpile: Integrity and Risk Analysis* 2-12 (June 1993). Consequently, the installations where the rockets were stored were required to seek hazardous waste storage permits for the storage igloos. *See also* Message, Dep't of Army, Classification of M55 Chemical Rockets as a Hazardous Waste (241/1345Z 10 Sept 1984).

The term "hazardous waste" is not a generic term for any form of toxin, but a term with specific technical meanings. To define the term, the EPA has provided extensive lists of hazardous wastes from nonspecific and specific sources.⁹⁵ These lists include substances that were potentially present at Spring Valley, to include mustard gas and phosgene.⁹⁶ Additionally, some states have listed chemical agents as hazardous wastes.⁹⁷

In addition to the listing chemical agents as hazardous wastes under state law, discarded chemical agents and chemical munitions also exhibit a characteristic of hazardous waste pursuant to subpart C of the EPA's RCRA regulation—by exhibiting the characteristic of reactivity. Under this analysis, a solid waste is a hazardous waste if it exhibits one of four characteristics, to include ignitability, reactivity, corrosivity, or toxicity.⁹⁸ Of the four characteristics, the only one that applies to chemical agents is reactivity.⁹⁹ While chemical munitions do not react violently with water, most chemical munitions are capable of detonation or explosive decomposition because they are designed to function by explosion.¹⁰⁰ Based on this analysis, one reasonably can conclude that discarded or buried chemical munitions are hazardous wastes.¹⁰¹ Using a slightly different analysis, the Army has determined that the M55 rocket, which is one type of chemical munition currently stored in the Army's stockpile of chemical weapons, is a hazardous waste, due to its obsolescence and potential to degrade and spontaneously explode.¹⁰²

Determining that the recovered munitions were hazardous waste caused the SRF to search for a RCRA permitted facility to store or treat¹⁰³ the recovered munitions as hazardous wastes. The only Army storage facility that had adequate storage space and an existing hazardous waste storage permit was at Pine Bluff Arsenal, Arkansas. Consequently, the SRF prepared a uniform hazardous waste manifest for the state of Arkansas. On 11 January 1993, the Arkansas Department of Pollution Control and Ecology issued a permit to allow the Army to transport liquid filled munitions recovered from Spring Valley to Pine Bluff Arsenal as hazardous wastes. The state of Arkansas also received and approved an amendment to the RCRA Part A application from the Army, adding certain substances to the interim status M55 rocket storage area.¹⁰⁴ These actions allowed the Army to transport munitions suspected of containing chemical agent by military aircraft¹⁰⁵ to Pine Bluff Arsenal and store them in a RCRA permitted hazardous waste storage facility.¹⁰⁶

Recovered conventional munitions were flown by military aircraft from Spring Valley to Fort A.P. Hill, Virginia. The state of Virginia granted an emergency permit to treat these munitions by detonation with high explosives.¹⁰⁷

Spending appropriated funds to transport any lethal chemical agent to or from any military installation and the open air testing or disposal of any agent within the United States is prohibited, unless certain procedures are followed.¹⁰⁸ These procedures—which include notifying the Secretary of Health and Human Services as well as Congress—ensure that any shipment of chemical agent to or from a military installation is done in a deliberate manner.¹⁰⁹ The statute does not restrict or delay, however, the transport or disposal of chemical agents when “compliance with the procedures and requirements . . . would clearly endanger the health or safety of any person.”¹¹⁰ Throughout the course of Operation Safe Removal, the affected states, Congress, and the Department of Health and Human Services were kept informed of the transport, storage, and treatment of the recovered munitions. Any future emergency situation will have to be evaluated independently to determine if delaying transport or disposal of chemical agents to allow time for the Army to provide prior notification would endanger the health or safety of any person.¹¹¹

¹⁰³“Treatment” means any method, technique or process that is designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize the waste or otherwise render it less hazardous. 40 C.F.R. § 260.10 (1992).

¹⁰⁴The M55 storage area is a RCRA permitted hazardous waste storage facility at Pine Bluff Arsenal, Arkansas. The following substances were added to the terms of the permit, to allow storage of recovered liquid filled rounds, to include phosgene, barium, cadmium, chromium, lead, mercury, selenium, and silver.

¹⁰⁵See AR 50-6, *supra* note 89, para. 4-3f, which states that “the preferred mode for moving chemical surety material is by military aircraft.” Air shipments of hazardous wastes, even on military aircraft, must comply with Department of Transportation (DOT), EPA, and DOD requirements. The Military Traffic Management Command (MTMC) performs liaison for the DOD with the DOT and the Federal Aviation Administration (FAA). Assistance can be obtained by calling the MTMC Safety Office (703) 756-1951, DSN 289-1951, FAX 756-0547. This office provided a great deal of assistance during Operation Safe Removal.

¹⁰⁶Under federal RCRA regulation, the EPA (or the state, under its implementing regulations) may issue a temporary emergency permit to a permitted facility when it finds an “imminent and substantial endangerment to human health or the environment” to allow treatment, storage, or disposal of hazardous wastes not covered by an effective permit. 40 C.F.R. § 270.61 (1992). Permit requirements do not apply to treatment or containment activities during an immediate response to a discharge of a hazardous waste or an imminent and substantial threat of discharge of hazardous waste. *Id.* 264.1(g)(8)(i).

¹⁰⁷The Virginia emergency permit was granted on 29 January 1993. Pursuant to the permit, only solid filled munitions that contained either white phosphorus or high explosives were flown to Fort A.P. Hill for demolition.

¹⁰⁸50 U.S.C.A. § 1512 (1992). The procedures include the following:

- (1) A determination by the Secretary of Defense that the transportation or testing is “necessary in the interests of national security.”
- (2) Referring the proposed transport, testing or disposal to the Secretary of Health and Human Services, who may direct the Surgeon General of the Public Health Service and other qualified persons to review any particulars regarding hazards to public health and safety and to recommend precautionary measures thought to be necessary.
- (3) Notifying Congress and the Governor of any affected state.

Id.

¹⁰⁹These statutory restrictions do not extend to the transport or disposal of research quantities of lethal chemical agent. *Id.* § 1517. Several munitions were shipped by military aircraft from Spring Valley to the Edgewood Research, Development, & Engineering Center at Aberdeen Proving Ground, Maryland, for testing. The munitions were drilled, drained, and chemically analyzed to determine their chemical composition at an Army Laboratory. In this way, the PINS analysis, which is a new technology, was confirmed through laboratory testing.

¹¹⁰*Id.*

¹¹¹The proximity of homes to the burial site and recovery operations constituted a danger to the health and safety of the community. Nevertheless, sufficient time existed to provide an abbreviated form of prior notice to Congress, the Secretary of Health and Human Services, and appropriate state authorities prior to transporting the munitions by air to Virginia and Arkansas.

The RCRA regulations also apply when the material to be shipped is characterized as hazardous waste, as it was in Operation Safe Removal. The RCRA requires the following: securing an EPA identification number prior to transport;¹¹² ensuring that the waste is accompanied by a hazardous waste manifest;¹¹³ and ensuring that the waste is shipped to a storage or disposal facility that has an EPA or state permit for that type of waste.¹¹⁴ Special rules also govern how the hazardous waste is packaged and shipped, to ensure that the transport is done safely.¹¹⁵

When material to be shipped also meets the definition of chemical surety material, another set of requirements apply as well. The Army Chemical Surety regulation specifies packaging and labeling requirements, assignment of technical escort and security personnel to accompany the shipment, and transportation by military aircraft.¹¹⁶

The Impact of the National Environmental Policy Act (NEPA) on Operations

The NEPA¹¹⁷ did not adversely impact Operation Safe Removal.¹¹⁸ Because of the danger posed to the community by munitions that had the potential of spontaneously detonating and causing a release of chemical agent, the emergency exemption to the NEPA applied.¹¹⁹ Consequently, the Army was authorized to take immediate actions to remove, transport, store, or destroy the munitions.

Entry onto Private Property

A potential problem that did not affect emergency operations at Spring Valley was obtaining access to private property. The developer and residents were more than willing to

allow the SRF access to their property to conduct removal operations.

During remedial operations conducted by the Corps or Engineers, right of entry forms were provided to local residents which, when executed, authorized the Corps of Engineers and its agents to enter private property to carry out its remedial investigation and where necessary, remedial actions.

Army policy is to obtain consent to gain entry onto private property to investigate possible contamination and to perform clean-up activities. Right of entry forms generally are used whenever site investigation or clean-up activities are temporary and the physical impact on the property is minor. For longer term access to property, a real estate interest may be acquired (such as an easement, license, or a lease). If coordination through the local government and other means to gain access to property fail, condemnation proceedings may be necessary to conduct site investigations or remedial action.¹²⁰

The Army also has received delegated authority pursuant to Executive Order 12,580¹²¹ to issue an order to obtain involuntary access where the sole source of the release is from an Army installation. This action is not favored and could constitute a taking of private property without just compensation.¹²² The concurrence of the United States Attorney General must be obtained before issuing a compliance order. As a result, this an unlikely option.

Preparing the Administrative Record

The NCP requires that the lead agency for a release establish an administrative record to document the basis for the

¹¹²40 C.F.R. § 263.11 (1992).

¹¹³*Id.* § 262.20.

¹¹⁴*Id.* §§ 264.12 to 264.13, 270.61.

¹¹⁵*Id.* § 263.10. The EPA has expressly adopted certain DOT regulations governing the shipment of hazardous material. *Id.* See also 49 C.F.R. §§ 171.11, 172.200 to 172.204 (1992) (DOT requirements); see also note 105.

¹¹⁶AR 50-6, *supra* note 89, para. 4-2a. The MTMC Safety Office can greatly assist in making the necessary notifications and determining how the material should be packaged and shipped.

¹¹⁷42 U.S.C.A. §§ 4321-4370c (1993).

¹¹⁸The Act is designed to provide full and fair discussion of significant environmental impacts and inform the decisionmakers and the public of the reasonable alternatives that would avoid or minimize the adverse impacts or enhance the quality of the human environment. 40 C.F.R. § 1502.1 (1992). Had an environmental impact statement been required, removal operations would have been delayed 18 to 24 months.

¹¹⁹DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL QUALITY: ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, para. 2-3 (23 Dec. 1988); 40 C.F.R. § 1506.11 (1992).

¹²⁰DA PAM. 50-6, *supra* note 6, para. 9-8(f).

¹²¹Exec Order No. 12,580, 52 Fed. Reg. 2,923 (1987).

¹²²See U.S. CONST. amend V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). Prominent cases on "takings" include *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

selected response action.¹²³ This requirement expressly applies to CERCLA response actions.¹²⁴ It also applies to emergency response actions “to the extent practicable.”¹²⁵

This requirement was first brought to my attention by the EPA’s emergency coordinator, who was on site throughout the operation.¹²⁶ For nonemergency response actions, a number of procedural requirements must be complied with, to include attaching all decision documents to the administrative record, providing public notice, and affording the public an opportunity to comment.¹²⁷ Some of these were not practical, given the imperative to complete emergency removal operations as quickly as possible.¹²⁸ The administrative record, which was written in the form of a memorandum entitled: “Selection of Response Action,” was signed and released on 2 February 1993.

Operation Safe Removal—Mission Accomplishment

At the conclusion of the operation, 144 munitions had been recovered from the burial site. Forty-four munitions were determined to be liquid filled. Of these, nine munitions were shipped to Aberdeen Proving Ground, Maryland, for sampling.¹²⁹ The remaining liquid filled munitions were shipped to Pine Bluff Arsenal for storage as hazardous waste.¹³⁰

After all munitions and material were removed, the SRF determined that the burial site was free from hazards. By this time, the burial site was greatly enlarged, and extended from

the front of the partially constructed house out into the cul-de-sac. Soil samples, analyzed by the Army and the EPA in separate laboratories, confirmed that the soil met standards set by the EPA. On 30 January, the emergency was terminated and residents were able to reoccupy their homes without restriction.

The response action at Spring Valley was divided into two phases. Phase I consisted of conducting emergency recovery and removal of all munitions and related material from the burial site by the SRF. Phase II consisted of a site survey and remediation/restoration operations conducted by the Baltimore District of the Corps of Engineers. This mission is still ongoing.

Even as Operation Safe Removal ended, Phase II—the remediation phase, was already underway. The Baltimore District of the Corps of Engineers has continued to conduct its study of the area. The Baltimore District of the Corps of Engineers has attempted to locate burial pits or munitions that may still exist in the area that formerly comprised the American University Experiment Station. The Baltimore District of the Corps of Engineers has used various technologies, including a magnetometer¹³¹ and ground penetrating radar¹³² to assist in this study. Any metallic object that is detected during this search is excavated and removed. The Baltimore District Corps of Engineers began to excavate anomalies¹³³ in the fall of 1993. Operations were suspended for the winter and resumed in March 1994. All anomalies recovered to date

¹²³40 C.F.R. § 300.800(a) (1993).

¹²⁴*Id.* § 300.800(b) to (d).

¹²⁵*Id.* § 300.800(c). “For those response actions not included in paragraph (d) of this section, the lead agency shall comply with this subpart to the extent practicable.” *Id.*

¹²⁶This individual became part of the SRF team and provided valuable advice and assistance throughout Operation Safe Removal. He was able to provide a sample administrative record, which was critical in getting started on drafting an administrative record for the SRF.

¹²⁷40 C.F.R. §§ 300.805 to 300.825 (1993).

¹²⁸The documents that formed the basis of the response action were included in the administrative record. The record was provided to the NRC and the EPA. A public comment period was not provided.

¹²⁹The shipments of these munitions were done under the authority of 40 C.F.R. § 261.4(d), which states that a sample of solid waste that is collected for the sole purpose of testing to determine its characteristics or composition is not subject to most regulatory restrictions. Maryland authorities were informed of the proposed shipments and testing, and they did not object. These munitions were determined to contain fuming sulfuric acid, an early experimental smoke material. Chemical agent was not detected. Samples also were obtained from individually recovered items of scrap material, to include recovered vials, glass fragments, and pieces of munition. A residue of Lewisite breakdown products and Adamsite, which are World War I era blister agents, were detected from some of the recovered glassware.

¹³⁰Analysis of the recovered munitions through various means, to include PINS, revealed positive tests for nitrogen (indicating potential explosive compounds) and in a few, the presence of chlorine, which could indicate the presence of agent.

¹³¹This device, similar to a metal detector, looks for changes in underground magnetic fields to determine if iron-based metallic objects are present. A trained and experienced operator can use the device to determine the general size, depth, and location of buried metallic objects.

¹³²An EM-31 device was used to measure conductivity and resistivity in the soil. An operator using the device can determine where soil has been disturbed and can differentiate between manmade and natural objects. The device is able to locate pits, trenches, and other diggings to about 15 feet below the surface of the soil. Service Response Force Public Affairs Fact Sheet.

¹³³“Anomalies” are objects that give a positive read out from a metal detector. The great majority of these turn out to be innocuous—such as, soft drink cans, nails, and discarded metallic construction material.

have turned out to be scrap metal, except for one. On 16 May 1994, anomaly excavation uncovered a Livens projectile in a former impact area near Spring Valley.¹³⁴

Conclusion

Operation Safe Removal was an emergency response action that successfully removed World War I era munitions from a

residential area. Remedial action continues to be conducted in the area by the Corps of Engineers.

