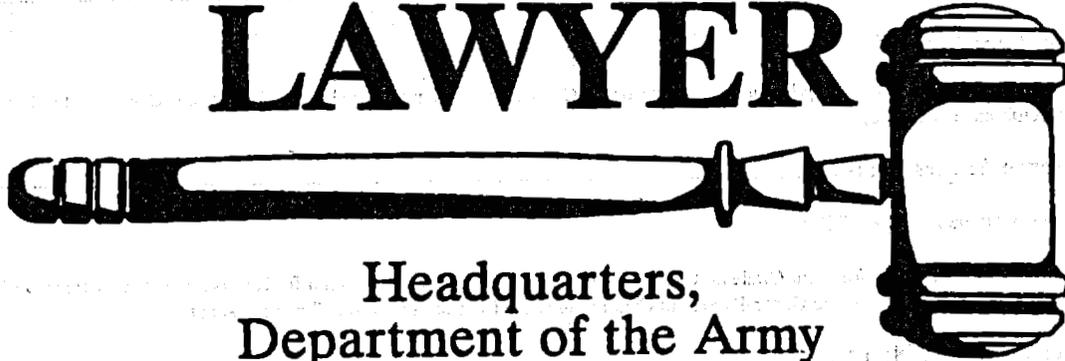


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Editor
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Three Strikes and You Are Out—The Realities of Military and State Criminal Record Reporting

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Introduction

Every year, the Army releases into society hundreds of soldiers with court-martial convictions for felony-type offenses¹—all potential repeat offenders. Many states (to which these soldiers return) have statutes that impose harsher punishments on repeat offenders. This article will: (1) determine what effect courts-martial convictions have under state repeat offender statutes that impose life imprisonment; (2) learn if and how the Army makes courts-martial convictions available to civilian law enforcement; (3) discuss to what degree the Army should report these courts-martial convictions; and (4) propose modifications to the Army's current reporting practice for comprehensive reporting.²

Background

State Repeat Offender Statutes

One of the criminal justice system's primary concerns is recidivism.³ Most criminals arrested are recidivists and many have active criminal histories.⁴ Because of the high rate of recidivism, criminal history information is critical so that the criminal justice system can make appropriate decisions regarding these repeat offenders.⁵ Accurate criminal history information affects decisions on pretrial release, prosecution, charging, sentencing, and in some cases probation and parole.⁶

¹ Although precise statistics on the number of Army prisoners with felony convictions released per year do not exist, the release statistics for the United States Army Disciplinary Barracks (DB), Fort Leavenworth, Kansas, are illustrative. Given the DB's confinement policy (over three years confinement, recently increased to over five years confinement), the actual numbers for released Army prisoners would be higher.

	Expiration of Sentence w/ Discharge	Parole	Excess Leave Pend Discharge
FY 94	174	140	45
FY 93	195	148	59
FY 92	223	150	38
FY 91	218	152	49
FY 90	219	173	24

Telephone Interview with Mr. Donnally Brothers, Director of Inmate Administration, United States Army Disciplinary Barracks, Fort Leavenworth, Kansas (Feb. 13, 1995).

² The DOJ has identified lack of completeness as "[b]y far the most serious deficiency in . . . [criminal history record information] databases . . ." UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, STATUTES REQUIRING THE USE OF CRIMINAL HISTORY RECORD INFORMATION, 68 (1991) [hereinafter RECORD USE REPORT]. "The lack of full and accurate disposition reporting has a significant negative impact on the . . . criminal justice system." U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON CRIMINAL HISTORY RECORD DISPOSITION REPORTING, 6 (1992) [hereinafter TASK FORCE REPORT].

³ TASK FORCE REPORT, *supra* note 2, at 6.

⁴ *Id.*

⁵ *Id.* at 6-7.

⁶ Currently, a number of statutes take repeat offenses into account. These statutes concern all aspects of the criminal justice system, from the charging decision, through pretrial release and sentencing, to probation and parole decisions. RECORD USE REPORT, *supra* note 2, tbls. 1, 3-5. However, this article focuses on those statutes that impose life imprisonment on repeat offenders.

Recently, the public has expressed heightened concern over repeat offenders. Manifesting that concern, a majority of states have enacted statutes that impose life imprisonment on repeat offenders after a certain number of convictions or terms of imprisonment (i.e., "strike-type" statutes).⁷

An individual's prior convictions and terms of imprisonment can significantly affect the disposition of a pending offense. How are prior convictions tracked and reported so that they are available when needed? For the answer, one must look to the Department of Justice (DOJ).

Criminal History Record Information: National Crime Information Center

All states have their own systems for tracking criminal history record information.⁸ Additionally, the DOJ has a nationwide automated criminal history record information system called the National Crime Information Center (NCIC).

The DOJ, through the Federal Bureau of Investigation (FBI), runs the NCIC. The FBI uses the NCIC to collect, preserve, and exchange criminal history information from and with other state and federal law enforcement agencies.⁹ Congress has called the NCIC, which links more than 16,000 federal, state, and local law enforcement agencies, the "single most important avenue of cooperation among law enforcement agencies."¹⁰

⁷ Thirty-six states have strike-type statutes that allow life sentences for repeat offenders. Memorandum from Mr. Alan Karpelowitz, National Conference of State Legislatures (Feb. 14, 1995) (on file with author). See NEV. REV. STAT. § 207.010 (1992) (life imprisonment on fourth felony conviction); WASH. REV. CODE ANN. § 9.94A.120 (West 1995) (mandatory life sentence for "persistent offender" on third "most serious offense" conviction); CAL. PENAL CODE §§ 667.7, 667.75 (West 1988) (mandatory life sentence—with parole in twenty years—for third prison term for specified offenses; mandatory life without parole for fourth prison term for specified offenses; life imprisonment without parole for first seventeen years on third term of imprisonment for specified drug offenses); COLO. REV. STAT. § 16-13-101 (1986) (life imprisonment for "habitual offender" on third conviction for specified offenses); CONN. GEN. STAT. ANN. § 53a-40 (West 1994) (life sentence may be imposed for "persistent dangerous felony offender" on third conviction and prison term for specified offenses); GA. CODE ANN. § 17-10-7 (1990) (mandatory life imprisonment without parole on second conviction for a "serious violent felony"); IND. CODE ANN. § 35-50-2-8.5 (Burns 1994) (life imprisonment without parole permitted on third conviction for specified felonies); LA. REV. STAT. ANN. § 15:529.1 (West 1992) (mandatory life imprisonment on third conviction for specified felonies); MD. ANN. CODE § 643B (mandatory life sentence without parole on fourth term of confinement resulting from four convictions for crimes of violence); N.M. STAT. ANN. § 31-18-23 (Michie 1994) (mandatory life imprisonment with parole on third violent felony conviction); N.C. GEN. STAT. § 14-7.12 (1993) (mandatory life imprisonment without parole for "violent habitual felon" on third violent felony conviction); TENN. CODE ANN. § 40-35-120 (1994) (mandatory life imprisonment without parole for "repeat violent offender" on third conviction for specified offenses); VA. CODE ANN. §§ 19.2-297.1, 18.2-248 (Michie 1994) (mandatory life imprisonment on third conviction for an "act of violence"; up to life imprisonment for second or subsequent specific drug distribution offenses); WIS. STAT. ANN. § 939.62 (West 1982) (mandatory life imprisonment without parole for "persistent repeater" on third conviction for a "serious felony"); ALA. CODE §§ 13A-5-9, 13-18-9 (1994) (On conviction of a Class A felony: life imprisonment without parole with any three prior felony convictions; life imprisonment or not less than 99 years with any two prior felony convictions; life imprisonment or 15-99 years with any one prior felony conviction. On conviction of a Class B felony: life imprisonment with any three prior felony convictions; life imprisonment or 15-99 years with any two prior felony convictions. On conviction of a Class C felony: life imprisonment or 15-99 years with any three prior felony convictions); ARK. CODE ANN. § 5-4-501 (Michie 1993) (On conviction of a Class Y felony: 10-60 years or life imprisonment with two or three prior felonies; life imprisonment or not less than 10 years with four or more felony convictions. On conviction of an unscheduled felony with life imprisonment as a possible punishment: life imprisonment or 10-50 years with two or more felony convictions); ARIZ. REV. STAT. ANN. § 13-604 (1989) (mandatory life imprisonment on third conviction of a specified "serious offense"); DEL. CODE ANN. tit. 11 § 4214 (1987) (may impose life imprisonment after fourth felony conviction for "habitual offender"; mandatory life without parole for "habitual offender" after third conviction for specified felonies); FLA. STAT. ANN. § 775.084 (West 1991) (mandatory life imprisonment for "habitual felony offender" on third specified felony conviction; mandatory life imprisonment with fifteen year minimum for "habitual violent felony offender" on second specified felony conviction); HAW. REV. STAT. §§ 706-661, 706-662 (1985) (mandatory life without parole on Class A felony conviction for "persistent offender" on third felony conviction); IDAHO CODE § 19-2514 (1987) (mandatory five year minimum, possible life imprisonment, on third felony conviction); KY. REV. STAT. ANN. § 532.080 (Michie/Bobbs-Merrill 1990) (twenty years through life for "persistent felony offender in the first degree" on third felony conviction for specified offenses; no parole for first ten years); MICH. COMP. LAWS ANN. §§ 769.12, 333.7413 (West 1982) (maximum life imprisonment on fourth felony conviction if fourth conviction offense carries maximum punishment of five or more years; mandatory life imprisonment without parole for second or subsequent specific drug-related offenses); MISS. CODE ANN. § 99-19-83 (1994) (mandatory life imprisonment without parole on third felony conviction if one conviction is for a "crime of violence" and offender was sentenced and served more than one year for each prior felony); ILL. ANN. STAT. ch. 720, para. 5/33B-1, ch. 730, para. 5/5-5-3 (Smith-Hurd 1993) (mandatory life imprisonment for "habitual criminal" on third specified felony conviction); S.C. CODE ANN. § 17-25-45 (Law. Co-op. 1993) (mandatory life imprisonment on third felony conviction for specified "violent crimes"); N.Y. PENAL LAW § 70.08 (McKinney 1987) (discretionary maximum life imprisonment for "persistent violent felony offender" on third conviction for violent felony); TEX. PENAL CODE ANN. § 12.42 (West 1994) (On conviction of first-degree felony: life imprisonment or 15-99 years with one prior felony conviction. On conviction of felony of any degree: life imprisonment or 25-99 years with two prior felony convictions); UTAH CODE ANN. § 76-3-408 (1995) (mandatory life imprisonment without parole on third conviction for specified sexual offenses); VT. STAT. ANN. tit. 13, § 11 (1974) (life imprisonment on fourth felony conviction); W. VA. CODE § 61-11-18 (1994) (mandatory life imprisonment without parole on second homicide conviction; mandatory life imprisonment on third conviction for offense "punishable by confinement in a penitentiary"); WYO. STAT. § 6-10-201 (1988) (mandatory life imprisonment on fourth felony conviction); MASS. GEN. LAWS ANN. ch. 265, §§ 13B, 23 (West 1990) (any term of years up to life imprisonment for commission of second or subsequent sexual offenses with children); MONT. CODE ANN. § 45-9-101 (1994) (minimum terms up to life imprisonment for repeat drug distribution); N.D. CENT. CODE § 12.1-32-09 (1985) (For a "persistent offender," up to life imprisonment if third felony conviction is for a Class A felony); PA. CON. STAT. ANN. § 42-9715 (1982) (mandatory life imprisonment on second homicide conviction).