Operation Safe Removal serves as an example of how the Army may have to conduct off-post environmental clean-up actions in the future. With 215 potential CWM burial sites, a significant chance exists that military lawyers will have to contend with similar issues in the future.

¹³⁴ Analysis of the projectile through PINS revealed that it contained smoke—a nonlethal chemical obscurant. This was confirmed through laboratory analysis.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial whose records of trial were received by the Army Judiciary during the first two quarters of Fiscal Year 1994 are shown below. Fiscal Year 1993 times are shown for comparison.

| | | | |
|------------------------------------|----|----|----|
| Days fr chgs or restnt to sentence | 54 | 49 | 58 |
| Days from sentence to action | 66 | 65 | 70 |
| Days from action to dispatch | 7 | 7 | 11 |
| Days enroute to Clerk of Court | 8 | 8 | 9 |

Particularly noticeable is the significant increase in the period from the convening authority's action to the mailing of the record to the Clerk of Court. Some eighteen general court-martial jurisdictions required more than an average of ten days to do what should be done in only a day or two: Namely, send that record!

BCD Special Courts-Martial

| | | | |
|------------------------------------|-----|----|----|
| Records received by Clerk of Court | 174 | 36 | 39 |
| Days fr chgs or restnt to sentence | 38 | 37 | 42 |
| Days from sentence to action | 59 | 64 | 58 |
| Days from action to dispatch | 7 | 6 | 8 |
| Days enroute to Clerk of Court | 7 | 8 | 10 |

General Courts-Martial

| | FY 1993 | 1Q,FY94 | 2Q,FY94 |
|------------------------------------|---------|---------|---------|
| Records received by Clerk of Court | 1,035 | 168 | 210 |

**COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES
RATES PER THOUSAND**

| | First Quarter Fiscal Year 1994; October-December 1993 | | | | | | | | | |
|---------|---|---------|-------|---------|--------|---------|---------|---------|-------|---------|
| | ARMYWIDE | | CONUS | | EUROPE | | PACIFIC | | OTHER | |
| GCM | 0.39 | (1.55) | 0.31 | (1.24) | 0.73 | (2.92) | 0.61 | (2.43) | 0.67 | (2.68) |
| BCDSPCM | 0.14 | (0.54) | 0.12 | (0.50) | 0.17 | (0.68) | 0.21 | (0.84) | 0.40 | (1.61) |
| SPCM | 0.02 | (0.07) | 0.02 | (0.08) | 0.00 | (0.00) | 0.04 | (0.17) | 0.00 | (0.00) |
| SCM | 0.19 | (0.75) | 0.20 | (0.80) | 0.18 | (0.73) | 0.17 | (0.67) | 0.27 | (1.07) |
| NJP | 17.41 | (69.65) | 18.78 | (85.10) | 15.64 | (62.54) | 18.36 | (73.45) | 17.72 | (70.87) |

Note: Based on average strength of 565,654
Figures in parentheses are the annualized rates per thousand

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES
RATES PER THOUSAND

| Second Quarter Fiscal Year 1994; January-March 1994 | | | | | | | | | | |
|---|----------|---------|-------|---------|--------|---------|---------|---------|-------|---------|
| | ARMYWIDE | | CONUS | | EUROPE | | PACIFIC | | OTHER | |
| <i>GCM</i> | 0.33 | (1.31) | 0.30 | (1.19) | 0.37 | (1.46) | 0.57 | (2.30) | 0.95 | (3.80) |
| <i>BCDSPCM</i> | 0.12 | (0.48) | 0.12 | (0.50) | 0.10 | (0.40) | 0.014 | (0.57) | 0.41 | (1.63) |
| <i>SPCM</i> | 0.01 | (0.05) | 0.01 | (0.06) | 0.00 | (0.00) | 0.02 | (0.08) | 0.00 | (0.00) |
| <i>SCM</i> | 0.15 | (0.61) | 0.15 | (0.62) | 0.26 | (1.06) | 0.04 | (0.16) | 0.00 | (0.00) |
| <i>NJP</i> | 19.15 | (76.61) | 21.72 | (86.90) | 17.79 | (71.18) | 9.26 | (37.02) | 22.14 | (88.56) |

Note: Based on average strength of 561,747
Figures in parentheses are the annualized rates per thousand

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin (Bulletin)*, designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue (volume 1, number 9) is reproduced below:

New TJAG Policy Memorandum

On 2 May 94, The Judge Advocate General issued Policy Memorandum (PM) 94-7, replacing PM 85-7, on environmental law. The new PM retains the old requirements that staff and command judge advocates designate an environmental law specialist (ELS), ensure professional training for ELSs, and make commanders aware of environmental issues. Additionally, the new PM encourages a close working relationship with the installation and MACOM environmental coordinators as an "essential element of effective delivery of environmental legal services." Mr. Nixon.

Federal Facility Compliance Act (FFCA)

Munitions Regulation

The Environmental Protection Agency (EPA) continues to work on developing regulations defining when military munitions become a hazardous waste, as well as rules regarding storage and transportation of such munitions. The new regulations apparently will not be promulgated until 1995. The Department of Defense (DOD) Working Group will continue

to assist the EPA in developing regulations that allow the military to perform its missions. In the meantime, current Resource Conservation and Recovery Act (RCRA) regulations govern any munitions that are waste. Army policy and guidance on the application of *existing* RCRA regulations to conventional explosive ordnance (military munitions) is outlined in a 1 November 1993 memorandum signed by the Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health). This guidance supersedes guidance contained in *Army Regulation 200-1*.¹ The Navy and Air Force also have published almost identical guidance for implementation within their services. Major Bell.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Reauthorization Update

The EPA continues to push for changes in the CERCLA that would drastically alter the way land uses are designated and enforced at National Priority List (NPL) sites. The EPA has circulated a draft proposal that would establish a federal regulatory program to ensure that the land uses designated at NPL sites in conjunction with determining clean-up levels are not changed in the future. This authority would conceivably lead to more regulatory flexibility on clean-up standards because the risk of exposure could be controlled through the land use restrictions. No word yet on the reaction in Congress or among the "stakeholders"—environmental and industry groups—who would be affected by the proposal.

New National Priority List

The EPA has added forty-two new sites to the NPL, eighteen to the general superfund section and twenty-four to the federal facilities section, including four Army sites.² Consistent with § 120 of the CERCLA, Army installations on the

¹ DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL QUALITY: ENVIRONMENTAL PROTECTION AND ENHANCEMENT, paras. 6-7, 6-8 (23 Apr. 1990).

² See 59 Fed. Reg. 27,989 (1994).

NPL must have an interagency agreement (IAG) with the EPA. The latest policy guidance regarding IAGs is contained in the 1994 DERP Guidance. This guidance requires installations on the NPL to negotiate IAGs as expeditiously as possible, using the model language negotiated between the DOD and the EPA in 1988. Interagency agreements negotiations should be conducted and draft agreements prepared in coordination with the ELD. Mr. Nixon.

Clean Air Act (CAA)

Field Citation Program

On 3 May 94, the EPA proposed a rule to establish a field citation program under CAA § 113(d)(3).³ The rule would authorize EPA inspectors to issue citations to facilities, including federal facilities, for "minor" CAA violations. The EPA proposes a maximum penalty of \$5000 per day for each violation cited, and a maximum cumulative penalty in the range of \$15,000 to \$25,000 per citation. The EPA anticipates that "a large number of citations will be issued in each region, addressing simple, easy to prove violations." The Services are preparing comments opposing application of the rule to federal facilities. Major Teller.

National Environmental Policy Act (NEPA)

NEPA Implementation Issues

The Council on Environmental Quality (CEQ) recently hosted a NEPA liaison meeting, attended by representatives of more than fifty federal agencies including the Army. Although a large number of NEPA implementation issues were discussed, one overarching theme emerged: the NEPA is often viewed as an obstacle, not as a tool. Some leaders may see the NEPA compliance in a negative light, focusing on the minimum we must do to avoid being sued. Our environmental staffs often view the NEPA as nothing more than an encyclopedia of environmental information used to justify a decision already made. As environmental attorneys, we need to do a better job of educating our leaders and our environmental community about better integrating the NEPA into early planning and programming. Army decision makers are expert in weighing mission requirements, technical issues, schedules, and costs. The NEPA merely adds one more factor into their decision-making matrix—environmental impacts. Properly approached, the NEPA process can be a useful decision-making tool that will aid in ensuring wise use of scarce natural resources, identifying true costs of programs, and avoiding "show-stoppers" before it is too late. If you would like help in putting together a briefing or class for your command, do not hesitate to ask the ELD for assistance. Major Miller.

Base Realignment and Closure (BRAC)

Finding of Suitability to Transfer BRAC Property

On 1 June 1994, the DOD issued a policy entitled "Finding of Suitability to Transfer (FOST) for BRAC Property," which supersedes the 11 June 1992 DOD guidance on the same subject. The new DOD policy provides guidance on the review process to document parcels of real property that are environmentally suitable for transfer by deed under CERCLA § 120(h). The memorandum contains two attachments—procedures to reach a FOST for property where a release or disposal has occurred, and procedures to reach a FOST where no release or disposal has occurred. The procedures, in part, facilitate compliance with § 330 of the National Defense Authorization Act for FY 1993, which requires the DOD to indemnify transferees of BRAC property from claims resulting from the release by DOD activities of hazardous substances or petroleum products. The procedures provide a framework for ensuring that we do not assume unwarranted risks as we transfer property. Headquarters, Department of the Army, will be forwarding the DOD policy to the field in the near future. In the meantime, the ELD will send it out through MACOM environmental attorneys. Major Miller.

Clean Air Act Definition of "Major Source" Under the Title V Operating Permit Program

Section 502 of the CAA⁴ requires each state to establish an EPA-approved operating permit program for regulated sources of air pollution. The program is commonly referred to as the "Title V operating permit program," referring to Title V of the 1990 Amendments to the CAA.⁵ The program is completely new and very different from the various state operating permit programs that currently exist. Most major Army installations will have to obtain a Title V operating permit.

The deadline for states to submit Title V programs to the EPA for approval was 15 November 1993. The EPA must approve or disapprove state programs by 15 November 1994. Facilities subject to the operating permit requirement must submit a permit application no later than one year after the EPA's approval of the state's program, which will be 15 November 1995, if the EPA meets its deadline. Some states, however, will require facilities to submit applications well before the November 1995 statutory deadline. Environmental law specialists should know the state's permit application deadline and ensure that the installation is prepared to meet it.

Under the Title V program, "major sources" of regulated air pollutants must obtain an operating permit. The "major

³*Id.* 22,776.

⁴42 U.S.C. § 7661a-f (1988).

⁵The EPA's implementing regulations are located at 40 C.F.R., part 70. The preamble for the Operating Permit Program rule—which contains helpful discussion and explanation—can be found at 57 Fed. Reg. 32,250 (1992).

source” definition located in 40 C.F.R. § 70.2 is complex. Under this definition, stationary sources of emissions, located on contiguous or adjacent properties; under common control of the same person; and belonging to a single major industrial grouping (as described in the *Standard Industrial Classification Manual*, 1987) are considered part of a single “major source.” Currently, the prevailing interpretation by the EPA regions and the states is that military installations are single sources for Title V permitting purposes. Consequently, each installation would have to total all potential air emissions within the boundaries of the entire installation in determining whether it is a “major source.” If the installation is a “major source,” then it would need a Title V permit covering the installation as a whole, including all tenant activities.

Based on information received from ELSs throughout the Army, treating installations as a single “source” for Title V purposes will result in significant problems for some installations. The problems identified by ELSs are summarized as follows:

a. Substantial administrative, control, and funding problems are associated with including other-service or agency, contractor operated, leased commercial, and other tenant activities within the installation’s Title V permit. It is a particularly significant problem for installation commanders. As the “responsible official,” as defined in 40 C.F.R. § 70.2, the commander must personally certify, on a periodic basis and based on reasonable inquiry, full compliance by all of the activities included under the permit. Inaccurate or incomplete certifications, either willful or negligent, are punishable by civil and criminal penalties under CAA § 113.

b. For installations to inventory and monitor the large number of small emissions units within the boundaries of the installation will be extremely difficult.

c. Installations will lose operational flexibility in having to revise the installation’s Title V permit for relatively minor operational changes anywhere on the installation.

d. Problems with one troublesome emissions unit would affect the operating permit for the entire installation.

e. Installations generally lack the resources to meet the requirements associated with maintaining a Title V permit covering all emissions units on the installation. Inventorying, monitoring, and controlling the countless minor emissions units that exist within the boundaries of a typical installation will divert the limited resources available from other major environmental problems facing installations.

In view of these potential problems, each installation must carefully evaluate the effects of treating the entire installation as a single “source” under Title V. If significant problems are anticipated, now is the time for an installation to obtain state agreement to treat the installation as multiple sources under Title V. For example, an installation may find it advantageous to obtain state approval to allow one or more tenant

units to obtain their own Title V permits or to separately permit a large, functionally distinct activity, such as an airport or chemical waste incinerator.

Treatment of an installation as multiple sources under Title V must be consistent with the definition of “major source” in 40 C.F.R. § 70.2. Working within this definition, depending on the installation’s circumstances, installations may be able to make one or more of the following arguments that a single source designation is not appropriate:

a. The installation should not be treated as one source because it is not under “common control.” Common control is an essential element of the “major source” definition. This argument would be appropriate where the installation commander has no actual control or funding authority over a tenant activity—that is, a Navy facility on an Army installation or a contractor-operated plant. Moreover, under certain circumstances, an installation commander may not have any actual control over an Army tenant activity, such as a classified facility. Because the CAA and 40 C.F.R. part 70 do not define “common control,” this issue should be resolved between the installation and the state on a case-by-case basis.

b. While most military facilities will fall under the Standard Industrial Classification (SIC) code 9711, National Security, in certain cases, this code may not be appropriate for an entire installation. The use of alternative SIC codes for some activities may be more appropriate to achieve Title V objectives. Consequently, dividing an installation by SIC codes would allow for multiple source permitting under Title V. The *Standard Industrial Classification Manual*, 1987, pages 18 and 419, suggests a flexible approach in using the 9711 classification.

c. In applying the “common control” and SIC code criteria, and the definition of “major source” generally, states must treat federal facilities consistently with nongovernmental facilities. Section 118(a) of the CAA provides that federal facilities shall be subject to and comply with air pollution control requirements, including permit requirements, “in the same manner and to the same extent as any nongovernmental entity.” Consequently, state application of the definition of “major source” under Title V that results in treating federal facilities more stringently than nongovernmental entities is not permissible.

To assist installations in making the above arguments, the Services are working together through the CAA Implementation Services Steering Committee to obtain written guidance from EPA headquarters allowing the EPA regions and states appropriate flexibility in applying the “major source” definition to military installations.

Installations should carefully assess the impact of single source treatment under the CAA, Title V. Installations that anticipate problems operating under one Title V permit should act now, while states are still formulating their Title V programs. Major Teller.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

United States v. McLaren: Reinitiation of Conversation by Accused May Constitute Implied Waiver of Previously Asserted Counsel Right

Introduction

In *United States v. Davis*,¹ the United States Court of Military Appeals (COMA) addressed how investigators should deal with ambiguous requests for counsel during custodial interrogations. As practitioners await the United States Supreme Court decision in *Davis*, they also should take note of the more recent COMA decision concerning waiver of previously asserted counsel requests. In *United States v. McLaren*,² the COMA held that an accused may impliedly waive his previously invoked Fifth Amendment³ right to counsel when he reinitiates conversation with investigators by answering a question asked before his rights invocation. Before practitioners include *McLaren* on their Fifth Amendment analysis schematic, however, they should review several "waiver law" cases that were not discussed in *McLaren*.⁴ These cases reveal that while the COMA may simply know a waiver when they see it, other courts have recognized a number of factors for use in resolving waiver issues.

Background

Following initial investigation of a complaint that he was sexually molesting the older of his two stepdaughters, Staff

Sergeant McLaren, United States Air Force, voluntarily accompanied two Air Force Office of Special Investigations Special Agents (SA) to a conference room inside the clinic where his daughter was being examined. Special Agent Sarantis advised McLaren of his rights, including his right to counsel,⁵ and informed him that he was suspected of rape, carnal knowledge, and assault with a deadly weapon.⁶ When SA Sarantis asked if McLaren wanted a lawyer, he responded, "Not at this time." When asked if he wanted to make a statement, McLaren indicated that he wanted to talk.⁷

After a few introductory questions, SA Sarantis steered the conversation toward the allegations of sexual abuse. McLaren became emotionally distraught. When SA Sarantis asked McLaren when he "first had sex with" his older stepdaughter, he replied, "These things happen."⁸ Agent Sarantis then repeated the question. At this point McLaren looked down and said something to the effect, "I think I want a lawyer," or "I think I need to talk to a lawyer."⁹ Special Agent Sarantis responded, "Well, yes, these charges seem—are serious."¹⁰ Special Agent Bianco said, "Yes, this is a decision that you'll have to make. We can't force you to stay here. You need to decide what you want to do."¹¹ After a brief pause, and without further questions or comments from the two special agents, McLaren resumed speaking. He responded to SA Sarantis's most recent question, saying, "It just happened."¹² The interrogation then resumed, and appellant orally confessed.¹³

¹36 M.J. 337 (C.M.A.), *cert. granted*, 114 S. Ct. 379 (1993). "Not every vague reference to counsel requires termination of the interrogation. An ambiguous reference to counsel must, however, be clarified before interrogation can continue." *Id.* at 341.

²38 M.J. 112 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1056 (1994).

³U.S. CONST. amend. V.

⁴*See infra* notes 23-29 and accompanying text.

⁵Although not discussed by the COMA, in *United States v. McLaren*, 34 M.J. 926 (A.F.C.M.R. 1992), the United States Air Force Court of Military Review addressed the issue of whether the subject questioning constituted custodial interrogation.

"Custody" is evaluated by "how a reasonable man in the suspect's position would have understood his situation." *Berkmer v. McCarty*, 468 U.S. 420, 442 (1984). Applying this standard to the facts, we find that the interrogation of appellant was custodial, and hence the advisement to the right to the presence of counsel was appropriate.

Id. at 929 n.2.

⁶*McLaren*, 38 M.J. at 113.

⁷*Id.* at 114.

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.*

At trial, the military judge denied appellant's motion to suppress his confession because "[a]fter a pause, and apparent reflective deliberation about his verbalized thoughts concerning his perceived need for a lawyer, [appellant] resumed the interrogation process by proceeding to answer the incriminatory question previously posed."¹⁴ Additionally, the military judge found that "[t]he agents reasonably construed this resumption by the accused as an election by him not to then act on his perceived need, if any, for a lawyer."¹⁵

Discussion

The COMA analysis in *McLaren* begins with the court's election not to decide whether McLaren's request for counsel was equivocal. Because the agents had not terminated the interview or conducted limited questioning to clarify McLaren's comment as required by *Davis*,¹⁶ the COMA ruled that the situation must be viewed as if McLaren had unequivocally requested a lawyer.¹⁷

In *Edwards v. Arizona*,¹⁸ the United States Supreme Court held that "an accused . . . having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police."¹⁹ In *McLaren*, the COMA acknowledged the Supreme Court ruling that "[i]f the interrogation continues

without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.²⁰ After acknowledging the nature of the government's burden, however, the COMA opted for brevity over precision, and blurred the line between the concepts of reinitiation of the conversation by the suspect, and waiver of the previously asserted right to counsel.²¹ Without significant discussion, the COMA found that the agents' somewhat provocative statements after McLaren's "unequivocal" counsel request did not amount to further interrogation, and that McLaren impliedly waived his counsel right by answering the question that preceded his request for counsel.²²

In *Johnson v. Zerbst*,²³ the United States Supreme Court held that the test for waiver of an individual's constitutional rights is whether the government has shown "an intentional relinquishment or abandonment of a known right or privilege."²⁴ In applying the *Zerbst* test, courts have focused on several factors. One such factor is the background, experience, and conduct of the accused.²⁵ Another factor is the time delay between the counsel request and the subsequent interrogation. Courts have viewed waivers which follow soon after the initial request as suspect,²⁶ because "[a] waiver obtained in such a case is likely to be the result of continued comment or questioning by the authorities."²⁷ Additionally, and although not required, courts have looked at whether the accused was

¹⁴*Id.*

¹⁵*Id.*

¹⁶36 M.J. 337 (C.M.A.), cert. granted, 114 S. Ct. 379 (1993).

¹⁷*McLaren*, 38 M.J. at 115.

¹⁸451 U.S. 477 (1981).

¹⁹*Id.* at 484-85. In *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983), the Court defined "initiation" as inquiries or statements that "represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation."

²⁰*McLaren*, 38 M.J. at 116 (emphasis added) (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)). The Supreme Court has recognized that an accused may countermand a previous rights invocation. In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court specifically stated "*Edwards* does not foreclose finding a waiver of Fifth Amendment protection after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities. *Id.* at 156.

²¹In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the Court ruled that if initiation by the accused is found, then a separate inquiry must be made whether, on the totality of the circumstances, the accused voluntarily waived his rights.

Thus the Oregon Court of Appeals was wrong in thinking that an "initiation" of a conversation or discussion by an accused not only satisfied the *Edwards* rule, but *ex proprio vigore* sufficed to show a waiver of the previously asserted right to counsel. The inquires are separate, and clarity of the application is not gained by melding them together.

Id. at 1045.

²²*McLaren*, 36 M.J. at 116.

²³304 U.S. 458 (1938).

²⁴*Id.* at 464.

²⁵*White v. Finkbeiner*, 611 F.2d 186 (7th Cir. 1979).

²⁶*United States v. Grant*, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); *United States v. Nixon*, 571 F.2d 1121 (9th Cir. 1978); *Government of Canal Zone v. Gomez*, 566 F.2d 1289 (5th Cir. 1978).

²⁷*Finkbeiner*, 611 F.2d at 193 (citing *United States ex. rel. Williams Twomey*, 467 F.2d 1248 (7th Cir. 1972)).

given his Miranda warnings again before reinitiation of the interrogation,²⁸ and whether the subsequent waiver was explicit.²⁹

Whether or not application of these factors would have led to a different result in *McLaren* is open to debate. Although the appellate opinions do not describe the background and experience of the accused, his highly charged emotional state at the time of the interrogation could be viewed as an impediment to a knowing and intelligent waiver. Further doubt on the validity of the waiver could be found in the short time delay between the request for counsel and the reinitiation of interrogation. Finally, the court would have to deal with the significance of the absence of renewed Miranda warnings and the decidedly unexplicit nature of the waiver.

Conclusion

Until a firm set of guidelines is established for military practitioners in this area, trial counsel should advise investigators of the need to clarify ambiguous counsel request waivers. Defense counsel should look to federal case law to challenge claims of implied waiver that are not supported by the facts. Major Kohlmann.

Contract Law Notes

Prompt Payment Discounts On Progress Payments

The government often finances contractor performance by making progress payments based on the contractor's incurred costs. Under this financing method, the government pays the contractor, generally on a monthly basis, in response to the contractor's request for payment for work in progress.³⁰ In the Department of Defense (DOD), the progress payment rate is customarily seventy-five percent of the total cost of contract performance.³¹ The DOD pays higher rates if the contractor is a Small Business (ninety percent) or a Small Disadvantaged Business (ninety-five percent).

In most supply contracts, the contractor makes several deliveries and is entitled to payment of the full contract price only after the government accepts the delivered items. Because the contractor generally will have received several progress payments before making the first delivery, the government will apply a liquidation formula to calculate the balance owed to the contractor.³² For example, assume that the government has a contract obligating the contractor to deliver 1200 items with a unit price of ten dollars each in twelve monthly installments. These terms would obligate the government for twelve payments of \$1000, in payment for each lot of 100 items. Also assume that the government has agreed to pay progress payments at the customary rate of seventy-five percent. Three months after award, the government accepts the first delivery. In the early phases of contract performance, the liquidation rate generally will be the same as the progress payment rate.³³ Therefore, in our example, we would apply a seventy-five percent liquidation rate to the amount owed for the delivery (\$1000) and pay the contractor the balance (\$250).³⁴

Application of these rules in conjunction with contract provisions for prompt payment discounts may yield unexpected results. Contracting officers may insert a clause in fixed-price supply and fixed-price service contracts authorizing the government to take a discount for prompt payment, if the contractor proposes such a discount in response to a government solicitation.³⁵ The offeror indicates the amount and terms of the discount on the *Standard Form (SF) 33, Solicitation, Offer, and Award*. On delivery, the contractor submits an invoice for payment, based on the terms of the contract. The payment due date and the discount period are both measured from the date the government accepts the items or the date indicated on the contractor's invoice, whichever is later. Thus, if the government pays the contractor within the discount period specified on the *SF 33*, it is entitled to a discount.

Because the government generally makes progress payments before it accepts end items or receives the contractor's postacceptance invoice, all progress payments are necessarily

²⁸United States v. Evans, 575 F.2d 1286 (9th Cir.), cert. denied, 439 U.S. 854 (1978). But see Maglio v. Jago, 580 F.2d 202 (6th Cir. 1978).

²⁹United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.), cert. denied, 436 U.S. 919 (1978).

³⁰See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.232-16, Progress Payments (1 Apr. 1984) [hereinafter FAR].

³¹See DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 232.501-1, Customary Progress Payment Rates (interim rule) (1 Apr. 1984); 58 Fed. Reg. 62,045 (1993).

³²See generally FAR 32.503-8.

³³*Id.*

³⁴This is an oversimplification for purposes of illustration. The liquidation could be increased (which would have the effect of reducing the amount the contractor receives) in several circumstances. The contracting officer could, for example, increase the rate if the contractor realizes a lower-than-anticipated profit rate. See *id.* 32.503-9(b).

³⁵*Id.* 52.232-8, Discounts for Prompt Payment. This clause provides in pertinent part:

(a) Discounts for prompt payment will not be considered in the evaluation of offers. However, any offered discount will be taken if payment is made within the discount period indicated in the offer by the offeror. As an alternative to offering a prompt payment discount in conjunction with the offer, offerors awarded contracts may include prompt payment discounts in individual invoices.

made before the end of the discount period. Is the government entitled to take the prompt payment discount based on previous progress payments when it computes the balance due to the contractor after acceptance of the end items? The answer seems to be yes, based on a recent decision of the Armed Services Board of Contract Appeals (board).

In *Jay Dee Militarywear, Inc.*, the board framed the prompt payment discount issue as, "Where the Government has previously paid the contractor progress payments which remain unliquidated, is the Government entitled to take the contractual prompt payment discount on progress payment liquidations, where the Government has not paid the balance of the invoiced amount within the discount period?"³⁶

In *Jay Dee Militarywear*, the contractor manufactured protective vests for the government and the government made progress payments throughout the course of contract performance. The contractor submitted invoices for payment with each delivery and, on receipt of the invoices, the government applied the contractually specified liquidation rate to the invoice amount. In addition to deductions based on the liquidation rate, the government took a prompt payment discount for progress payments made prior to delivery and acceptance of the end items. The balance was paid to the contractor after the discount period specified in the contract. The government did not take the discount on the balance due because it did not pay this amount within the discount period.

In its appeal, the contractor contended that the contracting officer lacked authority to take the discount. It noted that the contract's prompt payment discount provisions did not state that the discount applied to progress payments, and that the progress payment provisions did not refer to the discount provisions. The board was unpersuaded, however, and applied the well-established interpretational rule that contract provisions should be read together so that all are given effect. Because the discount provision did not exclude progress payments from its scope, they were included. The government satisfied the only precondition for taking the discount, the requirement to make at least partial payment before expiration of the discount period. Consequently, the contracting officer

was authorized to take the discount based on prior progress payments. The board found it irrelevant that the balance of the invoice was paid after the discount period.

The *Jay Dee Militarywear* decision is significant because administrative contracting officers rarely take discounts based on progress payments. Such payments are considered a type of financing³⁷ designed to alleviate the contractor's cash flow problems. Taking a discount based on prior progress payments seems contrary to the purpose for which such payments were intended. Further, progress payments are not made "earlier" than contemplated by the parties; they are made in the routine course of contract administration in response to the contractor's payment request. Nevertheless, decisional authority now exists for contracting officers to take prompt payment discounts based on prior routine progress payments. Although the board's reasoning is sound, the government's victory was gained through costly, time-consuming litigation. Contract attorneys should apprise their contracting officers of this money-saving opportunity but should urge caution in its application. Major Tomanelli.

International Law Notes

Law of War Treaty Developments

The United States government is currently reviewing four Law of War conventions for purposes of possible ratification. These conventions are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention),³⁸ the 1977 Protocol I Additional to the Geneva Conventions of 1949 (Protocol I),³⁹ the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Conventional Weapons Convention),⁴⁰ and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention).⁴¹ All of these conventions apply during time of international armed conflict, as defined

³⁶ ASBCA No. 46539, 94-2 BCA ¶ 26,720.

³⁷ FAR 32.902.

³⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter the 1954 Hague Convention].

³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter Protocol I]. On January 29, 1987, President Reagan transmitted Protocol II to the Senate for its advice and consent. With certain declarations, reservations, and understandings, he recommended its ratification. Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTIONS OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess., at III (1987), reprinted in 81 AM. J. INT'L L. 910 (1987).

⁴⁰ Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate effects, Oct. 10, 1980, 19 I.L.M. 1287 [hereinafter the Conventional Weapons Convention].

⁴¹ Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 [hereinafter the Chemical Weapons Convention].

by the specific convention. This note briefly discusses the purpose of each treaty, the controversial sections of each treaty, and the stage at which each treaty is in the ratification process.