⁸ All fifty states have criminal history information systems; forty-eight are fully or partially automated. UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SURVEY OF CRIMINAL HISTORY INFORMATION SYSTEMS, 1993, 1 (1995) [hereinafter SURVEY REPORT].

⁹ 28 U.S.C. § 534 (1988) authorizes the Attorney General to "acquire, collect, classify and preserve" criminal history information and "exchange such records and information" with other law enforcement officials. The FBI runs the NCIC under 20 C.F.R. § 20.31(a) (1994), the implementing regulations for that statute.

¹⁰ National Law Enforcement Cooperation Act of 1990, Pub. L. No. 101-647, Title VI, Subtitle B, 104 Stat. 4823, § 612(a) (1990).

The Criminal Justice Information Systems Regulations (CJISR)¹¹ control the use of the NCIC to "insure the completeness, integrity, accuracy and security of [criminal history record] information."¹² The CJISR apply to all NCIC users, including other federal agencies.¹³ The CJISR require that criminal history information include all "serious and/or significant adult . . . offenses."¹⁴ However, the CJISR exclude "nonserious charges, e.g., drunkenness . . . disturbing the peace . . . (except data will be included on . . . driving under the influence of drugs or liquor)."¹⁵ Each criminal justice agency contributing information has the responsibility to assure that the information they submit is kept "complete, accurate and current."¹⁶ The FBI can cancel a using agency's right to use the NCIC for failure to comply with these regulations.¹⁷

FBI NCIC Procedures

The Criminal Justice Information Services Division (CJIS)¹⁸ is the lead division in the FBI for criminal history record information.¹⁹ The CJIS accepts information for entry into the NCIC only from agencies that are registered users of the NCIC.²⁰ Agencies use two principal forms to submit information to the CJIS for

entry into the NCIC: (1) the fingerprint card, FBI Form FD-249 (FD-249); and (2) the Final Disposition Report, FBI/DOJ Form R-84 (R-84).

When the local police arrest a suspect, they normally fingerprint the suspect. They take at least one set of fingerprints each on an FD-249 and an R-84²¹ and also record other relevant data on both cards.²² If the local police do not immediately resolve the offense (for example, the suspect must await trial), they send the fingerprint card (FD-249) to the CJIS, but keep the R-84 for future use.²³ When the CJIS receives the FD-249, it enters the information in the NCIC.²⁴ When the charges against the suspect are resolved (for example, by conviction), the police fill in the disposition on the retained R-84 and send it to the CJIS.²⁵ The CJIS then matches the R-84 to the previously sent FD-249 and updates the information on the NCIC, including the conviction.²⁶ If the CJIS, for whatever reason, cannot locate an FD-249 for the suspect for that particular offense, the CJIS returns the R-84 to the submitting agency.²⁷ Once entered in the NCIC, the information about the suspect, including the conviction, is available to all other authorized agencies for their use.²⁸

¹¹ 28 C.F.R. § 20 (1994).

¹² *Id.* § 20.1.

¹³ *Id.* § 20.30.

¹⁴ *Id.* § 20.32(a).

¹⁵ *Id.* § 20.32(b). Memo 10 and *CIDR 195-1* do not require reporting of drunk driving offenses under the Uniform Code of Military Justice (UCMJ) Article 111.

¹⁶ 28 C.F.R. § 20.37 (1994).

¹⁷ *Id.* § 20.38.

¹⁸ Formerly the Identification Division. The CJISR, *CIDR 195-1*, and other regulations refer to the CJIS by the old name.

¹⁹ Telephone Interview with Ms. Wendy Williams, CJIS (Feb. 16, 1995).

²⁰ Telephone Interview with Ms. Mary Sweeney, Chief, User Services Section, CJIS (Feb. 22, 1995). Registered users are those agencies with an Originating Agency Identifier (ORI).

²¹ Telephone Interview with Ms. Wendy Williams, CJIS (Feb. 22, 1995).

²² The relevant data includes the suspect's height, weight, date of birth, social security number, date arrested and the charge(s).

²³ Telephone Interview with Ms. Wendy Williams, CJIS (Feb. 1995).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Can Courts-Martial Convictions Count as "Strikes"?

Strike-type statutes vary in their definitions of what is a strike. Of the thirty-six states with strike-type statutes, twenty-seven include federal convictions²⁹ as strikes.³⁰ Of the twenty-seven, ten states³¹ do not specifically state that the offense underlying the conviction must be an offense under state law—if it is a qualifying felony under federal law, it counts as a conviction for state strike purposes. The remaining seventeen states accepting federal convictions generally require that the underlying offense qualify as a strike only if the offense was committed in that state.³²

Because the majority of states have strike-type statutes that accept federal convictions as strikes, many former soldiers with courts-martial convictions who are repeat offenders may be affected. Crucial to the success of state strike-type statutes is the documentation of courts-martial convictions. Only with complete information about all of the offender's prior convictions can the criminal justice system reach proper dispositions for pending offenses and offenders.

Does the Army Make Courts-Martial Convictions Available to Civilian Law Enforcement? How?

Reporting disposition information on offenders is deficient nationwide.³³ The Army, recognizing this problem, stresses the importance of reporting offender disposition information.³⁴ As part of a larger Department of Defense (DOD) program,³⁵ the Army reports certain courts-martial results that the FBI enters in the NCIC.

Does the Army Directly Enter its Courts-Martial Convictions Into the CIC?

General

The FBI has statutory authority to collect, retain, and exchange criminal history information, and does so through the NCIC. In the Army, the Criminal Investigation Command (CID) has the authority to cooperate and coordinate with civilian law enforcement agencies to exchange "information of mutual interest."³⁶ Army regulations also authorize CID offices to pass along criminal information to any federal law enforcement agency with an interest in such matters, and to acquire such information from those federal agencies.³⁷

²⁹ The statutes typically refer to "Federal convictions," "convict[ions] . . . under the laws of the United States" or "convict[ions] . . . in any Federal court." In *United States v. Noble*, 613 F. Supp. 1224 (D. Mont. 1985), the court held that a court-martial conviction was a conviction from a "court of the United States" for the purposes of a federal statute concerning prior convictions. The statute, 18 U.S.C. App. § 1202(a), prohibited persons who had been convicted of a felony by a "court of the United States" from receiving, possessing or transporting a firearm. In *State v. Green*, 443 S.E.2d 14 (1994), a North Carolina court determined that a prior general court-martial conviction for rape was a prior conviction for a "felony of violence." (North Carolina law authorized the death penalty for certain offenses when the offender had prior convictions for felonies of violence.) In *Muir v. State*, 517 A.2d 1105 (Md. 1986), the court held that courts-martial convictions can be considered as prior convictions for the purposes of imposing enhanced punishments under habitual offender statutes. The case also cites other state court decisions supporting that conclusion. *Id.*

³⁰ Nevada, Colorado, North Carolina, New Mexico, Georgia, Louisiana, Tennessee, Virginia, Wisconsin, California, Washington, Illinois, South Carolina, Utah, Vermont, West Virginia, Wyoming, Arizona, Delaware, Florida, Idaho, Kentucky, Michigan, North Dakota, Pennsylvania, New York and Mississippi all count federal convictions as strikes under their strike-type statutes. For example, VA. CODE ANN. § 19.2-297.1B says: "[p]rior convictions shall include convictions under the laws of . . . the United States . . ."

³¹ NEV. REV. STAT. § 207.010 (1994); N.M. STAT. ANN. § 31-18-23 (Michie 1994); N.C. GEN. STAT. § 14-7.7 (1993); WIS. STAT. ANN. § 939.62(2m)(a)4 (West 1982); IDAHO CODE § 19-2514 (1987); KY. REV. STAT. ANN. § 532.080 (Michie/Bobbs-Merrill 1990); MISS. CODE ANN. § 99-19-83 (1994); S.C. CODE ANN. § 17-25-45 (1993); WYO. STAT. § 6-10-201 (1988); N.D. CENT. CODE § 12.1-32-09 (1985).

³² VA. CODE ANN. § 19.2-297.1B (Michie 1994); CAL. PENAL CODE § 667.5 (West 1988); GA. CODE ANN. § 17-10-7(b)(2) (1990); LA. REV. STAT. ANN. § 15:529.1A (West 1992); TENN. CODE ANN. § 40-35-120(d)(4) (1994); WASH. REV. CODE ANN. § 9.94A.030(25) (West 1995); ARIZ. REV. STAT. ANN. § 13-604 (1989); DEL. CODE ANN. tit. 11, § 4214 (1987); FLA. STAT. ANN. § 775.084 (West 1991); MICH. COMP. LAWS ANN. § 769.12 (West 1982); ILL. ANN. STAT. ch. 720, para. 5/33B-1 (Smith-Hurd 1993); UTAH CODE ANN. § 76-3-408 (1995); VT. STAT. ANN. tit. 13, § 11 (1974); W. VA. CODE § 61-11-18 (1994); N.Y. PENAL LAW § 70.04 (McKinney 1987); PA. CON. STAT. ANN. § 42-9715 (1982); COLO. REV. STAT. § 16-13-101(1)(b)(I) (1986).

³³ TASK FORCE REPORT, *supra* note 2, at 1.

³⁴ DEP'T OF ARMY, REG. 190-45, MILITARY POLICE: LAW ENFORCEMENT REPORTING, para. 4-3c (30 Sept. 1988) (C1, 3 Sept. 1993) [hereinafter AR 190-45].

³⁵ Memorandum, Department of Defense Inspector General, subject: Criminal Investigations Policy Memorandum Number 10 - Criminal History Data Reporting Requirements (25 Mar. 1987) [hereinafter Memo 10] (The DOD decided it would rely on the NCIC for reporting criminal history information, such as courts-martial convictions. The DOD's policy of linking up with the NCIC "will expand and enhance the effectiveness of a data base which is already frequently relied on by local, state, and Federal law enforcement organizations." This policy has the support of "Congress, the Under Secretary of Defense (Policy), the Department of Justice, Federal Bureau of Investigation, International Association of Chiefs of Police, National Sheriffs' Association, and several state law enforcement organizations. The DOD participation in the program is important to the civilian community, as well as our own organizations."). *Id.*

³⁶ DEP'T OF ARMY, REG. 195-1, CRIMINAL INVESTIGATION: ARMY CRIMINAL INVESTIGATION PROGRAM, para. 6c (18 Aug. 1974) [hereinafter AR 195-1].

³⁷ DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION: CRIMINAL INVESTIGATION ACTIVITIES, paras. 4-3d(1), 4-3d(2) (30 Oct. 1985) (C1, 27 Sept. 1993) [hereinafter AR 195-2].

Department of the Army Regulation (AR) 195-2 provides that the CID can enter information into the NCIC.³⁸ However, AR 195-2 does not refer to direct entry of courts-martial convictions by the CID.³⁹ The CID itself does not enter courts-martial information directly into the NCIC; each field office forwards that information (on FD-249s and R-84s) to the FBI (CJIS) for entry into the NCIC.⁴⁰

The CID Reporting Procedures

Department of Defense Inspector General Memorandum 10 (Memo 10) details the DOD's participation in the NCIC.⁴¹ Memo 10 requires all DOD criminal investigative agencies (including the CID) to complete and forward the appropriate FD-249 and R-84 to the FBI, for certain cases. Memo 10 lists the types of offenses that the CID must report and triggers reporting "when a command determination is made to initiate judicial or nonjudicial proceedings" on a listed offense.

Criminal Investigation Division Regulation 195-1 (CIDR 195-1)⁴² implements Memo 10 in the Army. This regulation provides that a suspect or subject of a listed offense⁴³ will have his or her fingerprints taken as soon as possible—on both the FD-249 and the R-84. As a rule, if a CID agent advises a suspect of his or her rights, the agent should take the suspect's fingerprints.⁴⁴

Under CIDR 195-1, the CID sends the FD-249 to the CJIS when either the court-martial charge sheets are served on the individual (after referral) or nonjudicial punishment is initiated at any level.⁴⁵

For nonjudicial punishment, the CID can hold the FD-249 until the commander completes the nonjudicial punishment. The CID can then enter the disposition on the FD-249 and dispense with the R-84 later.⁴⁶ When the case will be resolved by court-martial, CIDR 195-1 states that the CID should not wait for completion of the court-martial to ship the FD-249.⁴⁷ After the court-martial, the CID will note the disposition on the R-84 (which was prepared simultaneously with the FD-249 and retained) and send it to the CJIS.⁴⁸

The Army Corrections System Reporting Procedures

Beyond the CID's reporting procedures, the Army has a second line of documentation—through the Army's correctional and confinement facilities.

Army Regulation 190-47, Military Police: the Army Corrections System,⁴⁹ defines the Army Corrections System (ACS) as confinement facilities, regional correctional facilities, and the United States Army Disciplinary Barracks.⁵⁰ Army Regulation

³⁸ *Id.* para. 3-17. The effectiveness of the Army's reporting procedures depends on people actually doing what the regulations direct. In support of state repeat offender statutes, supervisors at all levels need to emphasize the importance of accomplishing every task required by the Army's reporting procedures, including fingerprinting.

³⁹ *Id.* para. 3-17 provides that CID can enter stolen personal and government property and absentees and deserters who are suspects or subjects in CID investigations. DEP'T OF ARMY, REG. 190-27, MILITARY POLICE: ARMY PARTICIPATION IN THE NATIONAL CRIME INFORMATION CENTER (28 May 1993) (C1, 17 Aug. 1994) [hereinafter AR 190-27], governs Army use of the NCIC and limits use to Army activities with an ORI. Over 200 Army organizations have separate ORIs, including every Provost Marshal Office and CID field office. However, only the Provost Marshal Offices and the United States Army Crime Records Center have NCIC terminals. Telephone Interview with Mr. Jeff Porter, MOMP-O (3 Mar. 1995).

⁴⁰ Telephone Interview with Ms. Barbara Parker, United States Army Crime Records Center (13 Feb. and 2 Mar. 1995).

⁴¹ Memo 10, *supra* note 35.

⁴² U.S. ARMY CRIMINAL INVESTIGATION COMMAND, REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES (1 Oct. 1994) [hereinafter CIDR 195-1].

⁴³ *Id.* Criminal Investigation Division Regulation 195-1 contains the same list of offenses as Memo 10.

⁴⁴ CIDR 195-1, *supra* note 42, paras. 5-13, 5-14a.

⁴⁵ *Id.*

⁴⁶ *Id.* para. 5-14d.

⁴⁷ *Id.* para. 5-14e.

⁴⁸ *Id.* paras. 5-14e, 5-14f.

⁴⁹ DEP'T OF ARMY, REG. 190-47, MILITARY POLICE: THE ARMY CORRECTIONS SYSTEM, para. 2-2 (17 June 1994) [hereinafter AR 190-47].

⁵⁰ The current sentence cut-offs for the ACS facilities are: Confinement Facilities—90 days or less; Regional Correctional Facilities—more than 90 days to 5 years; Disciplinary Barracks—more than 5 years. Telephone Interview with LTC Morales, United States Army Military Police Operations Agency, MOMP-O (17 Feb. 1995).

190-47, not Memo 10, controls the ACS reporting procedures. These reporting procedures apply to all levels of the ACS.⁵¹

As part of initial inprocessing of a prisoner at an ACS facility, the ACS staff prepares an FD-249 and sends it to the CJIS.⁵² The FD-249 includes the charge, the final disposition, and the sentence imposed.⁵³

To close out the Army reporting system, the ACS sends the R-84 (to update the FD-249) when they receive a "final judicially approved sentence" for a prisoner⁵⁴ that meets three criteria: (1) it includes a dismissal or a punitive discharge; (2) the conviction is on an offense that carries a maximum punishment of more than one year in confinement, despite the sentence actually imposed or approved; and (3) the offense is not "military unique."⁵⁵

Some substantial offenses go unreported under the Memo 10 approach. For example, assaulting a superior commissioned officer and failure to obey a general order, with their maximum punishments above the traditional one-year felony limit, are not reportable offenses. One might argue that the purposes of these strike-type statutes are being defeated by not reporting all offenses. For the following reasons, I would argue that the limited reporting is sufficient.

Should the Army Report Courts-Martial Convictions?

Complete Reporting

The argument that any disobedience to authority shows a character flaw, which should be documented for future reference, supports reporting all courts-martial convictions. The *Task Force Report*⁵⁶ favors this complete reporting. The *Task Force Report*,

viewing recidivism as a major problem, recommends that the Army report not only all felony convictions, but also all misdemeanor convictions. "[C]ourts need all misdemeanor arrest and conviction information. Misdemeanor information is essential so that courts can distinguish chronic offenders from first or infrequent offenders."⁵⁷ The argument is that, because recidivism is such a chronic problem, courts need all available information to make appropriate decisions.

However, the language of many state strike-type statutes would blunt the impact of reporting all courts-martial convictions, especially those resulting from military unique offenses. Some state legislatures, although willing to accept out-of-state convictions as strikes, are not willing to punish their citizens for conduct that, if done in that state, would not be criminal. For example, Georgia law states that "[a]ny person who has been convicted . . . under the laws of . . . the United States of a crime which if committed within this state would be a serious violent felony . . . shall be sentenced to imprisonment for life without parole."⁵⁸ In states like Georgia, if the offense underlying the soldier's court-martial conviction is not an offense in that state, it will not count as a strike under the state strike-type statute.⁵⁹

Limited Reporting

Beyond the filtering effect of certain state statutes, one argument against complete reporting is that the Army should not stigmatize forever soldiers who commit offenses while still young and immature. This argument is especially persuasive when the court-martial is for military-unique offenses, such as absent without leave or disrespect to a commissioned officer. However, Memo 10, which establishes the DOD's position on this issue, opts for limited reporting.

⁵¹ *Id.*

⁵² AR 190-47, *supra* note 49, para. 10-2a. The regulation does not specify a particular time when to complete and forward the FD-249. In practice, the correctional staff complete and forward the FD-249 at inprocessing.

⁵³ See *id.* Army Regulation 190-47, paragraph 10-2a, does not place any limits on which offenses to report with an FD-249 at inprocessing; it dictates FD-249s on all prisoners. Furthermore, AR 190-47, paragraph 10-2c, implicitly allows the ACS to do FD-249s on only those prisoners for whom ACS submits R-84s in accordance with AR 190-47, paragraph 10-2b.

⁵⁴ The ACS must complete and forward the R-84 when it receives the "final judicially approved sentence" for soldiers who have been released on excess leave. *Id.* para. 10-2c.

⁵⁵ The ACS submits the R-84 when it receives a "final judicially approved sentence." *Id.* para. 10-2b. In all likelihood, these terms mean when the "final orders" (as defined in the glossary) are issued in the court-martial; when the conviction is final in accordance with Rule for Courts-Martial 1209(b). MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1209(b) (1984) [hereinafter MCM]. This is the practice at the DB. Telephone Interview with Mr. Donnally Brothers, Director of Inmate Administration, United States Army Disciplinary Barracks, Fort Leavenworth, Kansas (2 Mar. 1995).

⁵⁶ TASK FORCE REPORT, *supra* note 2.

⁵⁷ *Id.* at 3. Mr. Jeff Porter, the Army's coordinator for NCIC matters, supports complete reporting. Telephone Interview with Mr. Jeff Porter, MOMP-O (3 Mar. 1995).

⁵⁸ GA. CODE ANN. § 17-10-7(b)(1) (1990).

⁵⁹ This limitation on prior convictions as strikes affects not only military unique offenses, but also other nonmilitary offenses that may not be criminal in all jurisdictions (for example, sodomy). While sodomy is a crime in the military and is a reportable offense under Memo 10, it is not a crime in most states. As of 1986, sodomy was not a crime in 26 states. *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986).

Memo 10, and its implementing regulation *CIDR 195-1*, requires reporting offenses to the CJIS only when: (1) the offender has committed a reportable offense;⁶⁰ and (2) the reportable offense is to be disposed of through either judicial or nonjudicial channels.⁶¹

Conspicuously absent from the list of reportable offenses are those military-unique offenses such as AWOL—and disrespect to a commissioned officer (although the latter could result in confinement beyond the normal one-year limit for felonies).⁶² Generally, the offenses listed in Memo 10 and *CIDR 195-1* would be felony offenses if committed in civilian jurisdictions.⁶³

One of the basic purposes of repeat offender statutes is to penalize offenders who repeatedly violate proscriptions that the citizens of a particular state deem criminal. With this purpose in mind, reporting military-unique offenses, which by definition are not criminal in the civilian world, is not productive. For these reasons, both practical and philosophical, the Army does not need to report all courts-martial convictions.