The Chemical Weapons Convention is the farthest along the ratification process. President Clinton transmitted it to the Senate for its advice and consent on 23 November 1993.⁴² The treaty represents the culmination of over thirty years of negotiations aimed at eliminating chemical weapons.⁴³ Going far beyond the mandates of the 1925 Geneva Gas Protocol—the current international convention governing chemical weapons—the 1993 Chemical Weapons Convention bans the use (including retaliatory use), development, production, acquisition, transfer, and storage of chemical weapons. It also requires parties to destroy their existing stocks of chemical weapons. President Clinton strongly endorsed the ratification of the convention in his transmittal letter.⁴⁴ This is not surprising as the United States was a key player during the negotiation of the convention.⁴⁵

The only controversial provision of the convention involves its ban on the use of riot control agents as a “method of warfare.” The controversy, which is a domestic one, surrounds the impact of this article on Executive Order 11850, which renounces the first use in war of riot control agents as a matter of national policy except in certain “defensive military modes.”⁴⁶ The Executive Order cites four examples of such defensive military uses of riot control agents, if authorized by the National Command Authority.⁴⁷ One point of view considers all four of those situations as being primarily defensive uses of riot control agents, and not “methods of warfare,” while the other considers the use of riot control agents in two of those situations, where civilians are used to mask attacks and in the rescue of downed aircrew, to be “methods of war-

fare.” This dispute obviously will have to be resolved before the Senate offers its advice and consent as to ratification of the convention.

In the 1993 and 1994 National Defense Authorization Acts, Congress recommended that the President submit the Conventional Weapons Convention to the Senate for its advice and consent.⁴⁸ The President recently has acted on this recommendation. This treaty prohibits or restricts the use of three categories of weapons: (1) weapons that injure by producing nondetectable fragments; (2) mines, booby traps, and other devices; and (3) incendiary weapons. The treaty deals with each category in a separate protocol. To ratify the treaty a nation must consent to be bound by two of the three protocols.

Weapons that injure by producing nondetectable fragments are banned by Protocol I of the treaty. No such weapon currently exists. Various types of booby traps described in Protocol II also are outlawed. Protocol II also places significant restrictions on the use of land mines.⁴⁹ United States land mine doctrine is entirely consistent with Protocol II. Protocol III places targeting limits on the use of incendiary weapons, and specifically prohibits the use of air-delivered incendiaries against military objectives located within a very broadly defined concentration of civilians. Disagreement between the DOD and the Department of State regarding the last provision delayed its submission to the Senate. Following a new review, on May 12, 1994, President Clinton submitted the convention, and Protocols I and II only, to the Senate for its advice and consent to ratification.⁵⁰

Ratification of the 1954 Hague Convention also seems likely. International attention focused on this treaty because of the cultural property issues that arose during Operation Desert Storm and the conflict in the former Yugoslavia. While the

⁴²*Chemical Weapons Convention* (Letter of Transmittal from President William J. Clinton), DEP'T ST. DISPATCH, Dec. 6, 1993, at 849 [hereinafter Letter of Transmittal].

⁴³*Chemical Weapons Convention*, DEP'T ST. DISPATCH, Jan. 18, 1993, at 27.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶Exec. Order 11,850, 3 C.F.R. 980 (1971-1975), reprinted in, DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 38 (18 July 1956) (C1, 15 July 1976).

⁴⁷The four cited examples include to control rioting prisoners of war (PW) in areas under United States military control, to reduce civilian casualties in situations where civilians are used to mask or screen attacks, to execute rescue missions of downed aircrews and passengers in remote areas, and to protect convoys from civil disturbances, terrorists, and paramilitary organizations in rear echelon areas outside the zone of immediate combat. *Id.*

⁴⁸Congress implied that its recommendation was based on its desire to promote arms control agreements and to protect noncombatants. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1365, 106 Stat. 2315 (1992); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1423, 107 Stat. 1547 (1993).

⁴⁹The Conventional Weapons Convention, *supra* note 40, does not apply to internal conflicts such as the ones in which tens of millions of land mines have been indiscriminately sewn in places such as Afghanistan, Angola, Cambodia, Iraqi Kurdistan, Central America, Somalia, and Mozambique. The innocent victims of land mines in these areas number in the hundreds of thousands. In an effort to set an example in this area, the United States recently extended a moratorium on the sale, transfer, or issuance of an export license for any antipersonnel mine, imposed in 1992, until 1996. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-60, § 1423, 107 Stat. 1547 (1993). Additionally, the United States is participating in meetings of government experts that will lead to a review conference in September of 1995 for the Conventional Weapons Convention. The principal focus of the convention will be the improvement of the land mine regime in Protocol II, including expanding its scope of application to internal conflicts.

⁵⁰Letter from W. Hays Parks, Chief, International Law Branch, Office of The Judge Advocate General (June 17, 1994) (on file with author).

treaty breaks little new ground in the protection of cultural property, it does represent the first global attempt to comprehensively codify rules regarding the treatment of cultural property.

The treaty protects museums, monuments, archeological and scientific sites among others as long as they are not used for military purposes and no military necessity exists for their attack. While the United States signed the treaty after its negotiation, it did not ratify the treaty because of the Joint Chiefs of Staff's objections to the articles providing special protections to cultural property of great importance; the Joint Chiefs feared that the Soviet Union would take advantage of this special protection by using it to shield strategically important targets.⁵¹ Today these concerns have largely dissipated with the dissolution of the Soviet Union and the recognition of the military necessity exception contained within the special protection section.⁵² The DOD has recommended ratification, subject to some relatively minor statements of understanding. Ratification is expected in late 1994 or early 1995.

The last Law of War treaty under DOD review is the most contentious one: the 1977 Protocol I Additional to the 1949 Geneva Conventions. During the 1993 Convention on the Protection of War Victims, the United States pledged to review its decision not to ratify this convention.⁵³ The product of three years of diplomatic conferences, the drafters of Protocol I sought to fill in gaps in the Hague and Geneva Conventions; gaps which manifested themselves during conflicts in Africa, the Middle East, and Vietnam.⁵⁴ Protocol I reinforces or provides protections for the Geneva Convention categories of war victims: wounded and sick, prisoners of war, and civilians.

The most controversial articles of the treaty involve its scope of application and qualification for PW status. Article 1(4) extends the application of the Protocol and all of the Geneva Conventions to insurgencies fighting against colonial domination, alien occupation, and racist regimes in the exercise of their right of self determination. The United States previously has objected to this provision on the grounds that it

unnecessarily "politicizes" International Humanitarian Law by extending it to certain conflicts based on subjective determinations of the participant's motivations.⁵⁵ Recent events—specifically the recognition of the Palestinian Liberation Organization and the African National Congress, two of the most prominent insurgent groups contemplated by the drafters of the Protocol—have diminished the impact of that particular objection.

In an effort to encourage irregular forces to comply with International Humanitarian Law, Article 44 makes it easier for these forces to obtain PW status by eliminating the absolute requirement of the Third Geneva Convention for such forces to wear a distinctive symbol.⁵⁶ Article 44 also qualifies the carrying arms openly requirement by limiting the time the irregular must carry his weapon openly.⁵⁷ The United States contended that this relaxation effectively blurred the distinctions between irregulars and civilians, thereby jeopardizing the safety of civilians.⁵⁸

The DOD Law of War Working Group has undertaken the review of Protocol I. The group's article-by-article analysis of the Protocol is expected to take the remainder of 1994, if not longer. This exhaustive review is necessary because, of all the Law of War treaties discussed, Protocol I will have the most significant impact on United States military operations. Lieutenant Commander Winthrop.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys 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.

⁵¹ W. Hays Parks, Address at the Carnegie Endowment for International Peace Symposium on the Destruction and Rebuilding of Architectural Treasures in Bosnia and Herzegovina (May 2, 1994).

⁵² *Id.*

⁵³ *Protection of War Victims*, DEP'T ST. DISPATCH, Sept. 6, 1993, at 615.

⁵⁴ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, et al. eds., 1987).

⁵⁵ Letter of Transmittal, *supra* note 42.

⁵⁶ The Third Convention accords irregular forces PW status if they (1) are commanded by a person responsible for his subordinates; (2) are wearing a fixed distinctive sign recognizable at a distance; (3) are carrying arms openly; (4) are conducting their operations in accordance with the laws and customs of war. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁵⁷ The irregular need only carry the weapon openly "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Protocol I, *supra* note 39, art. 44(3).

⁵⁸ Letter of Transmittal, *supra* note 42.

Client Services Note

Client Referrals

Those who have not practiced legal assistance in a number of years may be surprised to learn of several significant changes to Army legal assistance policy. One change was to the procedures for referring clients outside of the Army Legal Assistance Program (ALAP).

The 1992 revision of *Army Regulation 27-3, The Army Legal Assistance Program*⁵⁹ (AR 27-3), adopted new procedures for referring clients to civilian attorneys. These procedures created an affirmative responsibility on the part of the legal assistance attorney (LAA) to "hand off" representation properly. Instead of simply providing clients with a list of civilian practitioners, or, perhaps, the *Yellow Pages*, the LAA must carefully weigh the decision to refer and follow a more deliberative procedure established in the regulation.⁶⁰ Because of these procedures, the LAA must be aware of several professional and ethical obligations attendant to the referral. The most complex obligations involve the fee structure that the client will face in civilian representation.

The LAA first must consider carefully the merits of referring a client to a civilian practitioner. If the subject matter of the referral falls under the ALAP, the LAA only may make the referral after considering several factors, including the comparative workload of the LAA and the civilian practitioner, the LAA's and the civilian attorney's expertise in the area, the goals of the client, convenience to the client, and the cost to the client.⁶¹

The last factor, cost, presents a unique problem. The regulation requires the LAA to make every effort to reduce the costs to the client because, by definition, the service is within the ALAP and ordinarily is cost free. The regulation states further that an LAA *may* negotiate a fee with the civilian attorney on behalf of the client.⁶² The regulation establishes a priority for civilian referrals, starting with attorneys who will

handle the case on a no, or reduced fee, basis and ending with an attorney whose fee is "reasonable for the locale in which he or she practices."⁶³

This last requirement is essentially a restatement of the general rule regarding attorney fees set forth in both *Army Regulation 27-26, Rules of Professional Conduct for Lawyers* and the ABA Model Rules of Professional Conduct. Army Rule 1.5(a) states that "[a] lawyer's fee shall be reasonable." The rule further establishes that one is to measure "reason" with reference to the fee customarily charged in the locality or for similar services.⁶⁴

In referrals *outside* the scope of the ALAP, AR 27-3 establishes a different requirement. In these cases, the regulation requires that "when ever possible" the LAA should base the referral on knowledge of, among other factors, the civilian attorney's "normal fee arrangements."⁶⁵ The regulation specifically requires LAAs to refer cases that ordinarily result in representation on a contingent fee basis.⁶⁶ The primary category of cases that is most likely included are tort cases.

Tort contingency fee arrangements can run from thirty to fifty percent of the recovery.⁶⁷ Some states have taken statutory action to limit contingency fees and tort awards.⁶⁸ The only national ethical standard, however, is embodied in ABA Model Rule 1.5 and its comments. The rule holds that a contingent fee, like all other fees, must be reasonable and not "clearly excessive." An ABA informal ethics opinion has opined that an attorney has an ethical obligation to offer clients an alternative to contingency fees before accepting any case on such a basis.⁶⁹

Because referrals are a basic service performed by every legal assistance office, LAAs must familiarize themselves with ordinary fee arrangements. Furthermore, many referrals occur after the creation of an attorney client relationship between LAAs and their clients. Consequently, LAAs owe a fiduciary duty of loyalty to their clients. *Army Regulation 27-3* contemplates the possibility of LAAs becoming intimately

⁵⁹ DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (30 Sept. 1992) [hereinafter AR 27-3].

⁶⁰ *Id.* para. 3-7.

⁶¹ *Id.* para. 3-7h(3).

⁶² *Id.* para. 3-7h(3)(e).

⁶³ *Id.* para. 3-7h(7)(f).

⁶⁴ DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 1.5 (a)(3) (1 May 1992).

⁶⁵ AR 27-3, *supra* note 59, para. 3-7h(8).

⁶⁶ *Id.* para. 3-8b(2). "Contingent legal fee cases. Legal assistance will be limited to general advice on civil lawsuits, court procedures and filing requirements, the potential merits of a case, and the client's need to retain a civilian lawyer to obtain further legal advice or assistance." *Id.*

⁶⁷ LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES 13 (1994).

⁶⁸ *Id.* at 17.

⁶⁹ ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1521 (1986) (offering alternatives to contingency fees).

involved in fee negotiations with civilian counsel during referrals.⁷⁰ Even if LAAs do not engage in actual negotiations, the regulation requires LAAs to be aware of the fee structures of the civilian practitioners.⁷¹ Moreover, the regulation states that in contingent fee cases, LAAs should inform their clients about court procedures, the potential merits of the case, and the need to obtain a civilian lawyer to pursue the case.⁷²

The LAA must fully inform clients about the nature and possible cost of contingent fee arrangements. While the civilian practitioner theoretically has the ethical obligation to inform the client about the fee options, LAAs should not attempt to take refuge in that obligation. The LAA should consider the merits of actively negotiating a fee with the civilian attorney on behalf of the client.

The revised referral procedures found in *AR 27-3* represent a welcome departure from past practice. The *Yellow Pages*, a referral book, or the local bar association represent just the beginning of the referral process; they no longer represent the end. Major McGillin.

Family Law Notes

Jurisdiction over Paternity Actions

The Nebraska Court of Appeals recently held,⁷³ consistent with decisions in several other states,⁷⁴ that an act of sexual intercourse within the state provided "minimum contacts" sufficient to vest a state paternity court with jurisdiction over a nonresident defendant. The same court upheld a default judgment of paternity and award of child support based on Nebraska child support guidelines.

The decision of the court in Nebraska, and in other states that take an expansive view of long-arm jurisdiction, emphasizes what soldiers should already understand—complaints of

paternity should not be ignored. The result may be a lost opportunity to challenge a judgment of paternity or provide input into a determination regarding child support. In either case, the soldier may have little or no basis to challenge the decision. At the same time, the decision would form a basis for a punitive family support obligation under *Army Regulation 608-99*.⁷⁵ Responding to paternity allegations and family support generally continues to be an excellent subject for troop training by LAAs. Major Block.

Uniformed Services Former Spouses' Protection Act

Although the Uniformed Services Former Spouses' Protection Act (USFSPA)⁷⁶ has been effective for over a decade, former spouses continue to inquire about their potential right to a share of retirement pay while retroactivity of state authority to divide military retirement pay as property has been a point of contention since passage of the USFSPA.

The USFSPA expressly envisions retroactive application of its terms at least as far back as the United States Supreme Court's *McCarty* decision,⁷⁷ which it overruled in part.⁷⁸ State court willingness to revisit the issue in cases that predated the *McCarty* decision led Congress to amend the USFSPA in 1990.⁷⁹ This amendment expressly prohibits courts from treating military retired pay as property in any case in which a preexisting final decree has been issued *before* 25 June 1981 without an express reservation of jurisdiction to divide. Authority to reopen decrees issued subsequent to 25 June 1981 is a question of state law.