Suggested Improvements

Although the general framework of the Army reporting procedure is sound, the Army can refine those procedures to make them more effective. The goal of the reporting system is to have the same offenses and offenders followed from the beginning of the court-martial process to the end of appellate review. To do

this, the Army must redefine the CID reporting procedures and clarify the relationship between the CID and the ACS reporting procedures.

The CID Reporting Procedures

Coverage

Even if the Army follows the Memo 10 policy on which offenses to report, the Army needs to include Uniform Code of Military Justice (UCMJ) Article 111 (drunk driving) as a reportable offense to comply with 28 C.F.R. § 20.32(b).

A significant problem with UCMJ Article 111 as a nonreportable offense is that drunk driving offenses handled by nonjudicial punishment do not affect the soldier's driving record. Accordingly, local District Attorneys (DAs) who prosecute soldiers for drunk driving offenses occurring off post will be unaware of the existence of any prior offenses. Therefore, including UCMJ Article 111 as a reportable offense would address both of these concerns by entering that information in the NCIC.

However, including UCMJ Article 111 in the list of *CIDR 195-1* reportable offenses will not fix the problem and will only raise an additional concern that not all of the offenses are the CID's investigative responsibility.⁶⁴ To ensure that both the military police⁶⁵ and the CID are completing and forwarding FD-249s/R-84s on all reportable offenses, the Army should amend *AR 190-*

⁶⁰ *CIDR 195-1*, *supra* note 42, app. C.

⁶¹ Although beyond this article's scope, the question needs to be asked. If the purpose of Memo 10 includes reporting the disposition of felony-type criminal activity of military personnel that is not military unique, why doesn't the Army report administrative dispositions?

⁶² See Appendix for UCMJ offenses that are not reportable under Memo 10 or *CIDR 195-1*.

⁶³ The ACS reporting procedures, which are not governed by Memo 10, also limit reporting to nonmilitary offenses: "[c]onvictions for military unique offenses, such as absent without leave (AWOL), will not be reported [to the CJIS]." *AR 190-47*, *supra* note 49, para. 10-2b.

⁶⁴ *AR 195-2*, *supra* note 37, app. B, lists the offenses that CID has investigative responsibility. The following UCMJ offenses required to be reported by CID under *CIDR 195-1* are not listed in *AR 195-2*, Appendix B:

Article 108- Selling or otherwise disposing of military property of a value of less than \$1000.

- Willfully damaging, destroying or losing, or willfully suffering to be damaged, destroyed or lost, sold or wrongfully disposed of, military property of a value of between \$100 and \$1000.

Article 121- larceny or wrongful appropriation of property of a value of between \$100 and \$1000.

Article 111 - drunk driving.

Article 134- escape from correctional custody.

- obtaining services under false pretenses of a value between \$100 and \$1000.

- wrongful discharge of a firearm so as to endanger human life.

- knowingly receiving, buying or concealing stolen property of a value of between \$100 and \$1000.

- communicating a threat.

- carrying a concealed weapon.

Although, *CIDR 195-1* requires the CID to report these offenses, *AR 195-2*, Appendix B, does not require the CID to investigate them (unless in conjunction with another offense they do investigate). Unfortunately, the practical result is that nobody reports these offenses.

⁶⁵ Currently, Army military police are not required to submit FD-249s for any offenses. *AR 190-45*, *supra* note 34. In practice, they will report some offenses, but reporting is sporadic at best. Telephone Interview with Mr. Jeff Porter, MOMP-O (3 Mar. 1995).

45 to require the military police to complete and forward FD-249s/R-84s, in the same manner as the CID on those reportable offenses not within the CID's investigative authority. The military police would then fill the gap in the list of reportable offenses. Although this system would increase the military police's administrative burden, it makes the Army's reporting procedures consistent with the DOJ's regulations on the NCIC and the DOD's list of reportable offenses.⁶⁶

Consistency

Memo 10 and *CIDR 195-1* are inconsistent on submitting FD-249s. Memo 10 has the CID sending the FD-249 when the command decides that the case will be disposed of by either court-martial or Article 15. On the other hand, *CIDR 195-1* delays sending the FD-249 (for judicial disposition) until service of the charge sheet on the accused (after referral).⁶⁷ Accordingly, the CID should amend *CIDR 195-1* to require that the CID send the FD-249 when the command prefers charges, as the first indication of the command's decision.⁶⁸

Clarity

Memo 10 is unclear on when to submit the R-84. Memo 10 states that the CID sends the R-84 "on conclusion" of the court-martial, but does not define "conclusion." Although Memo 10 states that "final disposition" does not include appellate action," for clarity, the CID should amend *CIDR 195-1* to require the CID to send their R-84 "immediately after sentencing at trial." Furthermore, *CIDR 195-1* also should require the CID to submit a supplemental R-84 at the time the convening authority takes initial action. Providing the CID this information would be easy by amending *AR 27-10*⁶⁹ to require the Special Agent in Charge of the local CID field office in the distribution channels for the Report of Result of Trial and the Promulgating Order.

Relationship Between CID and ACS Reporting Procedures

Reportable Offenses

Memo 10 contains a list of offenses that the CID must report. The Army's reporting procedures should be structured to follow

these offenses from the beginning of the court-martial process to the end of appellate review.

Although the list of reportable offenses in *CIDR 195-1* follows Memo 10 exactly, *AR 190-47* does not. Rather than listing specific reportable offenses, *AR 190-47*, paragraph 10-2b, lists reportable offenses by category. The ACS facilities are to report all convictions when: (1) the sentence has a dismissal or punitive discharge; (2) the offense for which the prisoner was convicted has a possible punishment of confinement more than one year, no matter the sentence actually adjudged or approved; and (3) the offense is not military unique. *Army Regulation 190-47*, paragraph 10-2b, should be amended to include a list of reportable offenses identical to those listed in *CIDR 195-1*, Appendix O, and Memo 10.

Reporting Periods

Under the CID and the ACS reporting procedures, the CID and the ACS submit FD-249s and R-84s covering different periods during the progress of an offender's court-martial case. The concept of passing responsibility for reporting is sound, but lines of responsibility need to be defined.

According to *CIDR 195-1*, as currently written, the CID is responsible for sending the R-84 after the initial action by the convening authority.⁷⁰ Waiting until initial action allows some courts-martialed soldiers—those who receive a discharge, but no confinement and are placed on voluntary excess leave—to reenter society for a period of time without a report of their conviction because neither the CID nor the ACS reporting systems require a report.

To remedy this situation, the CID should amend *CIDR 195-1* to require the CID to send the R-84 immediately after sentencing. As amended, *CIDR 195-1* also would require the CID to submit a supplemental R-84 at the time the convening authority takes initial action. Admittedly, the time between sentencing and initial action may be small, but not reporting defeats the purpose of full and accurate reporting.⁷¹

To clarify when the ACS's reporting responsibility begins, the Army should amend *AR 190-47*, paragraph 10-2b to specify

⁶⁶ Mr. Jeff Porter, MOMP-O, the Army's coordinator for NCIC matters, supports a change to *AR 190-45* to require the Army military police to complete and forward the FD-249s/R-84s for those offenses listed in Memo 10. Telephone Interview with Mr. Jeff Porter, MOMP-O (3 Mar. 1995).

⁶⁷ Note that *CIDR 195-1* is also internally inconsistent on this point. In paragraph 5-14b, *CIDR 195-1* instructs the CID to forward the FD-249 when "[c]ourt-martial charge sheets have been served on the individual." However, in Appendix O, paragraph O-2, *CIDR 195-1* instructs the CID (more consistent with Memo 10) to send the FD-249 on "the initiation of military judicial action . . ." For nonjudicial punishment, *CIDR 195-1* states that the FD-249 should be sent when nonjudicial punishment is initiated at any level. This can be interpreted consistently with Memo 10—nonjudicial punishment is initiated when the commander decides to dispose of the offense via an Article 15.

⁶⁸ Arguably, referral can be considered the point at which the command clearly makes a decision to dispose of misconduct by court-martial; however, I would argue that referral is a more logical choice. If one of the goals for reporting is to completely document all misconduct, then referral is the first tangible indication of the command's desire to dispose of misconduct by court-martial. Even if the Army retains referral as the triggering event, the Army should amend DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, (8 Aug. 1994) (C1, 16 Dec. 1994) [hereinafter *AR 27-10*] to require either the commander or trial counsel to notify the CID of referral.

⁶⁹ See *supra* note 67.

⁷⁰ *CIDR 195-1*, *supra* note 42, app. O, para. O-4b11.

⁷¹ See RECORD USE REPORT, *supra* note 2, at 68 and TASK FORCE REPORT, *supra* note 2, at 6.

cally state that the ACS facility prepares the FD-249 and R-84 (and submits the former) as a part of inprocessing. Although this may duplicate the CID's R-84 if the ACS inprocesses the prisoner prior to initial action, the benefit of complete reporting outweighs the cost of redundancy. *Army Regulation 190-47* also should clearly state that the ACS facility should submit the R-84 when the court-martial is final as defined by Rule for Courts-Martial 1209.⁷² In this regard, *AR 27-10*, paragraph 12-7, already provides that the Army send the court-martial orders to the confinement facility that holds the prisoner.

Separate Database

Army Courts-Martial Management Information System

The Clerk of Court, United States Army Legal Services Agency (USALSA), maintains an automated database on courts-martial convictions called the Army Courts-Martial Management Information System (ACMIS).⁷³ Civilian law enforcement personnel cannot currently use the ACMIS,⁷⁴ but the Clerk's office receives regular inquiries from civilian prosecutors for copies of courts-martial convictions.⁷⁵

Problems

Opening the ACMIS to civilian law enforcement personnel would create a number of problems. Who would the Army allow to access to the system? Who would be responsible for administering the system? How would the Army publicize the system's availability?

The first problem would be access. The Army would have to decide to whom access should be granted and then design a system to control that access. Would access be provided to the general public, or like the NCIC, would access be restricted to only civilian law enforcement personnel for law enforcement purposes? If the latter, how would the Army enforce access procedures? Using the NCIC to report courts-martial convictions, would answer these questions.

The second problem would be the administrative burden entailed by opening the system. The Clerk's office (or whomever would be responsible for an open ACMIS system) would have to establish and maintain phone lines, evaluate and approve requests for access, monitor access and generate responses to requests for hard copies of information. Additionally, the ACMIS has only recent courts-martial cases in automated form--someone would have to automate the rest of the records.

A third problem would be publicity; for the Army system to be useful, those who need its information would need to know it is there. Educating the civilian law enforcement community would be a huge task.

The NCIC is an established, well known, and frequently used system for recording, accessing, and recovering criminal history record information. With the changes mentioned above, the Army could more effectively integrate courts-martial conviction reporting into the NCIC and avoid the need for a separate system and its accompanying problems.⁷⁶

⁷² See MCM, *supra* note 55, R.C.M. 1209(a), which provides that a court-martial conviction is final generally when all appellate avenues have been exhausted. At that time, R.C.M. 1209(b) states that any orders publishing the proceedings of the court-martial are binding on "all departments, courts, agencies, and officers of the United States. . . ."

⁷³ The ACMIS contains automated information on courts-martial (general and both levels of special courts-martial) from 1 July 1986 to the present. For courts-martial prior to 1 July 1986 (back to World War II-era cases), the information is in hard copy. The ACMIS contains, but is not limited to:

- name
- social security number
- date of birth
- offenses charged
- offenses convicted
- findings
- sentence adjudged
- convening authority initial action on findings and sentence
- United States Army Court of Criminal Appeals review results
- Court of Appeals for the Armed Forces petition for review status
- Court of Appeals for the Armed Forces review results
- United States Supreme Court petition for review status
- United States Supreme Court review results
- courts-martial case processing information, such as time from referral to Article 32 and Article 32 to referral.

⁷⁴ Telephone Interview with Mr. William Fulton, Clerk of Court, United States Army Legal Services Agency, JALS-CCZ (12 Feb. 1995). Mr. Fulton stated that the ACMIS contains a large amount of information that would be irrelevant to local prosecutors seeking courts-martial conviction information (such as case processing times). He also stated that one Major Army Command Staff Judge Advocate office had direct access to the ACMIS at one point, but currently no offices are on-line with ACMIS. While beyond the scope of this article, trial and defense counsel in the field could put the information in the ACMIS to good use preparing for trial.

⁷⁵ *Id.*

⁷⁶ The TASK FORCE REPORT, *supra* note 2, at 11, identifies "fracturing of responsibility" as a major problem in reporting disposition information. This same concern is true for retrieving the information; the more sources the DA must check, the more chance there is something will be overlooked. This is not to say that the NCIC would or should replace the ACMIS, or vice versa. The ACMIS and the NCIC currently serve different functions and both should remain as currently configured. The Army does not need to adapt either one to fill the role the other was intended to, and presently does, fill.

In addition to the NCIC, the FBI also developed another reporting system, the National Incident-Based Reporting System (NIBRS). The FBI developed the NIBRS as an update to the FBI's Uniform Crime Report (UCR) system developed in the 1930's.

Both the UCR and the NIBRS are reporting systems that gather statistical data on criminal activity. The UCR uses aggregate tallies of criminal activity reported in summary fashion by local law enforcement agencies. As the name implies, the NIBRS is based on reporting single criminal incidents.⁷⁷

Neither the NIBRS nor the UCR have offender-specific information⁷⁸, and are not designed to replace the NCIC. Instead, each database serves a different need. For example, if a local law enforcement agency wants to find out whether a particular person has a criminal history, it references the NCIC. If, on the other hand, an agency is interested in the number of assaults committed by women in a particular town during a certain period, the NIBRS would be the appropriate source.⁷⁹

When Congress established the NIBRS, it required that the DOD participate by providing information.⁸⁰ The DOD is developing the Defense Incident-Based Reporting System (DIBRS) to facilitate feeding information to the NIBRS. The DIBRS will be more than a statistical tool to feed the NIBRS. It will contain offender information from initiation of the investigation through disposition, to confinement and release, and include offender-specific information.⁸¹ The DIBRS is designed to provide a centralized database for information on military offenders.⁸² While the DOD will link this system to the FBI for NIBRS input, only the FBI will use part of the information gathered under the DIBRS. The DOD is designing the DIBRS for use only within the DOD and does not plan to make the DIBRS directly accessible to civilian law enforcement agencies.⁸³ At this point, the DOD does not intend to have the DIBRS replace the Army's reporting procedures mentioned above.⁸⁴

As a centralized database for criminal history record information on military offenders, the DIBRS has the potential to replace the Army's courts-martial conviction reporting system. It also could replace the NCIC as the point of civilian access for courts-martial conviction information. What information the DIBRS will contain, whether it will replace the Army's current reporting system and whether DIBRS information will be available to local district attorneys for repeat offender use remains to be seen.

Conclusion

The Army handles reporting courts-martial convictions in two parts—initially through the CID channels and later through the ACS channels. The CID and the ACS procedures are roughly sequential—the ACS picks up where the CID leaves off.

The CID reports from apprehension and the decision to dispose either judicially or nonjudicially through completion of the court-martial or the Article 15. (For a court-martial, the earliest time that the CID would have to submit an R-84 would be at the time sentence is announced). The ACS system picks up, via the FD-249, after conviction and sentencing, when a prisoner reaches the ACS facility to serve a term of confinement. The ACS then updates the CJIS with an R-84 when the conviction becomes final.

When a court-martial occurs, the Army does not directly enter the conviction in the NCIC. Instead, the Army provides the conviction information to the FBI. The FBI custodian of the NCIC then enters the information, which civilian law enforcement personnel can access.

Because an offender's prior court-martial conviction can have an impact on the disposition of a pending civilian offense, the Army has an obligation to be complete and accurate in reporting courts-martial convictions. The Army ought not frustrate repeat offender statutes by failing to report (or inaccurately or haphaz-

⁷⁷ 56 Fed. Reg. 49344 (1991).

⁷⁸ Offender-specific information is information that could identify specifically the suspect of a particular offense, such as name, social security number or date of birth.

⁷⁹ Telephone Interviews with Mr. Jeff Porter, MOMP-O (3 Mar. 1995); LTC John Meixell, DAJA-CL (3 Mar. 1995). Again, as with the ACMIS, the NIBRS and the NCIC were initially designed to perform different missions. The main thrust of the NIBRS is statistical analysis, while the NCIC is designed for tracking specific offenders. While the NIBRS/DIBRS has the potential to evolve into a replacement for the NCIC for reporting Army courts-martial, whether it will do so remains to be seen.

⁸⁰ Uniform Federal Crime Reporting Act of 1988, Pub. Law 100-690, 102 Stat. 4181, § 7332(c)(2) (1988).

⁸¹ Telephone Interviews with LTC John Meixell, DAJA-CL (3 Mar. 1995); LTC David Shutler, OUSD P&R/R&R-LP (3 Mar. 1995).

⁸² *Id.* The DIBRS is not only the DOD's contribution to the NIBRS, but it allows the DOD, in one database, to comply with various other statutory requirements (such as reporting convictions under the Brady Act and tracking confinement status for victim/witness purposes) and respond quickly and accurately to congressional inquiries.

⁸³ Telephone Interviews with Mr. Jeff Porter, MOMP-O (3 Mar. 1995); LTC David Shutler, OUSD P&R/R&R-LP (3 Mar. 1995); LTC John Meixell, DAJA-CL (3 Mar. 1995). Mr. Porter, LTC Meixell, and LTC Shutler belong to the DIBRS Working Group. LTC Shutler is the Chairman. For a detailed discussion of the DIBRS in our future, see CPT Holly O'Grady Cook & LTC David F. Shutler, *Tracking Criminals on the Information Highway: "DIBRS" Makes it Closer Than You Think*, Army Law., May 1995, at 76.

⁸⁴ *Id.*

ardly reporting) courts-martial convictions. Although not all courts-martial convictions are reported, the Army does report to the NCIC those courts-martial convictions that generally would be considered felonies in civilian jurisdictions.

Although the current reporting system has some shortcomings, with minor modifications, common definitions, and clear and consistent guidelines for reporting, the Army can make the two parts of the Army's reporting system fit together seamlessly. The point, after all, in reporting courts-martial convictions is to get that information to the local district attorneys for their use under strike-type statutes.

APPENDIX

The following UCMJ offenses *are not* reportable under Memo 10 or CIDR 195-1:

- Article 82 - solicitation
- Article 83 - fraudulent enlistment, appointment or separation
- Article 84 - effecting unlawful enlistment, appointment or separation
- Article 85 - desertion
- Article 86 - AWOL
- Article 87 - missing movement
- Article 88 - contempt toward officials
- Article 89 - disrespect toward a superior commissioned officer
- Article 90 - assaulting or willfully disobeying a superior commissioned officer
- Article 91 - insubordinate conduct toward a warrant officer, noncommissioned officer or petty officer
- Article 92 - failure to obey an order or regulation
- Article 93 - cruelty or maltreatment
- Article 94 - mutiny or sedition
- Article 95 - resistance, breach of arrest or escape
- Article 96 - releasing a prisoner without proper authority
- Article 97 - unlawful detention
- Article 98 - noncompliance with procedural rules
- Article 99 - misbehavior before the enemy
- Article 100 - subordinate compelling surrender
- Article 101 - improper use of countersign
- Article 102 - forcing a safeguard
- Article 103 - captured or abandoned property
- Article 104 - aiding the enemy

- Article 105 - misconduct as a prisoner
- Article 106 - spying
- Article 109 - waste, spoilage or destruction of property other than military property of the United States
- Article 110 - hazarding a vessel
- Article 111 - drunken or reckless driving
- Article 112 - drunk on duty
- Article 113 - misbehavior of a sentinel or lookout
- Article 114 - dueling
- Article 115 - malingering
- Article 116 - riot or breach of the peace
- Article 117 - provoking speech or gestures
- Article 133 - conduct unbecoming an officer and gentleman
- Article 134 - General Article
 - abusing a public animal
 - adultery
 - bigamy
 - worthless checks
 - wrongful cohabitation
 - dishonorably failing to pay just debts
 - disloyal statements
 - disorderly conduct; drunkenness
 - drinking liquor with a prisoner
 - drunk prisoner
 - incapacitation from duty due to prior wrongful overindulgence
 - false or unauthorized pass offense
 - discharging a firearm through negligence
 - fleeing scene of an accident
 - fraternization
 - gambling with subordinates
 - impersonating an officer, warrant officer, NCO, petty officer, or agent or official
 - indecent exposure
 - indecent language
 - jumping from a vessel into the water
 - wrongful interference with an adverse administrative proceeding
 - breaking medical quarantine
 - requesting commission of an offense
 - breaking restriction
 - offenses against or by a sentinel or lookout
 - solicitation of an offense
 - straggling
 - unlawful entry
 - wearing unauthorized insignia

Calculating Late Payment Interest Penalties Under the Prompt Payment Act: A Primer

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Introduction

The life of the law has not been logic, it has been experience.¹

The twofold purpose of this article is to survey the proper calculation of late payment interest penalties² under the Prompt Payment Act³ (PPA) and to provide a practical methodology to calculate late payment interest penalties.⁴ Attorneys must understand the components of the mathematical formulas used to calculate the late payment interest penalties to truly understand how this act operates.⁵

Legislative Backdrop of the PPA

Before the enactment of the PPA, the government was generally regarded in the business community as a "slow payer" with little or no incentive to pay its bills on time.⁶ Congress believed that the government's reputation as a "slow payer discourage[d]

businesses from bidding for [g]overnment contracts" and, as a direct consequence, deprived the government "of the innovation and lower prices that result from vigorous competitive bidding."⁷ Accordingly,

[b]y improving [the government's] reputation as a reliable payer of its bills, the . . . [g]overnment [would] . . . save substantial amounts of money . . . first by increasing the number of companies [that] compete for [the government's] business; and second, by ending the contractor practice of inflating estimates to compensate for [the interest expense created by] late bill payments.⁸

Congress enacted the PPA "to provide incentives for the . . . [g]overnment to pay its bills on time."⁹ In general, the PPA provides that, if an agency fails to pay a contractor by the required

¹ O.W. HOLMES, *THE COMMON LAW* (1881).