Despite the seemingly clear language of the USFSPA amendment, state court rulings have not been entirely consistent.⁸⁰ While inconsistencies may be resolved on appeal, LAAs should ensure that the USFSPA amendment is the focus of discussion when counseling retirees and former spouses with decrees predating 25 June 1981.⁸¹ Major Block.

⁷⁰ See *AR 27-3*, *supra* note 59, para. 3-7h(3)(e) (permissible for an LAA to engage in fee negotiations).

⁷¹ *Id.* para. 3-7h(7)(f), (8).

⁷² *Id.* para. 3-8b(2).

⁷³ Nebraska Dep't of Social Services, *ex. rel. Yankton v. Cummings*, 20 Fam. Law Rept. 1333 (BNA May 1994).

⁷⁴ *Id.* States cited include Wisconsin, Iowa, California, Louisiana, and Mississippi.

⁷⁵ DEP'T OF ARMY, REG. 608-99, PERSONNEL AFFAIRS: FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (22 May 1987).

⁷⁶ 10 U.S.C. § 1408 (1988).

⁷⁷ In its decision issued 25 June 1981, the United States Supreme Court held that states had no authority to divide military retirement pay. *McCarty v. McCarty*, 453 U.S. 210 (1981).

⁷⁸ Title 10 U.S.C. § 1408(c)(1) states, in part, that "a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981"

⁷⁹ *Id.*

⁸⁰ Compare the Missouri Court of Appeals case in *Knox (Born) v. Born*, 20 Fam. Law Rept. 1338 (BNA May 1994), (finding amendment to be a bar to reopening a decree) with the New Mexico case of *Roybal v. Gonzalez* (discussed in *NAVY TIMES*, Dec. 6, 1993, at 24).

⁸¹ The potential to reopen decrees that were final after 25 January 1981 to address division of military retirement pay is a question of state law.

Administrative Law Note

Digest of Opinion Office of The Judge Advocate General Administrative Law Division

*Army Regulation 600-9*⁸² (AR 600-9) establishes body fat standards for military personnel. The only method that AR 600-9 explicitly recognizes for measuring body fat percentage is the circumference measurement technique—that is, the “tape measure test”.

Although AR 600-9 only describes the circumference measurement technique, an OTJAG Administrative Law Division opined that a commander is not precluded from using the results of a hydrostatic weighing—that is, “immersion test”.⁸³ If the hydrostatic weighing is properly conducted, it may be considered as evidence of whether a soldier actually meets Army weight control standards.⁸⁴ Major Peterson.

Tax Note

Moving Expense Allowances Not Taxable

The Legal Assistance Division, Office of The Judge Advocate General, has issued a message summarizing the Internal Revenue Service’s recent announcement on the federal taxation of moving expense allowances.⁸⁵ The contents of the message are reprinted below because of obvious widespread interest. Legal assistance attorneys should further distribute this information. Lieutenant Colonel Hancock.

1. As a result of changes to the income tax laws in the Omnibus Reconciliation Act of 1993, it appeared that certain allowances intended to reimburse soldiers for their expenses incurred because of a PCS move became taxable. These allowances included Temporary Lodging Allowance (TLA), Temporary Lodging Expense (TLE), Dislocation Allowance (DLA), and Moving-in-housing Allowance (MIHA). The new tax rules apply for all moves on or after 1 January 1994.

2. Since the initial review of the changes to the tax law, the Internal Revenue Service (IRS) has had the opportunity to reexamine the issue of the taxation of these allowances. On 18 May 1994, the IRS issued notice 94-59, Allowances for Subsistence and Quarters. This notice stated that the IRS intends to issue guidance to clarify that certain allowances provided by the Army in connection with PCS moves continue to be excludable from gross income despite the recent changes to the tax law.

3. The guidance, not expected to be published until later this year, will confirm the intent of IRS to restore the tax treatment of our allowances to a status that existed prior to the tax law change in 1993. Thus, TLA, TLE, and MIHA are not included in taxable income. However, the excess of DLA over allowable moving expenses is still taxable income even though DLA is not included as income on a W-2 form.

4. This information must be disseminated to our soldiers to facilitate tax planning. Soldiers who have questions about their tax liability should contact a legal assistance attorney or an ACS financial counselor.

⁸² DEP’T OF ARMY, REG. 600-9, PERSONNEL—GENERAL: THE ARMY WEIGHT CONTROL PROGRAM (1 Sept. 1986).

⁸³ DAJA-AL Opinion, 1993/1744, subject: Body Fat Measurement Methodology.

⁸⁴ See DEP’T OF DEFENSE DIRECTIVE 1308.1, PHYSICAL FITNESS AND WEIGHT CONTROL PROGRAMS, encl. 1, para. 7 (June 29, 1981).

⁸⁵ Message, Headquarters, Dep’t of Army, DAJA-LA, subject: Moving Expense Allowances Not Taxable (021614Z Jun 94). This message incorporates information announced by the Internal Revenue Service in IRS Notice 94-59, 1994-23 I.R.B., 1994 WL 191325. This notice was previously uploaded to the Legal Automation Army-Wide System Bulletin Board, Legal Assistance Conference.

Claims Report

United States Army Claims Service

Personnel Claims Notes

Final Thoughts: Personnel Claims 1994

On reassignment after three years in personnel claims, I would offer some observations about the health of the personnel claims system in the Army. Generally, I believe that soldiers, their families, and the claims system are being well served by conscientious and dedicated field claims personnel. Even so, we can, and must, improve certain areas.

File Substantiation

We must do a better job of documenting and substantiating files. We can explain to our clients that these requirements exist to maximize recovery and show proper stewardship of government funds, not because we do not trust them. As new claims personnel transition into our legal offices, certain items need repeated emphasis.

- Make better use of chronology sheets to explain awards. Decisions on how much to

deduct for preexisting damage, why one estimate was used instead of another, and whether the evidence actually shows that an item was tendered to the carrier are inherently subjective. When litigated months or years after the fact, adjudicator reasons about how and why these decisions were made become vital.

- Claims examiners must complete recovery calculations. A decision on how much to award a claimant is one side of the same coin that involves recovery from the responsible carriers or contractors. The same evidence is used for both decisions. It just makes good sense for one person to consider both actions when deciding on a particular award.

- Adequately document key issues. In recent decisions, the General Accounting Office (GAO) has become specific in ruling on claims for missing items or internal damage. Files must show that the item was tendered to the carrier, through inventory notations or by solid evidence that the item was packed or given to the carrier. The claimant usually will have to provide this evidence. For internal damage, the file must show that the item worked prior to shipment and that damage was shipment related. Specific claimant statements can show mechanical condition at origin and external damage or a qualified repair estimate can show damage in transit. Full documentation must exist before award.

- Use government or claims inspections to document decisions. Personal observation often is the only way to help a claimant and document a file. Even though resources are tight, we cannot always do claims from behind a desk.

Notice/Quality

Timely notice of loss and damage is more important than ever before and must be emphasized as part of the claims information program. Soldiers must understand that *DD Form 1840*¹ is the primary scoring document under Military Traffic Management Command's (MTMC) Total Quality Assurance Program. If they leave this document blank, even if they later report loss or damage on the *DD Form 1840R*² within seventy days, a risk exists that the carrier will never be penalized for a bad move. We can help this process by emphasizing the following:

- Soldiers understand that *DD Form 1840* is both a notice and quality control tool and resist the temptation—often at the carrier's suggestion—to leave the form blank on taking delivery of their personal property.

- Claims offices always give copies of *DD Form 1840R* to destination transportation offices and try to ensure these are dispatched to origin transportation offices—where the scoring is actually done—in a timely fashion.

- Inventory documents and notations are important. Carriers are becoming increasingly sophisticated at using high value inventories, check-off sheets, and driver statements to prove delivery. We have to deny too many claims because soldiers or their agents do not understand the effect of signing such important documents. If a soldier signs a statement that a high value item was delivered, using the *DD Form 1840R* to overcome the presumption of correct delivery usually will be difficult.

Carrier Recovery

Carrier recovery is a vital function. First, it returns dollars directly to claims accounts so that we can pay soldiers. Secondly, it provides a strong financial incentive to carriers to improve the quality of their service. Stated succinctly, it does little good to raise carrier and nontemporary storage liability rates if carrier recovery files remain backlogged in field offices. On the positive side of the ledger, the following actions are in the works:

- Raising overseas liability from its current \$1.80 per pound per item to \$1.25 times the net weight of the shipment. A long awaited GAO report should support this MTMC initiative and allow for future changes to the international rate solicitation.

- Changing the nontemporary storage liability from fifty dollars per line item to \$1.25 times the net weight of the shipment. This Service has been engaged in numerous discussions with the MTMC to facilitate this change to the Basic Ordering Agreement. The MTMC has recognized that this change needs to be made for both nontemporary storage and for direct procurement method inbound and outbound shipments so that carrier liability rates are the same no matter what mode of shipment is used.

¹Dep't of Defense, *DD Form 1840, Notice of Loss or Damage* (Jan. 1988).

²Dep't of Defense, *DD Form 1840R, Notice of Loss or Damage* (Jan. 1988).

Future Initiatives

The United States Army Claims Service (USARCS) is working closely with the MTMC and the other military claims services to use adjudicated claims data in the quality control process. Eventually, we can expect that this data—which is the best objective measure of good or bad performance—will be used to grade carriers and award future business. The USARCS also is working with the MTMC to improve the privately owned vehicle (POV) shipment and claims system to improve our dismal rate of recovery. New initiatives such as the Single Contractor Pilot Program, in which a single contractor will be fully liable for all damage caused during POV shipment, presently are under solicitation. We also continue to study other ways to improve POV shipments under a newly created MTMC Process Action Team.

Conclusion

We have come a long way in personnel claims. Recoveries have improved significantly, to a record of \$19.8 million in fiscal year 1993. Expenditures and claims are continuing to decline slightly from record levels in fiscal years 1992 and 1993 when we spent more than \$70 million per year on personnel claims (\$56 million per year on household goods claims). Soon to be published changes to *Army Regulation 27-20*³ will make administration of personnel claims somewhat easier by limiting reconsideration periods to sixty days, restricting claims for vandalism to vehicles, and incorporating previous guidance on dealing with fraudulent claims.

That we help more than 100,000 soldiers and families per year offset the effects of unusual occurrence or moving is a testament to the dedicated effort to countless military and civilian claims personnel. As LTC Lee Kennerly assumes his new duties as Chief of Personnel Claims and Recovery Division, I wish to thank all who have helped improve the system and helped this division perform its mission. Keep up the good work. Colonel Brian X. Bush, Chief, Personnel Claims & Recovery Division.

United States Government Car Rental Agreement

Claims offices, at one time or another, may have had a soldier file a claim seeking to recover money to pay for a rental car that was damaged while he or she was on temporary duty (TDY). The soldier was authorized a rental car on the TDY orders, did not take the daily liability or collision coverage offered by the rental car agency (within the continental United States (CONUS) it is prohibited), had an accident in which the rental car was damaged, and the rental car agency has asserted a demand against the soldier for damage to the car. Our response to the soldier has been to deny the claim and refer

them to the local finance office under the provisions of the Joint Travel Regulation.⁴

The MTMC has negotiated a government car rental agreement on behalf of the armed services with the following major rental car companies: 3C Rent-A-Car, ABC Car Rental and Motorhomes, Able Rent-A-Car, Ace Rent-A-Car, Admiral Car Rental, Advantage Rent-A-Car, Airline Rent-A-Car, Airways Rent-A-Car, Ajax Rent-A-Car, Alamo Rent-A-Car, Americar Rentals Systems, Inc., Avis Rent-A-Car, Budget Rent-A-Car, Checkered Flag Toyota Rent-A-Car, Courtesy Car Rental and Sales, Inc., Delta Rent-A-Car, Discount Car Rental, Discount Car and Truck Rentals, Dollar Rent-A-Car, ECR European Car Reservations, Enterprise Rent-A-Car, Eurorent USA, Inc., Freeway Ford Rent-A-Car, Hayat Car Rental Systems, Inc., The Hertz Corporation, Interamerican Car Rental, ITS International Travel Services, Jack Trebour Rental & Leasing, Kenning Car and Van Rental, Ladki International Rent-A-Car, McRae Ford, Inc., Midway Rent-A-Car, Midwest Auto Rental Services, National Rent-A-Car, Payless Car Rental, Practical Rent-A-Car, Quality Auto Rentals, Inc., Raceway Ford, Rebate Rent-A-Car, Senator Rent-A-Car, Standard Rent-A-Car, Thrifty Rent-A-Car, Tim Whitehead Chrysler Plymouth Dodge Jeep Eagle, Toyota Rent-A-Car, Tropical Rent-A-Car, U-Save Auto Rental, Value Rent-A-Car.

This agreement is of interest to claims personnel because the insurance and damage liability paragraph provides coverage for government drivers with a few exceptions. The pertinent part of that paragraph reads

Government renters will not be subject to any fee for loss or collision damage waiver, and *in the event of an accident will not be responsible for loss or damage to the vehicle except as stated below* Personal accident insurance or personal effects coverage may be offered to a renter, but is not a prerequisite for renting a vehicle.

Notwithstanding the provisions of any Company rental vehicle agreement executed by the Government employee, the Company will maintain in force, at its sole cost, insurance coverage, or a fully qualified self-insurance program, which will protect the United States Government and its employees against liability for personal injury, death, and property damage arising from the use of the vehicle. . . . The company warrants that, to the extent permitted by law, the liability and property damage coverage provided are primary in all respects to other sources of compensation, including claims

³DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (28 Feb. 1990).

⁴Joint Fed. Travel Regs. ¶ U3415C1(b) (1 Jan. 1987).

statutes or insurance available to the Government, renter, or additional authorized driver.

Loss of or Damage to Vehicle. Notwithstanding the provisions of any Company vehicle rental agreement executed by the Government renter, the Company hereby assumes and shall bear the entire risk of loss of or damage to the rented vehicles (including costs of towing, administrative costs, loss of use, and replacements), from any and every cause whatsoever, including without limitation, casualty, collision, fire, upset, malicious mischief, vandalism, falling objects, overhead damage, glass breakage, strike, civil commotion, theft and mysterious disappearance, except where the loss or damage is caused by one or more of the following:

- (1) Willful or wanton misconduct on the part of a driver.
- (2) Obtaining the vehicle through fraud or misrepresentation.
- (3) Operation of the vehicle by a driver who is under the influence of alcohol or any prohibited drugs;
- (4) Use of the vehicle for any illegal purpose.
- (5) Use of the vehicle in pushing or towing another vehicle.

(6) Use or permitting the vehicle to carry passengers or property for hire.

(7) Operation of the vehicle in a test, race or contest.

(8) Operation of the vehicle by a person other than an authorized driver.

(9) Operation of the vehicle outside the continental United States except where such use is specifically authorized by the rental agreement.

(10) Operation across international boundaries unless specifically authorized at the time of rental.

(11) Operation of the vehicle off paved, graded or maintained roads, or driveways, except when the company has agreed to this in writing beforehand.

NOTE: The above exceptions are not valid where prohibited by state law.