² The term "penalties" is somewhat misleading. Late payment interest penalties under the Prompt Payment Act are not so much penalties as they are plain interest payments—the cost to the United States Government (government) for borrowing money. Congress chose to characterize these interest payments as "penalties" to "emphasiz[e] to government managers that a stigma [attaches] to the necessity for interest payments caused by an agency's failure to pay [its] bills on time." H.R. REP. NO. 97-461, 82d Cong., 2d Sess. 8 (1982), reprinted in 1982 U.S.C.C.A.N. 111-26.

³ The PPA, originally enacted as Pub. L. No. 97-177, 96 Stat. 85 (1985), codified as amended at 31 U.S.C. §§ 3901-3906 (1982) (commonly known as the "Prompt Payment Act of 1982"), was substantially amended on October 17, 1988, by Pub. L. No. 100-496, 102 Stat. 2455 (1988) (commonly known as the "Prompt Payment Act Amendments of 1988").

⁴ This article does not treat any of the myriad of rules and regulations governing or relating to: progress payments; advanced payments; payments under cost-reimbursement contracts; contract financing payments; lease payments; discount payments; payments to farm producers; grants; electronic fund transfers; tariffs; utility services; mixed invoices; withholding; set-off; reporting requirements; notice requirements; the Tennessee Valley Authority; the United States Postal Service; the Commodity Credit Corporation; the "Office of Management and Budget Penalty" or "additional penalty;" the acquisition of meat or meat food products; the acquisition of perishable agricultural commodities; the acquisition of dairy products; the acquisition of edible fats, oils, or food products prepared from edible fats or oils; or the original provisions of the PPA, including the "fifteen-day grace period." Nor does this article address the fiscal law aspects of the PPA. For an excellent comprehensive analysis of the PPA and its amendments, see Renner, *Prompt Payment Act: An Interest(ing) Remedy For Government Late Payment*, PUB. CONT. L.J. 177 (1992).

⁵ Furthermore, it behooves attorneys to fully understand their client's business. An anecdote best illustrates why an attorney can never know enough about his or her client's business. Recently, in a review of a finance office's calculations of late payment interest penalties, the author detected a logic error that evidenced a fundamental misunderstanding of the PPA, which, had it gone unnoticed, would have cost the government hundreds of thousands of dollars in overpaid interest penalties.

⁶ H.R. REP. NO. 97-461, *supra* note 2, at 111.

⁷ *Id.*

⁸ *Id.* at 116.

⁹ *Id.* at 111.

payment date, an interest penalty will be paid to the contractor on the amount of the payment due.¹⁰ Insuring timely payment of government contractors is the virtue of the PPA.

A Methodology for Calculating Late Payment Interest Penalties

The following scenario, which will be modified to enhance the discussion below, illustrates the rules and regulations that govern the calculation of late payment interest penalties under the PPA.

On 25 October 1993, the Department of the Army awarded a contract for the performance of custodial services to XYZ, a limited liability company organized pursuant to the laws of Delaware. Under the contract, XYZ submitted an invoice to the contracting officer's representative (COR). The invoice was dated 19 May 1995. (Assume that the services were performed on the same date.) The invoice was in the amount of \$23,340. It was proper in all respects. The contract provided that invoices presented thereunder be submitted to the COR for payment but did not establish a specific payment date or a specific acceptance period. The contract also provided that a certified invoice constituted the receiving report. The COR received the invoice on 22 May 1995, and annotated it accordingly. On 25 May 1995, the COR certified the invoice for payment, less \$3340 for failure to meet acceptable quality levels (AQLs), and forwarded it to the Finance and Accounting Office (FAO) for payment. The FAO paid the invoice with a check dated 28 August 1995, less \$3340 for failure to meet AQLs. The FAO

paid a late payment interest penalty at the same time.

When Does the PPA Apply?

The PPA applies to invoice payments¹¹ made by an agency to a contractor pursuant to contracts between an agency and a contractor for "the acquisition of property or services" entered into on or after 1 October 1982.¹² Whether or not the PPA applies to a particular transaction depends on the affirmative resolution of three subordinate issues: (1) the timing of the transaction; (2) the parties to the transaction; and (3) the nature of the transaction. If any of these subordinate issues is resolved in the negative, the PPA does not apply.

The Timing of the Transaction

Was the "Contract" Awarded On or After 1 October 1982?

The PPA applies to contracts for the acquisition of property or services entered into on or after 1 October 1982.¹³ A "contract," for the purposes of the PPA, is:

any enforceable agreement, including rental and lease agreements, purchase orders (including obligations under Federal Supply Schedule contracts), requirements-type (open-ended) service contracts, and blanket purchase agreements between an agency and a contractor for the acquisition of property or services.¹⁴

The contract award date determines the applicability of the PPA.¹⁵ In the scenario, the contract was awarded on 25 October 1993. Hence, the timing of the transaction accords with the temporal requirements of the PPA.

¹⁰ 31 U.S.C. § 3902(a) (1988). The PPA walks a tightrope between paying the government's bills too early, which forces the United States Treasury to either withdraw funds from interest bearing accounts or borrow funds at a premium, and paying them too late, which obligates the government to pay interest on its "borrowing." The Office of Management and Budget (OMB) requires agencies to "make payments no more than seven days prior to the [required payment] date, unless . . . earlier payment is necessary;" and encourages agencies "to experiment with the timing . . . of their payments" in order "to pay proper invoices as close as possible to the [required payment] date without exceeding it." OMB Circ. A-125 (Rev.) § 4(1) (1989).

¹¹ The PPA also applies to other types of payments that are not treated in this article.

¹² Pub. L. No. 97-177, 96 Stat. 85 (1985); OMB Circ. A-125 (Rev.) § 2(a) (1989); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 32.901, 32.907-1(a)(1) (1 Apr. 1984) [hereinafter FAR].

¹³ Pub. L. No. 97-177, 96 Stat. 85 (1985).

¹⁴ OMB Circ. A-125 (Rev.) § 1(e) (1989). Part 32 of the FAR does not define "contract" or "acquisition." *But see* FAR, *supra* note 12, 2.201.

¹⁵ OMB Circ. A-125 (Rev.) § 2(a) (1989); Renner, *supra* note 4, at 243-44.

The Parties to the Transaction

Is the Contract Between an "Agency" and a "Contractor"?

The PPA applies to contracts "awarded by all executive branch agencies."¹⁶ The term "agency" has the same meaning given it in § 551(1) of the Administrative Procedure Act.¹⁷ It includes military exchanges and commissaries.¹⁸ The Congress, the courts, the governments of territories or possessions, the government of the District of Columbia, courts-martial, military commissions and military authority exercised in the field in time of war or in occupied territory are not agencies within the meaning of the PPA.¹⁹

A "contractor" for the purposes of the PPA is any person (in the juridical sense) carrying on a profession, trade or business, or a nonprofit entity operating as a contractor. The term includes state and local governments, but does not include federal entities.²⁰

In the scenario, the parties to the transaction are the Department of the Army and XYZ, a limited liability company organized under Delaware laws. The Department of the Army is an agency, and XYZ is a contractor, both within the meaning of the PPA.

The Transaction

Did the Contractor Submit a "Proper Invoice"?

An "invoice" is a bill or a written request for payment submitted by a contractor for property delivered or services performed.²¹ A proper invoice under the PPA must meet the minimum contractually specified standards and other contract terms and conditions for submissions, and there must be no dispute between the parties as to quantity, quality, or contractor compliance with contract requirements.²² If a dispute exists between the parties concerning either the payment amount, the quantity or quality of the property delivered or the services performed, or contractor compliance with other contract requirements, the payment period is "tolled."²³ A "proper invoice" must contain or be accompanied by:

- (1) the name and address of the contractor;
- (2) the invoice date;
- (3) the contract number, or other authorization for the property delivered or services performed (including the order number and contract line item number);
- (4) the description, the quantity, and the price of the property actually delivered or the services actually performed;
- (5) the shipping and payment terms;
- (6) the name, title, telephone number, and complete mailing address of the responsible official to whom payment is to be sent;
- (7) the name (if available), title, telephone number, and complete mailing address of the responsible official to be notified in the event that the invoice is defective; and
- (8) any other substantiating documentation or information required by the contract.²⁴

In the scenario, the invoice submitted by XYZ was proper. It met the minimum contractually specified standards and other contract terms and conditions for invoice submissions and was otherwise proper in all respects.

When Is an Invoice "Received"?

The date that a proper invoice is received by the agency is important for two reasons. It is used to determine the required payment date and to calculate the date when a late payment interest penalty, if any, begins to accrue.²⁵ A proper invoice is received by the agency on the latter of:

¹⁶ 31 U.S.C. § 3901(a)(2) (1988); OMB Circ. A-125 (Rev.) §§ 1(g), 2(a)(1) (1989).

¹⁷ 31 U.S.C. § 3901(a)(1) (1988); OMB Circ. A-125 (Rev.) § 1(b) (1989).

¹⁸ OMB Circ. A-125 (Rev.) § 1(b) (1989).

¹⁹ *Id.*

²⁰ 31 U.S.C. § 3901(a)(2) (1988); OMB Circ. A-125 (Rev.) § 1(g) (1989). The statute uses the term "business concern."

²¹ OMB Circ. A-125 (Rev.) § 1(l) (1989); FAR, *supra* note 12, 32.902; Renner, *supra* note 4, at 199.

²² FAR, *supra* note 12, 32.902.