Your local SATO knows which car rental companies participate in this agreement, and SATO attempts to make reservations with these participating companies where at all possible. Should you have a potential claim, contact SATO (if it made the reservation) to confirm a car rental company's participation, and then if necessary, contact the car rental agency that has asserted a demand against the soldier to review the agreement and to withdraw the demand. Lieutenant Colonel Kennerly.

Professional Responsibility Notes

Department of the Army Standards of Conduct Office

Ethical Awareness

Army Rule 4.2 (Communication with Person Represented by Counsel)

Army Rule 3.8 (Special Responsibilities of a Trial Counsel)

Rule 4.2 of the Army's *Rules of Professional Conduct for Lawyers (Army Rules)*¹ protects the sanctity of the attorney-client relationship and shields represented parties from improper approaches, in theory. However, a number of recent cases shows that too many Army trial counsels (TCs) carelessly endanger their professional reputations by communicating

¹DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]. Army Rule 4.2, Communication with Person Represented by Counsel, states that "[i]n representing a client, a lawyer shall not communicate about the subject at the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Id.*

with represented persons.² Even staff judge advocates can find themselves in difficulty by *creating even the appearance of impropriety*. This note directly incorporates findings from actual cases to alert Army lawyers to the dangers associated with these practices. Even when frustrated by unsuccessful attempts to coordinate with opposing counsel, we must guard against lapses of judgement and insist on maintaining only the highest professional standards. Mr. Eveland.

Haste Makes Waste

What possibly could be gained by talking to a represented person, for example, before his or her lawyer arrives at a scheduled interview? Why would an attorney want to remain in the same room with an accused before the accused's lawyer comes to the meeting?

Lessons Learned

Damage to the Lawyer's Professional Reputation

Army lawyers applying for bar membership or seeking civilian or government positions will have to answer the question: "Has your professional conduct or competence ever been challenged or questioned? If so, please state fully the circumstances and the outcome." Communicating with represented persons is one of the most highly reported ethical breaches; far too many Army lawyers' professional reputations have been tarnished by this one shortcoming.

Dangers of Improper Appearances

Lack of notice to opposing counsel inevitably will result in the perception of the kind of unfair tactic that Army Rule 4.2 is designed to eliminate—that is, taking advantage of a lay person in the absence of counsel. We must be sensitive to the letter of the *Army Rules*, as well as to perceptions that may arise whenever, as Army lawyers, we have contact with parties represented by counsel.

Even the *appearance* of unauthorized contact with a represented person undermines the perception of fairness and raises doubts about the professionalism of Army lawyers, regardless of motivation. Army lawyers, as leaders in their military and legal communities, set standards and communicate those standards to staff members, clients, and opposing parties by example. Unauthorized contact will be perceived as insensitive and hurtful and will needlessly lower the dignity of the profession. Damaging misperceptions may persist in the legal and military community, which will have an adverse impact on morale.

Any contact with a represented party will create litigation in the form of suppression motions and appeals, as well as congressional and inspector general (IG) complaints—which are relayed directly to the Department of the Army Standards of Conduct Office (SOCO). What is true regarding substandard legal advice bears repeating in the context of unauthorized contact: "The investigative and other costs to the government; . . . and possibility of . . . job loss . . . can be a heavy price to pay for all concerned parties."³

Need to Have Trial Defense Service (TDS) or Other Counsel Present

An Army lawyer who engages in unauthorized contact with a represented person has violated the duty of trust owed to his fellow attorneys and to TDS clients within the command. Furthermore, Army Rule 3.8, Special Responsibilities of a Trial Counsel, is subverted when TCs bypass TDS counsel. That rule states, "A trial counsel shall: . . . make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel"⁴

Ethics rules apply at all times—not only during criminal proceedings. They are not suspended before trial or during administrative matters. Ethics rules are separate and apart from the *Manual for Courts-Martial*, the Uniform Code of Military Justice, and the Sixth Amendment. As retired Chief Justice Warren Burger told the *American Bar Association (ABA) Journal* in August 1990, "The fact that the Constitution permits particular conduct does not mean that it's professionally appropriate to engage in that conduct."⁵

²See generally Gregory G. Sarno, Annotation, *Communication with Party Represented by Counsel as Ground for Disciplining Attorney*, 26 A.L.R. 102 (1983); Professional Responsibility Notes, Professional Responsibility Opinion Number 93-2, Advisory Opinion, ARMY LAW., Dec. 1993, at 51, June 1994, at 65 (staff judge advocate who is to be present at a meeting involving informal procedures not specifically prescribed by statute or regulation, between the commander and a soldier whom the SJA knows is represented by legal counsel in the matter to be discussed, must notify the soldier's counsel of the meeting and not attend the meeting unless the soldier's counsel consents). *But see* Communications with Represented Persons, 59 Fed. Reg. 10,086 (1994) (to be codified at 28 C.F.R. pt. 77) (proposed Mar. 3, 1994) (Justice Department lawyers: (a) would be bound by their licensing jurisdiction's ethics rules except when those rules conflicted with a federal rule calling for different conduct; (b) would be allowed generally to make ex parte contacts with represented persons prior to the initiation of litigation; and (c) would be prohibited generally from contacting "targets" of a federal criminal or civil enforcement investigation.)

³Alan K. Hahn, *United States v. Hedges: Pitfalls in Counseling Retirees Regarding Negotiating for Employment*, ARMY LAW., May 1991, at 16, 21.

⁴AR 27-26, *supra* note 1, Rule 3.8.

⁵Retired Chief Justice Burger was quoted in Monroe Freedman, *Dirty Pool in the Prosecutor's Office*, LEG. TIMES, Sept. 24, 1990, at 24 (reporting a case involving unethical federal prosecutors who wired a *represented* murder suspect's friend to obtain incriminating statements, but who did not violate the Sixth Amendment because formal charges had not yet been made when the prosecutors bypassed the suspect's counsel); *but see* Geoffrey C. Hazard, Jr., *The Ongoing Battle over Client Rights*, THE NAT'L L.J., Oct. 8, 1990, at 13 (arguing generally that courts and the legislature should define ethical conduct, with bar participation). "The courts may not be the proper forum for every issue of professional conduct, but the bar has neither the frame of reference nor the scope of authority to give the final pronouncement." *Id.*

Discipline for Unauthorized Contact

The ABA Model Standards (Standards) for Imposing Lawyer Sanctions indicate that an admonition is reserved for cases where the lawyer has been negligent; there has been little or no injury to a client, the public, the legal system or the profession; and where there is little or no likelihood of repetition.⁶ A reprimand is appropriate where the lawyer's conduct, although violating ethical standards, is not serious enough to warrant suspension or disbarment. "A reprimand serves the useful purpose of identifying lawyers who have violated ethical standards, and, if accompanied by a published opinion, educates members of the bar as to those standards."⁷ As an example of discipline imposed by state bars, three-month suspensions were imposed for unethically communicating with represented parties in three reported state cases.⁸ In thirteen other reported decisions from a variety of jurisdictions, attorneys were censured or reprimanded for this violation.⁹ Either disbarment or suspension was imposed when the improper communication was combined with other misconduct.¹⁰

Bypassing Accused Soldier's Defense Counsel When Interviewing

One recent preliminary screening inquiry (PSI) involved a TC, Captain A. He displayed a pattern of violating Army Rule 4.2 by communicating with three soldiers—Private W (once), Private X (three times), and Private Y (once)—who were, at the time, represented by counsel. The soldiers to whom he spoke were all court-martial defendants represented by attorneys assigned to the TDS. All situations arose in the context of Captain A's interviewing the soldiers as witnesses against soldiers who were their coaccused. The W case, the three X cases, and the Y case were related.

Summary of Findings

At the conclusion of the PSI, Captain A was determined to have committed two ethical violations and he was cleared of the remaining three allegations as follows:

The communication with Private W was ethically proper because Captain A reasonably believed that he had the consent of defense counsel (DC).

Private X: (1) A first communication about getting an ID card was ethically proper because it involved a different subject than the trial where X was represented; (2) a sec-

ond communication about testifying was unethical because Captain A never received the DC's consent; and (3) a third communication about testifying was ethically proper because Captain A had obtained the DC's consent.

The communication with Private Y was unethical because Captain A never received the DC's consent and because Captain A's belief that he had received consent was unreasonable.

Discussion of Allegations Involving Private W

Captain A stated that he believed he had Private W's counsel's consent to a posttrial interview of Private W who, as part of a pretrial agreement (PTA), had agreed to testify against a coaccused. W's counsel had an extremely poor recollection of events. The preliminary screening official (PSO) concluded that the weight of the evidence supported the conclusion that Captain A reasonably believed that the counsel had consented to his communication with Private W.

Discussion of Allegations Involving Private X

Captain A spoke to X on three occasions. Two occasions occurred before his trial. In the first instance, the conversation pertained solely to the necessity for X to obtain a new ID card. Captain A assisted him in this respect. Because the conversation had nothing to do with the reason for which X was represented by counsel—that is, his pending court-martial—Army Rule 4.2 was not violated.

The second instance occurred during an Article 32 investigation involving a soldier accused of drug offenses. Captain A spoke privately with X, before X's own trial, concerning X's intentions with regard to testifying against that other accused soldier. In his response to the PSI, Captain A acknowledged that he acted improperly. The PSI believed that Captain A had no improper motive, noting that X's attorney was in the vicinity at the time, that X's guard was present as a witness, that Captain A already had taken action to have X compelled to testify, that X was not harmed by the conversation, and that Captain A had no apparent intent to persuade X to testify without an order.

The third instance occurred after X's trial, while he was in confinement. X's attorney acknowledged that he had consented in advance, however, so Army Rule 4.2 was not violated.

⁶2.6 Admonition, [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) at 01.801 (Feb. 1986).

⁷*Id.* (2.5 Reprimand).

⁸*Sarno, supra* note 2, at 139.

⁹*Id.* at 140.

¹⁰*Id.* at 143.

When Captain A spoke with Y, Y had a pending PTA. Prior to his conversation with Y, Captain A tried to pin down Y's attorney on certain points pertaining to a coaccused that were to be included in the stipulation of fact. Captain A recalled that Y's attorney responded, "I don't know, you'll have to sit down with Y and hammer it out." He took this as permission to speak with Y without the presence of counsel. Y's counsel conceded that he may have said to Captain A, "You will have to get that from him," referring to Y, but said he never intended to permit Captain A to interview his client in his absence. When Captain A and Y talked, Captain A recalled that Y responded affirmatively when he asked if his attorney told him that he was going to sit down with him; however Y denied this to the PSO. Captain A remembered discussing only the coaccused; however Y recalled discussing his own case plus those of three other coaccuseds.

The PSO concluded that Captain A's belief that he had the counsel's consent to speak with Y was unreasonable. Even if Y's attorney said to Captain A that "you will have to sit down with Y and hammer it out," this statement falls short of what a reasonable attorney would consider to be adequate consent to speak with an accused against whom charges are pending, in the absence of counsel. Accepting that Y told Captain A that his attorney had informed him that Captain A was going to "sit down with" him, Captain A should not have relied on the client's statement.

For this reason, the rule requires that consent be obtained from the lawyer—not the represented party. Given the ambiguity of Y's attorney's statement to Captain A, Captain A's failure to seek clarification, his failure to inform Y's attorney when he intended to see Y, and the lack of care Captain A demonstrated earlier in approaching X, Captain A was determined to have negligently violated Rule 4.2.

Mitigating factors impacting on the W/X/Y series of cases include the following: when Captain A spoke to Private W, W's PTA already had been approved; when he spoke to Y, he expected Y's PTA to be approved; he did not intend to derive some improper benefit; he was under pressure to finish his cases prior to his pending transfer; the breaches occurred in connection with a series of difficult courts-martial, and the defense attorneys contributed to Captain A's violations by their repeated collegial interactions with him throughout the period in which plea negotiations and testimony were discussed.

Captain A demonstrated insensitivity to Army Rule 4.2. On two occasions (involving X and Y) Captain A violated Rule 4.2 through negligence and an apparent lack of understanding. Despite the repeated nature of the violations, no evidence exists that Captain A did what he did to gain any improper advantage or that anyone was prejudiced by his actions. Apparently no one brought his improper conduct to his attention until after all alleged violations were committed.

Bypassing Counsel on the Telephone

In three other unrelated cases, attorneys forgot that Army Rule 4.2 applied to routine phone messages.

In one instance, Captain E was a TC who was charged with communicating with an accused represented by counsel. The accused (who was an Army captain) had called the TC about taking leave pending trial, because the accused's own counsel was on leave.

During this phone call, the TC tried several times to avoid expanding the scope of the call, but the accused persisted. They discussed the burden of proof and advisability of taking a polygraph examination.

The TC realized the impropriety of his conversation, reported the incident, and took full responsibility. The PSO found that Captain E committed a minor violation of Army Rule 4.2.

In a second case, Captain G was a TC who, unable to get in touch with the accused's TDS counsel, telephoned the accused's supervisor to have the supervisor tell the accused to contact his counsel. Someone put the accused on the phone.

The accused and Captain G discussed accepting a Summary Court-Martial in exchange for dropping an administrative elimination. At that point, the accused told the TC that he needed time to talk with his counsel. The PSO found an inadvertent violation of Army Rule 4.2.

Attorneys May Not Phone Opposing Counsel's Client to Leave a Message

In the third case, Captain F was a TC who could not get in touch with the accused's TDS counsel. Captain F decided to telephone the accused soldier directly; he told the soldier to contact his lawyer to discuss a plea agreement in his pending court-martial.

After the accused complained to a member of Congress, the PSO concluded that Captain F committed a minor, technical violation.

Appearing to Use Another to Improperly Communicate with a Represented Person

A final case involves miscommunications and misunderstandings. The attorney was cleared of apparent ethical improprieties that were perceived by the complainant. However, this is a reminder of how easy it is for lawyers' misunderstood actions to lead to charges of ethical improprieties.

Background

An officer who was a nuclear weapons technician reported a security violation against the wishes of his superiors. He was reassigned and given an adverse Officer Efficiency Report (OER).

On arriving at his new post, the technician obtained classified materials under the Freedom of Information Act (FOIA),

which he used in preparing a petition to the Army Board for the Correction of Military Records (ABCMR) challenging the adverse OER. Many officials at the officer's new installation reviewed this material and assisted him in preparing his ABCMR petition.

After the ABCMR petition was filed, the officer distributed several copies to non-DOD personnel, including members of Congress. His purpose was to obtain assistance in expediting his ABCMR petition. He had been told that it would take an extraordinarily long time for the board to reach a decision on his petition.

Unfortunately for the officer, personnel from his major Army command (MACOM) read a newspaper article that apparently contained information taken from the ABCMR petition, but which did not mention the nuclear weapons technician by name. Thereafter, the installation commander was directed to investigate the apparent leak of classified materials. During that investigation, the nuclear weapons technician, on advice of his counsel, declined to provide a statement. Without input from the officer, and having little or no knowledge that part or all of the material was obtained through FOIA channels, the installation commander issued a letter of reprimand.

The nuclear weapons technician's supervisor was sympathetic and introduced him to the installation SJA, Colonel C, for help. First, Colonel C explained the OER appeal process and suggested that because the appeal would involve security issues, those issues should be worked through other procedures. Colonel C explained to the nuclear weapons technician that he could not represent him, but that he would make a legal assistance attorney available.

After that, the officer's concerned supervisor met with Colonel C, two information officials, and a security officer. They discussed how the nuclear weapons technician had lawfully obtained the classified materials using the FOIA. As a

result of that second meeting, the supervisor spoke with the technician, convinced that if he would ignore his attorney's advice, break his silence, and explain how he lawfully obtained the information under the FOIA, the reprimand would be withdrawn. In a subsequent sworn statement, the supervisor related:

I was aware all along of the fine line that I was walking in trying to resolve this issue. The advice I gave [the nuclear weapons technician] was to ensure that his lawyer was using all the information necessary to try to resolve this matter. I told [him] that Colonel C and I had talked and I told him that I did not want to interfere with anyone's perception as to who was doing what to whom. Colonel C only advised me as to what I could do or not do. He did not tell me to tell [the technician] anything.

Complaint to the IG

The nuclear weapons technician complained to the Department of the Army IG, who relayed it to the OTJAG. The technician asserted that in communicating with him, his supervisor was acting at Colonel C's request in a deliberate attempt to bypass the technician's attorney.

After inquiring into the facts, a PSO found that the officer had misinterpreted his supervisor's statements and formed a mistaken belief that his supervisor actually was relaying information from Colonel C. During that second meeting, Colonel C had actually told the supervisor that he was ethically prohibited from contacting the officer. The PSO found that Colonel C's meeting with the officer's supervisor was not an attempt to interfere with the attorney-client relationship, and that Colonel C did not tell or imply to the supervisor that the supervisor should approach the officer about making a statement. Mr. Eveland.

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Fiscal Year 1995 JAGC Lieutenant Colonel Promotion Selection Board

On or about 20 September 1994, a promotion selection board will convene to consider eligible JAGC majors for promotion to lieutenant colonel. The announced zones of consideration are:

Above the zone: 31 December 1989 and earlier
In the zone: 1 January 1990 through 31 December 1990
Below the zone: 1 January 1991 through 31 August 1991

The key items that the board considers include: the performance fiche of the Official Military Personnel File (OMPF); the Officer Record Brief (ORB); and the official Department of the Army (DA) photograph. These items should be current and complete. Please note that photographs¹ and physicals² older than five years are considered out of date.

Officers who have not reviewed their OMPF performance fiche lately should obtain a copy from PERSCOM. A written request containing the officer's full name, rank, social security number, and mailing address should be sent to:

Commander
U.S. Total Army Personnel Command
ATTN: TAPC-MSR-S
200 Stovall Street
Alexandria, Virginia 22332-0444

Alternatively, requests can be faxed directly to PERSCOM at commercial: (703) 325-0742; or DSN: 225-0742.

Officers also should contact their supporting Personnel Service Center (PSC) to review their board ORB. The PSC will forward the signed board ORB through personnel channels to PERSCOM for inclusion in the officer's promotion board file.

Updated DA photographs (a color photograph is preferred, but not required), a back-up copy of the signed board ORB, and any documentation missing from the OMPF performance fiche should be mailed directly to:

Office of The Judge Advocate General
ATTN: DAJA-PT (MAJ Poling)
2200 Army Pentagon
Washington, DC 20310-2200

For the board to consider an academic evaluation report (AER) or officer evaluation report (OER), the original report must be received by the Evaluation Reports Branch (TAPC-MSE-R) at PERSCOM not later than 13 September 1994. If a report is late, a waiver can be obtained in accordance with *Army Regulation (AR) 624-100*.³ Complete-the-record OERs must comply with *AR 623-105*⁴ and have a "Thru Date" of 15 July 1994. They also are due at PERSCOM not later than 13 September 1994.

Address questions about this board to Major Poling (DAJA-PT), DSN: 225-1353.

¹DEP'T OF ARMY, REG. 640-30, PERSONNEL RECORDS AND IDENTIFICATION OF INDIVIDUALS: PHOTOGRAPHS FOR MILITARY IDENTIFICATION FILES (1 Oct. 1991).

²DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (15 May 1989).

³DEP'T OF ARMY, REG. 624-100, PROMOTION OF OFFICERS ON ACTIVE DUTY, para. 2-7 (21 Aug. 1989).

⁴DEP'T OF ARMY, REG. 623-100, OFFICER EVALUATION REPORTING SYSTEM, para. 5-21 (31 Mar. 1992).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Reserve Component Quotas for Resident Graduate Course

Two student quotas in the 44th Judge Advocate Officer Graduate Course have been set aside for Reserve Component Judge Advocate General's Corps (JAGC) officers. The forty-two week graduate level course will be taught at The Judge Advocate General's School in Charlottesville, Virginia, from 31 July 1995 to 16 May 1996. Successful graduates will be awarded the degree of Master of Laws (LL.M.) in Military Law. Any Reserve Component JAGC captain or major who will have at least four years JAGC experience by 31 July 1995 is eligible to apply for a quota. An officer who has completed the Judge Advocate Officer Advanced Course, however, may not apply to attend the resident course. Each application packet must include the following materials:

Personal data: Full name (including preferred name if other than first name), grade, date of rank, age, address, and telephone number (business, fax, and home).

Military experience: Chronological list of reserve and active duty assignments; include all OERs and AERs.

Awards and decorations: List of all awards and decorations.

Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded. Law school transcript.

Civilian experience: Resume of legal experience.

Statement of purpose: A concise statement (one or two paragraphs) of why you want to attend the resident graduate course.

Letter of Recommendation: Include a letter of recommendation from one of the judge advocate leaders listed below:

USAR TPU: Legal Support Organization (LSO) Commander or Staff Judge Advocate.

ARNG: Staff Judge Advocate.

USAR IMA: Staff Judge Advocate of proponent office.

DA Form 1058 (USAR) or NGB Form 64 (ARNG): The DA Form 1058 or NGB Form 64 must be filled out and be included in the application packet.

Routing of application packets: Each packet shall be forwarded through appropriate channels (indicated below) and must be received at the Guard and Reserve Affairs Division, Office of The Judge Advocate General, no later than 31 December 1994.

ARNG: Through the state chain of command to the National Guard Bureau, Office of The Judge Advocate, ATTN: NGB-JA, 2500 Army, Pentagon, Washington, D.C. 20310-2500.

USAR CONUS TROOP PROGRAM UNIT (TPU): Through the MUSARC chain of command, to Commander, ARPERCEN, ATTN: ARPC-ZJA, St. Louis, MO 63132-5200.

USAR CONTROL GROUP (IMA/REINFORCEMENT): Commander, ARPERCEN, ATTN: ARPC-ZJA, St. Louis, MO 63132-5200.

The Judge Advocate General's Continuing Legal Education (On-Site) Training

Following is an updated schedule of The Judge Advocate General's Continuing Legal Education (On-Site) Training Program for academic year 1995. Questions concerning the On-Site Training Program should be directed to the appropriate local action officer. Any problem that an action officer or a unit commander cannot resolve should be directed to Captain Eric Storey, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, Charlottesville, Virginia 22903-1781 telephone (804) 972-6380.

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95

| <u>DATE</u> | <u>CITY, HOST UNIT AND TRAINING SITE</u> | <u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP</u> | <u>ACTION OFFICER</u> |
|--------------|--|--|---|
| 15-16 Oct 94 | Boston, MA 94th ARCOM/3d LSO Hanscom Air Force Base Bedford, MA 01731 | AC GO RC GO Int'l Law Contract Law GRA Rep | MAJ Donald Lynde 3d LSO Hanscom Air Force Base Bedford, MA 01731 (617) 470-2845 DSN 470-2845 |
| 22-23 Oct 94 | Minneapolis, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th St. Bloomington, MN 55425 | AC GO RC GO Ad & Civ Int'l Law GRA Rep | COL Thomas G. Armstrong 214th LSO 225 E. Army Post Rd. Des Moines, IA 50315 (612) 430-6335 |
| 5-6 Nov 94 | New York City, NY 77th ARCOM/4th LSO Fordham Law School New York, NY | AC GO RC GO Ad & Civ Crim Law | LTC Henry V. Wysocki 77th ARCOM Bldg. 637 Fort Totten, NY 11359 (718) 352-5703 |
| | | MAJ Masterson | |

**THE JUDGE ADVOCATE GENERAL'S
SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)**

| <u>DATE</u> | <u>CITY, HOST UNIT AND TRAINING SITE</u> | <u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP</u> | <u>ACTION OFFICER</u> |
|---|--|---|---|
| 12-13 Nov 94 | Willow Grove, PA 79th ARCOM/153d LSO Willow Grove Naval Air Station Air Force Auditorium Willow Grove, PA 19090 | AC GO RC GO Ad & Civ Int'l Law GRA Rep | LTC Christopher R. Wogan 153d LSO Woodlawn & Division Aves. Willow Grove, PA 19090 (215) 342-1700 (717) 787-3974 |
| 6-8 Jan 95 | Long Beach, CA 78th LSO Hyatt Regency Long Beach, CA 90815 | AC GO RC GO Int'l Law Ad & Civ GRA Rep | COL James F. Gatzke 78th LSO 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (714) 229-3700 |
| 21-22 Jan 95 | Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205 | AC GO RC GO Crim Law Contract Law GRA Reo | MAJ O'Hare LTC Matthew L. Vadnal 6th LSO 4505 36th Ave., W. Seattle, WA 98199 (206) 281-3002 |
| 25-26 Feb 95 split training w/ Denver | Salt Lake City, UT 87th LSO Olympus Hotel 6000 Third Street Salt Lake City, UT 84114 | AC GO RC GO Crim Law Ad & Civ GRA Rep | MAJ Barto COL Richard H. Nixon 96th ARCOM Douglas AFRC Bldg. 103 Salt Lake City, UT 84113 (801) 468-2639 |
| 25-26 Feb 95 | Denver, CO 87th LSO Fitzsimmons AMC, Bldg. 820 Aurora, CO 80045-7050 | AC GO RC GO Crim Law Ad & Civ GRA Rep | MAJ Barton COL Richard H. Nixon 96th ARCOM Douglas AFRC Bldg. 103 Salt Lake City, UT 84113 (801) 468-2639 |
| 4-5 Mar 95 | Columbia, SC 120th ARCOM Univ of SC Law School Columbia, SC 29208 | AC GO RC GO Crim Law AD & Civ GRA Rep | MAJ Winn MAJ Robert H. Uehling 209 South Springs Road Columbia, SC 29223 (803) 733-2878 |
| 10-12 Mar 95 | Dallas/Fort Worth 1st LSO Bldg. 602 Ft. Sam Houston, TX 78234 | AC GO RC GO Int'l Law Crim Law GRA Rep | MAJ Burrell COL Richard Tanner 401 Ridgehaven Richardson, TX 75080 (214) 991-2124 |
| 11-12 Mar 95 | Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319 | AC GO RC GO Int'l Law Contract Law | LTC Merrill W. Clark 7402 Flemingwood Lane Springfield, VA 22153 (703) 756-2281 |

**THE JUDGE ADVOCATE GENERAL'S
SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)**

| <u>DATE</u> | <u>CITY, HOST UNIT AND TRAINING SITE</u> | <u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP</u> | <u>ACTION OFFICER</u> |
|---|--|--|--|
| 18-19 Mar 95 | San Francisco, CA 5th LSO Sixth Army Conference Room Presidio of SF, CA 94129 | AC GO RC GO Ad & Civ Crim Law GRA Rep LTC Bond | COL Paul K. Graves 6th LSO 4505 36th Ave., W. Seattle, WA 98199 (206) 281-3002 |
| 1-2 Apr 95 | Indianapolis, IN National Guard | AC GO RC GO Ad & Civ Crim Law GRA Rep MAJ Kohlman | COL George A. Hopkins 2002 South Holt Road Indianapolis, IN 46241 (317) 457-4349 |
| 7-9 Apr 95 | Orlando, FL 81st/65th ARCOMS | AC GO RC GO Contract Law Int'l Law GRA Rep | TBD |
| 29-30 Apr 95 | Columbus, OH 83d ARCOM/9th LSO | AC GO RC GO Ad & Civ Crim Law GRA Reo MAJ Wright | LTC Robert J. Beggs 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-2589/5108 |
| 5-7 May 95 | Huntsville, AL 121st ARCOM Corps of Engineer Ctr. Huntsville, AL | AC GO RC GO Contract Law Crim Law MAJ Frisk | LTC Bernard B. Downs, Jr. HHC, 3d Trans Bde 3415 McClellan Blvd. Anniston, AL 36201 (205) 939-0033 |
| 19-21 May 95 (Armed Forces Day is 29 May) | Kansas City, MO 89th ARCOM 3130 George Washington Blvd. Wichita, KS 67120 | AC GO RC GO Contract Law Ad & Civ GRA Reo | LTC Keith H. Hamack HQ, Fifth U.S. Army ATTN: AFKB-JA Fort Sam Houston San Antonio, TX 78234 (210) 221-2208 DSN 471-2208 |

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: ARPC-ZJA-P, 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

1994

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 1st Federal Courts and Boards Litigation Course (5F-F14).

19-30 September: 2d Criminal Law Advocacy Course (5F-F34).

3-7 October: 1994 JAG Annual Continuing Legal Education Workshop (5F-JAG).

12-14 October: 1st Ethics Counselors' CLE Workshop (5F-F201).

17-21 October: USAREUR Criminal Law CLE (5F-F35E).

17-21 October: 35th Legal Assistance Course (5F-F23).

17 October-21 December: 135th Basic Course (5-27-C20).

24-28 October: 126th Senior Officers' Legal Orientation Course (5F-F1).

31 October-4 November: 240th Fiscal Law Course (5F-F12).

14-18 November: 18th Criminal Law New Developments Course (5F-F35).

14-18 November: 58th Law of War Workshop (5F-F42).

5-9 December: USAREUR Operational Law CLE (5F-F47E).

5-9 December: 127th Senior Officers' Legal Orientation Course (5F-F1).

1995

9-13 January: 1995 Government Contract Law Symposium (5F-F11).

10-13 January: USAREUR Tax CLE (5F-F28E).

23-27 January: 46th Federal Labor Relations Course (5F-F22).

23-27 January: 20th Operational Law Seminar (5F-F47).

6-10 February: 128th Senior Officers' Legal Orientation Course (5F-F1).

6-10 February: PACOM Tax CLE (5F-F28P).

6 February-14 April: 136th Basic Course (5-27-C20).

13-17 February: 59th Law of War Workshop (5F-F42).

13-17 February: USAREUR Contract Law CLE (5F-F15E).

27 February-3 March: 36th Legal Assistance Course (5F-F23).

6-17 March: 134th Contract Attorneys' Course (5F-F10).

20-24 March: 19th Administrative Law for Military Installations Course (5F-F24).

27-31 March: 1st Procurement Fraud Course (5F-F101).

3-7 April: 129th Senior Officers' Legal Orientation Course (5F-F1).

17-20 April: 1995 Reserve Component Judge Advocate Workshop (5F-F56).

17-28 April: 3d Criminal Law Advocacy Course (5F-F34).