²³ 31 U.S.C. § 3907(c) (1988); OMB Circ. A-125 (Rev.) §§ 7(c)(1), 13(a)(3) (1989); FAR, *supra* note 12, 32.902; 32.905(a)(1)(ii), 32.907-1(f); Renner, *supra* note 4, 215.

²⁴ 31 U.S.C. § 3901(a)(3) (1988); OMB Circ. A-125 (Rev.) § 5(b) (1989); FAR, *supra* note 12, 32.905(e).

²⁵ 31 U.S.C. § 3901(a)(4) (1988); OMB Circ. A-125 (Rev.) §§ 1(n), 4(d) (1989); FAR, *supra* note 12, 32.901-1(a)(1).

(1) the date that the designated billing office (DBO) actually receives the invoice, if the DBO annotates the invoice with the actual date of receipt at the time that the invoice is actually received; or

(2) the date that the property delivered or the services performed are actually or constructively accepted by the agency, whichever occurs first.²⁶

"Acceptance" is the act by the agency acknowledging that property delivered and services performed conform with the contract requirements.²⁷ Acceptance is evidenced by an authorized agency official in a writing, commonly known as a receiving report.²⁸

The DBO is the governmental or nongovernmental office or employee designated in the contract to first receive invoices from the contractor.²⁹ Typically, the DBO is the COR's office, but it also may be the disbursing office, the contract administration office, the requiring activity, the contract audit office, or a nongovernmental agent.³⁰ The DBO is required by regulation to annotate invoices with the date that they are actually received—usually by a date stamp.³¹

The Constructive Acceptance Rule

Under the PPA, property delivered and services performed are deemed accepted by the agency on the seventh day after the date that the property actually is delivered or the services are actually performed and completed, unless the agency accepts before the seventh day after delivery or performance, or the contract specifies a longer acceptance period.³² If the agency has accepted the property or services before the seventh day after delivery or performance, this date controls.³³

The contracting officer may determine that a longer acceptance period is required to afford the agency time and opportunity to inspect and test the property delivered or to evaluate the services performed and completed. The contracting officer may not specify a longer acceptance period in a contract for the acquisition of a brand-name commercial item for authorized resale.³⁴

Failure to Annotate a Proper Invoice: Constructive Receipt

If the DBO fails to annotate an invoice with the date of actual receipt, the invoice is deemed received by the agency on the invoice date.³⁵ The date that the invoice was actually received and the date that the property or services were actually or constructively accepted by the agency are not relevant.

In the scenario, the office of the COR actually received the invoice on 22 May 1995. The COR properly annotated the invoice with the date received. The COR accepted the custodial services performed and completed by XYZ within seven days—on 25 May 1995—by certifying the invoice for payment. Because the custodial services performed and completed by XYZ were accepted by the Department of the Army before the seventh day after the services were performed and completed by XYZ, and because the invoice was received by the COR—22 May 1995—before the services performed and completed were accepted by the COR, the invoice is considered "received" by the Department of the Army on 25 May 1992.

This date is used to determine the required payment date and is also the date that an interest penalty begins to accrue, if at all. If the COR had failed to annotate the invoice with the date actually received, the invoice would have been deemed to have been received on the date appearing on the invoice—19 May 1995, and this date would have been used to determine the required payment date and the accrual of any late payment interest penalty.

²⁶ 31 U.S.C. § 3901(a)(4) (1988); OMB Circ. A-125 (Rev.) § 1(n)(1) (1989); FAR, *supra* note 12, 32.905(a)(1).

²⁷ OMB Circ. A-125 (Rev.) § 1(a) (1989).

²⁸ *Id.* § 1(o) (1989); FAR, *supra* note 12, 32.902.

²⁹ OMB Circ. A-125 (Rev.) § 1(i) (1989); FAR, *supra* note 12, 32.902.

³⁰ OMB Circ. A-125 (Rev.) § 1(i) (1989); FAR, *supra* note 12, 32.902.

³¹ OMB Circ. A-125 (Rev.) § 4(b)(1) (1989); FAR, *supra* note 12, 32.905(h).

³² 31 U.S.C. § 3901(a)(4)(A)(ii) (1988); OMB Circ. A-125 (Rev.) § 1(n)(1) (1989); FAR, *supra* note 12, 32.905(a)(1)(ii).

³³ OMB Circ. A-125 (Rev.) § 1(n)(1)(i) (1989); FAR, *supra* note 12, 32.905(a)(1)(ii).

³⁴ OMB Circ. A-125 (Rev.) § 1(n)(1)(i) (1989); FAR, *supra* note 12, 32.905(a)(1)(ii).

³⁵ 31 U.S.C. § 3901(a)(4)(B) (1988); OMB Circ. A-125 (Rev.) § 1(n)(2) (1989).

When Is Payment Due Under the PPA?

The Required Payment Date

The "required payment date," referred to as "the date that payment is due" or the "due date," is the date the agency should pay a proper invoice.³⁶ If payment is made on or before the required payment date, then payment is considered timely and no late payment interest penalty accrues.

Under the PPA, payment is due on the date specified in the contract.³⁷ All solicitations and contracts that are subject to the PPA must specify payment due dates.³⁸ If the contract does not establish a specific payment due date, then payment is due thirty days after a proper invoice is received by the agency.³⁹

Counting Days

For the purpose of determining the required payment date, "days" means calendar days, including weekends and holidays, unless the required payment date falls on a weekend or a holiday.⁴⁰ If the required payment date falls on a weekend or a holiday, payment may be made on the following business day without incurring a late payment interest penalty.⁴¹ When determining the required payment date, the rule is to count as "one" the day following the pertinent event.⁴²

Failure to Annotate a Proper Invoice—Reprise

If the DBO fails to annotate a proper invoice with the date of actual receipt, the invoice is considered received on the invoice date. Payment is due thirty days thereafter, without reference to

the date that the invoice was actually received or the date that the property or services were actually or constructively accepted by the agency.⁴³

Return of "Improper" Invoices

The DBO must review each invoice submitted by a contractor to insure that each is proper within the meaning of the PPA.⁴⁴ Deficient invoices are "improper" and must be returned to the contractor for correction. The DBO has seven days to return improper invoices to the contractor for correction, and the DBO must specify the reasons why an invoice is improper.⁴⁵ If the DBO fails to return an improper invoice to a contractor within seven days after it is actually received, the number of days that are available to the agency to pay the corrected invoice on time, without incurring a late payment interest penalty, is reduced by the number of days over seven that the DBO used to return the improper invoice to the contractor.⁴⁶

In the scenario, the contract did not establish a specific payment date. The invoice was proper in all respects, and the COR properly annotated it with the date that it was actually received, 22 May 1992. On 25 May 1992, less than seven days after the custodial services were performed and completed by XYZ, the COR certified the invoice for payment, thereby accepting the services. Payment of the invoice was due thirty calendar days thereafter, on 24 June 1992.

How Much Money Is Due a Contractor?

The "amount of the payment due" is the approved invoice amount.⁴⁷ It is this amount, or some unpaid portion thereof, that a late payment interest penalty, if any, will be paid. In the scenario,

³⁶ OMB Circ. A-125 (Rev.) § 1(k) (1989); FAR, *supra* note 12, 32.902.

³⁷ 31 U.S.C. § 3903(a)(1)(A) (1988); OMB Circ. A-125 (Rev.) § 4(e)(1) (1989).

³⁸ FAR, *supra* note 12, 32.903, 32.905(a)(1).

³⁹ 31 U.S.C. § 3903(a)(1)(B) (1988); OMB Circ. A-125 (Rev.) § 4(e)(2) (1989); FAR, *supra* note 12, 32.905(a)(1). "Receipt" is a term of art under the PPA. The definition encompasses its ordinary (and constructive) sense and concepts of actual and constructive acceptance.

⁴⁰ OMB Circ. A-125 (Rev.) § 1(h) (1989); FAR, *supra* note 12, 32.902.

⁴¹ OMB Circ. A-125 (Rev.) § 4(n) (1989). Currently, there is no equivalent provision in the FAR, and therefore, OMB Circular A-125 and the FAR are in conflict. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have proposed changes to the FAR that will bring it into accord with OMB Circular A-125. See 59 Fed. Reg. 23,776 (1994) (to be codified at 48 C.F.R. §§ 32, 52) (proposed May 6, 1994).

⁴² DEP'T OF ARMY, REG. 37-1, ARMY ACCOUNTING AND FUND CONTROL, para. 20-43(a) (30 Apr. 1991) [hereinafter Army Regulation 37-1].

⁴³ 31 U.S.C. § 3901(a)(4)(B) (1988); OMB Circ. A-125 (Rev.) § 1(n)(2) (1989); FAR, *supra* note 12, 32.905(a)(2).

⁴⁴ 31 U.S.C. § 3903(a)(7)(A) (1988); OMB Circ. A-125 (Rev.) § 4(b)(2) (1989).

⁴⁵ 31 U.S.C. § 3903(a)(7)(B) (1988); OMB Circ. A-125 (Rev.) § 4(b)(3) (1989); FAR, *supra* note 12, 32.905(e).

⁴⁶ 31 U.S.C. § 3903(a)(7)(C); OMB Circ. A-125 (Rev.) §§ 4(b)(4), 7(a)(7) (1989); FAR, *supra* note 12, 32.905(e), 32.907-1(b).

⁴⁷ The amount of the payment due also may include unpaid late payment interest penalties that have been added to the principal amount of the debt.

the amount of the payment due was \$20,000 (\$23,340, less \$3,340 for failure to meet AQLs).

When Is an Invoice "Paid" Within the Meaning of the PPA?

Determining when an invoice is paid is perhaps the most controversial issue under the PPA. An "invoice payment" is a disbursement of money by an agency to a contractor for the acquisition of property or services.⁴⁸ Invoices are paid by the designated payment office. The "designated payment office" is the office or employee designated in the contract to make invoice payments.⁴⁹

The PPA provides that payment is deemed to be made, depending on the method used by the agency,⁵⁰ either on the date that a check for payment is dated or on the date that an electronic fund transfer is made.⁵¹ Where a contractor's failure to receive payment is outside the control of the agency, the date that the contractor actually receives the payment is immaterial.⁵² To insure that agencies do not manipulate the payment rule of the PPA, the OMB mandates that checks must be mailed and electronic fund transfers must be made on the same date that the payment action is dated.⁵³

A recent decision of the Armed Services Board of Contract Appeals (ASBCA) has partially abrogated the payment rule of the PPA.⁵⁴ In the appeal of *Sun Eagle Corp.*,⁵⁵ the contractor sought

late payment interest penalties under the PPA on two invoices where the checks for payment had been "dated, signed, correctly addressed, and placed in an envelope for mailing in a timely manner"⁵⁶ but were stolen by an employee of an independent contractor before they could be mailed. Both checks were canceled by the agency and "[p]ayments were made several months later by replacement check."⁵⁷ The ASBCA held that the agency's invoice payments were late within the meaning of the PPA and found the agency liable for late payment interest penalties.⁵⁸

In the *Sun Eagle Corp.* decision,⁵⁹ the ASBCA stated that their understanding of the legislative intent of the PPA is that contractors "receive payments in a timely manner."⁶⁰ After discussing the general rule that, absent an agreement to the contrary, a check constitutes only conditional payment by the drawer and does not liquidate a debt until it has been presented for payment by the drawee,⁶¹ the ASBCA "found no indication that Congress may have intended to change this judicially developed rule or establish a different rule for payments by check."⁶²

Arguably, the ASBCA's focus on the contractor's receipt of payment and liquidation of the debt misses the point of the PPA. The payment rule of the PPA only establishes the agency's obligation to deliver payment in a timely manner with the corresponding duty to pay a late payment interest penalty for not honoring that obligation. The ASBCA is correct in asserting that Congress did not intend to change the conditional payment rule when the discharge of an agency's debt is germane. However, it does not follow that Congress necessarily intended a contractor's receipt

⁴⁸ FAR, *supra* note 12, 32.902.