24-28 April: 21st Operational Law Seminar (5F-F47).

1-5 May: 6th Law for Legal NCOs' Course (512-71D/E/20/30).

1-5 May: 6th Installation Contracting Course (5F-F18).

15-19 May: 41st Fiscal Law Course (5F-F12).
15 May-2 June: 38th Military Judge Course (5F-F33).
22-26 May: 42d Fiscal Law Course (5F-F12).
22-26 May: 47th Federal Labor Relations Course (5F-F22).
5-9 June: 1st Intelligence Law Workshop (5F-F41).
5-9 June: 130th Senior Officers' Legal Orientation Course (5F-F1).
12-16 June: 25th Staff Judge Advocate Course (5F-F52).
19-30 June: JATT Team Training (5F-F57).
19-30 June: JAOAC (Phase II) (5F-F55).
5-7 July: Professional Recruiting Training Seminar
5-7 July: 26th Methods of Instruction Course (5F-F70).
10-14 July: 7th STARC Judge Advocate Mobilization & Training Workshop
10-14 July: 6th Legal Administrators' Course (7A-550A1).
10 July-15 September: 137th Basic Course (5-27-C20).
17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).
24-28 July: Fiscal Law Off-Site (Maxwell AFB).
31 July-16 May 1996: 44th Graduate Course (5-27-C22).
31 July-11 August: 135th Contract Attorneys' Course (5F-F10).
14-18 August: 13th Federal Litigation Course (5F-F29).
14-18 August: 6th Senior Legal NCO Management Course (512-71D/E/40/50).
21-25 August: 60th Law of War Workshop (5F-F42).
21-25 August: 131st Senior Officers' Legal Orientation Course (5F-F1).
28 August-1 September: 22d Operational Law Seminar (5F-F47).
6-8 September: USAREUR Legal Assistance CLE (5F-F23E).
11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 12th Contract Claims, Litigation and Remedies Course (5F-F13).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. United States Army Medical Command

27-29 September 1994: United States Army Medical Command (Prov) Continuing Legal Education Workshops. Further information is available at DSN 471-8400 or commercial (210) 221-8400.

4. Civilian Sponsored CLE Courses

November 1994

1-2, GWU: International Government Procurement, Washington, D.C.

1-4, ESI: Source Selection: The Competitive Proposals Contracting Process, Washington, D.C.

3, GWU: Contract Award Protests: GAO, Washington, D.C.

4, GWU: Contract Award Protests: GSBGA, Washington, D.C.

6-10, NCDA: Child Abuse & Exploitation, Baltimore, MD.

7-10, ESI: Negotiation Strategies and Techniques, Washington, D.C.

7-10, ESI: The Winning Proposal, Washington, D.C.

7-10, ESI: Advanced Source Selection: Evaluation Factors, Scoring Procedures, and Proposal Evaluation Techniques, Washington, D.C.

8-10, GWU: Patents, Technical Data, and Computer Software, Washington, D.C.

13-17, NCDA: Prosecuting Drug Cases, Orlando, FL.

14, ESI: Contract Accounting Systems for Small Businesses, Washington, D.C.

14-17, ESI: Procurement for Administrators, CORs, and COTRs, Washington, D.C.

14-18, GWU: Cost-Reimbursement Contracting, Washington, D.C.

14-18, ESI: Operating Practices in Contract Administration, San Diego, CA.

21-22, GWU: Procurement Ethics, Washington, D.C.

29-2 December, GWU: Source Selection Workshop, Washington, D.C.

29-2 December, ESI: Source Selection: The Competitive Proposals Contracting Process, San Diego, CA.

29-2 December, ESI: International Contracting, Washington, D.C.

29 November-2 December, ESI: Preparing and Analyzing Statements of Work and Specification, Washington, D.C.

29 November-2 December, ESI: Small Purchases, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1994 issue of *The Army Lawyer*.

5. 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 Hampshire** | 1 August annually |
| New Mexico | 30 days after program |
| North Carolina** | 28 February annually |
| North Dakota | 31 July annually |
| Ohio* | 31 January biennially |
| Oklahoma** | 15 February annually |
| Oregon | Anniversary of date of birth— new admittees and reinstated members report after an initial one-year period; thereafter triennially |
| Pennsylvania** | Annually as assigned |
| Rhode Island | 30 June annually |
| 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* | 31 December biennially |
| Wyoming | 30 January annually |

For addresses and detailed information, see the July 1994 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 in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is 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: commercial (703) 274-7633, DSN 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 A265755 Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).
- AD A265756 Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).
- AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).
- AD A259516 Legal Assistance Guide: Office Directory/JA-267(92) (110 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
- AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).
- AD A266177 Wills Guide/JA-262(93) (464 pgs).
- AD A268007 Family Law Guide/JA 263(93) (589 pgs).

- AD A266351 Office Administration Guide/JA 271(93) (230 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A269073 Model Income Tax Assistance Guide/JA 275-93) (66 pgs).
- AD A270397 Consumer Law Guide/JA 265(93) (634 pgs).
- AD A274370 Tax Information Series/JA 269(94) (129 pgs).
- AD A276984 Deployment Guide/JA-272(94) (452 pgs).
- AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- AD A269515 Federal Tort Claims Act/JA 241(93) (167 pgs).
- AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).
- AD A268410 Defensive Federal Litigation/JA-200(93) (840 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).
- AD A269036 Government Information Practices/JA-235(93) (322 pgs).
- AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

- AD A273376 The Law of Federal Employment/JA-210(93) (262 pgs).
- AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

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

Criminal Law

- AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).
- AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

- AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).
- AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).
- AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).
- AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

International Law

- AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 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 U.S.C. 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

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

(1) The U.S. Army Publications Distribution Center (USAPDC) 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 *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

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, Balti-

more, 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 (410) 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. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed fulltime by the federal government;

(d) Army Reserve and Army NG judge advocates not on active duty (access to OPEN and the pending RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve or NG enlisted personnel (MOS 71D/71E);

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

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

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

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

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

(2) DOD-wide access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing 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 new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight 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 BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PRO-COMM, or other telecommunications software, 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. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) 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 ask 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 Recieve, 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 onto 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 Recieve, 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 "XXXXX.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):

| <i>FILE NAME</i> | <i>UPLOADED</i> | <i>DESCRIPTION</i> | <i>FILE NAME</i> | <i>UPLOADED</i> | <i>DESCRIPTION</i> |
|------------------|-----------------|--|------------------|-----------------|--|
| ALLSTATE.ZIP | January 1994 | 1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994 | FSO 201.ZIP | October 1992 | Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB. |
| ALAW.ZIP | June 1990 | <i>Army Lawyer/Military Law Review Database</i> ENABLE 2.15. Updated through the 1989 <i>Army Lawyer Index</i> . It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF. | .JA200A.ZIP | August 1993 | Defensive Federal Litigation—Part A, June 1993. |
| | | | JA200B.ZIP | August 1993 | Defensive Federal Litigation—Part B, June 1993. |
| | | | JA210.ZIP | November 1993 | Law of Federal Employment, September 1993. |
| BBS-POL.ZIP | December 1992 | Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative. | JA211.ZIP | January 1994 | Law of Federal Labor-Management Relations, November 1993. |
| BULLETIN.ZIP | January 1994 | List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993. | JA231.ZIP | October 1992 | Reports of Survey and Line of Duty Determinations—Programmed Instruction. |
| | | | JA234-1.ZIP | February 1994 | Environmental Law Desk book, Volume 1, 28 February 1994. |
| CCLR.ZIP | September 1990 | Contract Claims, Litigation, & Remedies. | JA235.ZIP | August 1993 | Government Information Practices. |
| CLG.EXE | December 1992 | Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file. | JA241.ZIP | September 1993 | Federal Tort Claims Act, August 1993. |
| | | | JA260.ZIP | March 1994 | Soldiers' & Sailors' Civil Relief Act, March 1994. |
| DEPLOY.EXE | December 1992 | Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file. | JA261.ZIP | October 1993 | Legal Assistance Real Property Guide, June 1993. |
| | | | JA262.ZIP | April 1994 | Legal Assistance Wills Guide. |
| FISCALBK.ZIP | November 1990 | The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA. | JA263.ZIP | August 1993 | Family Law Guide. Updated 31 August 1993. |
| | | | JA265A.ZIP | September 1993 | Legal Assistance Consumer Law Guide—Part A, September 1993. |
| FOIAPT1.ZIP | May 1994 | Freedom of Information Act Guide and Privacy Act Overview, September 1993. | JA265B.ZIP | September 1993 | Legal Assistance Consumer Law Guide—Part B, September 1993 |

| <i>FILE NAME</i> | <i>UPLOADED</i> | <i>DESCRIPTION</i> | <i>FILE NAME</i> | <i>UPLOADED</i> | <i>DESCRIPTION</i> |
|------------------|-----------------|---|------------------|-----------------|--|
| JA267.ZIP | January 1993 | Legal Assistance Office Directory. | JA4223.ZIP | April 1993 | Op Law Handbook, Disk 3 of 5, April 1993 version. |
| JA268.ZIP | March 1994 | Legal Assistance Notarial Guide, March 1994. | JA4224.ZIP | April 1993 | Op Law Handbook, Disk 4 of 5, April 1993 version. |
| JA269.ZIP | January 1994 | Federal Tax Information Series, December 1993. | JA4225.ZIP | April 1993 | Op Law Handbook, Disk 5 of 5, April 1993 version. |
| JA271.ZIP | May 1994 | Legal Assistance Office Administration Guide, May 1994. | JA501-1.ZIP | June 1993 | TJAGSA Contract Law Deskbook, Volume 1, May 1993. |
| JA272.ZIP | February 1994 | Legal Assistance Deployment Guide, February 1994. | JA501-2.ZIP | June 1993 | TJAGSA Contract Law Deskbook, Volume 2, May 1993. |
| JA274.ZIP | March 1992 | Uniformed Services Former Spouses' Protection Act—Outline and References. | JA505-11.ZIP | March 1994 | Contract Attorneys' Course Deskbook, Volume I, Part 1, February 1994. |
| JA275.ZIP | August 1993 | Model Tax Assistance Program. | JA505-12.ZIP | March 1994 | Contract Attorneys' Course Deskbook, Volume I, Part 2, February 1994. |
| JA276.ZIP | January 1993 | Preventive Law Series. | | | |
| JA281.ZIP | November 1992 | 15-6 Investigations. | | | |
| JA285.ZIP | January 1994 | Senior Officer's Legal Orientation Deskbook, January 1994. | JA505-13.ZIP | March 1994 | Contract Attorneys' Course Deskbook, Volume I, Part 3, February 1994. |
| JA290.ZIP | March 1992 | SJA Office Manager's Handbook. | JA505-14.ZIP | March 1994 | Contract Attorneys' Course Deskbook, Volume I, Part 4, February 1994. |
| JA301.ZIP | January 1994 | Unauthorized Absences Programmed Text, August 1993. | | | |
| JA310.ZIP | October 1993 | Trial Counsel and Defense Counsel Handbook, May 1993. | JA505-21.ZIP | March 1994 | Contract Attorneys' Course Deskbook, Volume II, Part 1, February 1994. |
| JA320.ZIP | January 1994 | Senior Officer's Legal Orientation Text, January 1994. | JA505-22.ZIP | March 1994 | Contract Attorneys' Course Deskbook, Volume II, Part 2, February 1994. |
| JA330.ZIP | January 1994 | Nonjudicial Punishment Programmed Text, June 1993. | JA505-23.ZIP | March 1994 | Contract Attorneys' Course Deskbook, Volume II, Part 3, February 1994. |
| JA337.ZIP | October 1993 | Crimes and Defenses Deskbook, July 1993. | | | |
| JA4221.ZIP | April 1993 | Op Law Handbook, Disk 1 of 5, April 1993 version. | JA505-24.ZIP | March 1994 | Contract Attorneys' Course Deskbook, Volume II, Part 4, February 1994. |
| JA4222.ZIP | April 1993 | Op Law Handbook, Disk 2 of 5, April 1993 version. | JA506-1.ZIP | May 1994 | Fiscal Law Course Deskbook, Part 1, May 1994. |

| FILE NAME | UPLOADED | DESCRIPTION |
|-------------|---------------|--|
| JA506-2.ZIP | May 1994 | Fiscal Law Course Deskbook, Part 2, May 1994 |
| JA506-3.ZIP | May 1994 | Fiscal Law Course Deskbook, Part 3, May 1994 |
| JA508-1.ZIP | April 1994 | Government Materiel Acquisition Course Deskbook, Part 1, 1994. |
| JA508-2.ZIP | April 1994 | Government Materiel Acquisition Course Deskbook, Part 2, 1994. |
| JA508-3.ZIP | April 1994 | Government Materiel Acquisition Course Deskbook, Part 3, 1994. |
| JA509-1.ZIP | March 1994 | Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993. |
| JA509-2.ZIP | February 1994 | Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993 |
| JAGSCHL.WPF | March 1992 | JAG School report to DSAT. |
| YIR93-1.ZIP | January 1994 | Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium. |
| YIR93-2.ZIP | January 1994 | Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium. |
| YIR93-3.ZIP | January 1994 | Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium. |
| YIR93-4.ZIP | January 1994 | Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium. |
| YIR93.ZIP | January 1994 | Contract Law Division 1993 Year in Review text, 1994 Symposium. |

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International Law, or Doctrine, Developments, 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 on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SFC Tim Nugent, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)h, above.

4. 1994 Contract Law Video Teleconferences (VTC)

October VTC Topic (to be determined)

5 Oct. 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Oct: 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

November VTC Topic (to be determined)

8 Nov. 1300-1500: FORSCOM installations, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

9 Nov. 1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

December VTC Topic (to be determined)

5 Dec. 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Dec. 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

NOTE: Mr. Moreau, Contract Law Division, OTJAG, is the VTC coordinator. If you have any questions on the VTCs or scheduling, contact Mr. Moreau at commercial: (703) 695-6209 or DSN: 225-6209. Topics for 1994 VTCs will appear in future issues of *The Army Lawyer*.

5. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties:

Friedrich K. Juenger, *An International Transaction in the American Conflict of Laws*, 7 FLA. J. INT'L L. 383 (1992).

Bernard S. Jefferson, *The Hearsay Rule—Determining When Evidence Is Hearsay or*

Nonhearsay and Determining Its Relevance as One or the Other, 25 U. WEST L.A. L. REV. 59 (1994).

G. Nelson Smith III, *Trashing the Town and Making It Pay: The Problem with the Municipal Liability Scheme Under CERCLA*, 26 CONN. L. REV. 585 (1994).

Barbara L. Horwitz, Casenote, *The Duty of Schools to Protect Students from Sexual Harassment: How Much Recovery Will the Law Allow?* Doe v. Taylor Independent School District, 62 U. CIN. L. REV. 1165 (1994).

Comment, *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?*, Vol. 46 BAYLOR L. REV. 385 (1994).

6. 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.

7. 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, JAGS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

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

Chief Counsel, Tank Automotive Command, Legal Office, AMSTA-L, ATTN: Marge or Darlene, Warren, MI 48397-5000, commercial (313) 574-6289, has the following material:

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