⁴⁹ OMB Circ. A-125 (Rev.) § 1(c) (1989); FAR, *supra* note 12, 32.902.

⁵⁰ 31 U.S.C. § 3901(a)(5) (1988); OMB Circ. A-125 (Rev.) § 1(m); FAR, *supra* note 12, 32.902 [hereinafter payment rule of the PPA].

⁵¹ The date that an electronic fund transfer is made is known as the "settlement day" in the banking and finance industry.

⁵² *Matter of Four Square Constr. Co.*, 64 Comp. Gen. 32 (1984).

⁵³ OMB Circ. A-125 (Rev.) § 4(n) (1989); FAR, *supra* note 12, 32.903. The FAR provision currently provides that "[c]hecks will be mailed and electronic funds [sic] transfers will be transmitted on or about the same day the payment action is dated." The proposed changes to the FAR, if implemented, will bring this provision in line with the OMB Circular A-125. See 59 Fed. Reg. 23,776 (1994) (to be codified at 48 C.F.R. §§ 2, 52) (proposed May 6, 1994).

⁵⁴ *Sun Eagle Corp.*, ASBCA Nos. 45985, 45986, 94-1 BCA ¶ 26,425.

⁵⁵ *Id.*

⁵⁶ *Id.* at 131,461.

⁵⁷ *Id.*

⁵⁸ *Id.* at 131,464.

⁵⁹ *Id.*

⁶⁰ *Id.* at 131,463.

⁶¹ See, e.g., *United States v. Forcellati*, 610 F.2d 25 (1st Cir.), *cert. denied*, 445 U.S. 944 (1979).

⁶² 94-1 BCA, *supra* note 54, at 131,463.

of payment to dispose of the issue whether payment is late within the meaning of the PPA. Congress intended that the PPA "be administered in such a way as to provide for payment on the date [that] payment is due" but arguably did not intend that a late payment interest penalty be paid in the event that a check—dated on the date that payment is due—did "not reach a contractor until three or five days later."⁶³ Congress wanted to make the PPA:

as easy to administer as possible. Therefore, recognizing that brief delays may follow the date a government check is dated for payment or leaves the government's payment office, the Committee decided that the government's obligation to make payment would nonetheless be considered fulfilled as of the date the government's check is dated for payment. Only in this way is it possible for the government to assess its interest penalties before a check is issued . . .⁶⁴

*Sun Eagle Corp.*⁶⁵ seems to indicate that payment is deemed to be made under the PPA on the date that a check for the payment is dated—unless the contractor does not receive the check—in which case payment is not made under the PPA. Stated this way, it seems that the ASBCA's faulty reasoning is exposed, and it appears that *Sun Eagle Corp.*⁶⁶ is an aberration lacking precedential value.⁶⁷

In the scenario, the FAO paid XYZ on 28 August 1995, the date that the check for payment was dated.

When Is Payment of an Invoice Considered "Late" Within the Meaning of the PPA?

If an agency fails to pay a contractor on or before the required payment date, payment is late within the meaning of the PPA, and a late payment interest penalty must be paid on the amount of the payment due.⁶⁸ Contractors are not entitled to late payment interest penalties of less than one dollar.⁶⁹ Any late payment interest penalty owed by an agency must be paid automatically, whether or not the contractor has requested it.⁷⁰

The late payment interest penalty begins on the day after the required payment date and ends on the date that the principal amount of the debt and any accrued interest is paid.⁷¹ A late payment interest penalty will not continue to accrue after a claim for the late payment interest penalty is filed under the Contract Disputes Act (CDA) of 1978, or for more than one year.⁷²

The late payment interest penalty is computed at the interest rate established by the Secretary of the Treasury for interest payments under section twelve of the CDA that is in effect on the day after the required payment date.⁷³ This interest rate is known as the "Renegotiation Board Interest Rate," the "Contract Disputes Act Interest Rate," or the "Prompt Payment Act Interest Rate."⁷⁴ The interest rate is set semiannually and is published in the *Federal Register* on or about the first of January and the first of July.⁷⁵

A late payment interest penalty accrues daily on the amount of the payment due from the day after the required payment date

⁶³ S. REP. No. 302, 97th Cong., 1st Sess. 11 (1981).

⁶⁴ *Id.*

⁶⁵ *Sun Eagle Corp.*, ASBCA Nos. 45985, 45986, 94-1 BCA ¶ 26,425.

⁶⁶ *Id.*

⁶⁷ Compare *Sun Eagle Corp.*, *supra* note 65, with *Toombs and Co., Inc.*, ASBCA Nos. 35085, 35086, 89-1 BCA ¶ 21,402 (CCH, 1989) (remarking with approval on the payment rule as expressed in the statute) and *Ricway, Inc.*, ASBCA No. 29983, 86-2 BCA ¶ 18,841 (CCA, 1986) (remarking with approval on the payment rule as expressed in the statute) and *Zinger Constr. Co.*, ASBCA No. 31221, 85-3 BCA ¶ 18,508 (CCH, 1985) (emphasizing the payment rule expressed in the statute).

⁶⁸ 31 U.S.C. § 3902(a) (1988); OMB Circ. A-125 (Rev.) §§ 4(k), (p) (1989); FAR, *supra* note 12, 32.903, 32.907-1(a)(4).

⁶⁹ 31 U.S.C. § 3902(c)(1) (1988); OMB Circ. A-125 (Rev.) § 7(a)(8) (1989); FAR, *supra* note 12, 32.907-1(e).

⁷⁰ 31 U.S.C. § 3902(c)(1) (1988); OMB Circ. A-125 (Rev.) §§ 4(k), (p), 7(b)(2) (1989); FAR, *supra* note 12, 32.903, 32.907-1(a).

⁷¹ 31 U.S.C. § 3902(b) (1988); OMB Circ. A-125 (Rev.) § 7(a)(2) (1989).

⁷² 31 U.S.C. § 3907(b)(1) (1988); OMB Circ. A-125 (Rev.) § 13(a)(2) (1989); FAR, *supra* note 12, 32.907-1(e).

⁷³ 31 U.S.C. § 3902(a) (1988); OMB Circ. A-125 (Rev.) §§ 1(d), 7(a)(1) (1989); FAR, *supra* note 12, 32.907-1(d).

⁷⁴ OMB Circ. A-125 (Rev.) § 1(d) (1989); FAR, *supra* note 12, 32.907-1(d).

⁷⁵ 31 U.S.C. § 3902(a)(1988); OMB Circ. A-125 (Rev.) § 1(d) (1989); FAR, *supra* note 12, 32.907-1(d). A list of PPA interest rates from July 1971 to the present may be found in the *Government Contracts Reporter* at 26,630.

until payment of the principal amount of the debt and any accrued interest is made.⁷⁶ The amount of an accrued late payment interest penalty unpaid after a thirty-day period is added to the principal amount of the debt.⁷⁷ The late payment interest penalty continues to accrue so long as it remains unpaid, or until a claim for the unpaid late payment interest penalty is filed under the CDA, or a year has elapsed, whichever occurs first.⁷⁸

Only one interest rate is used to calculate the late payment interest penalty on any one late invoice payment even if the interest rate changes during the period that the late payment interest penalty is owed.⁷⁹ Because the PPA interest rate remains fixed, an agency may not take advantage of downward fluctuations in the interest rate.⁸⁰ This rule is consistent with Congressional intent that agencies not shop for interest rates by manipulating the dates that payments are made.⁸¹

If a late payment interest penalty is not paid automatically on the same date that the approved amount of the underlying invoice is paid, but paid at a later date or not at all, an interesting problem may arise concerning the monthly compounding of a late payment interest penalty. According to Renner:⁸²

[a] literal reading of the statute ("an amount of an interest penalty unpaid after any thirty-day period shall be added to the principal amount") and [the] FAR ("interest accrued at the end of any thirty-day period will be added to the approved invoice payment amount") leads to the conclusion that interest will not compound if payment is made on or before the twenty-ninth day after payment is late.⁸³

Application of the PPA as a waiver of sovereign immunity must be construed narrowly.⁸⁴ If a late payment interest penalty is not automatically paid on the same date that the approved amount of the underlying invoice is paid, but is paid at a later date

or not at all, a late payment interest penalty cannot accrue on the unpaid amount of any late payment interest penalty until it is added to (and becomes a part of) the principal amount of the debt—that is, until after thirty days have elapsed. For example, if an invoice is paid less than thirty days after the required payment date, and the late payment interest penalty is paid at a later date, but still less than thirty days after the required payment date, a late payment interest penalty cannot accrue on the unpaid amount of the accrued late payment interest penalty because it has not been added to the principal amount of the debt. The same result occurs when the late payment interest penalty is paid later than thirty days after the required payment date although only for the period during the first thirty days after the required payment date.

Calculating Late Payment Interest Penalties—the Hard Way

The formula to calculate late payment interest penalties follows:

$$\text{Principal} \times \frac{\text{Interest Rate}}{360} \times \text{Days} = \text{Interest Penalty}$$

The calculation is based on a 365-day year.⁸⁵ Because the late payment interest penalty is compounded monthly, the number of days used in any one equation will never exceed thirty.

In the scenario, the FAO paid a late payment interest penalty to XYZ. How much interest under the PPA did the FAO pay to XYZ on the date that the invoice was paid? The F&AO paid XYZ on the invoice sixty-five days after the required payment due date. Because accrued PPA interest that remains unpaid is compounded monthly, only the first thirty days that the payment was late may be captured in the first equation. The PPA interest rate in effect on the day after the date of the required payment due date was six and seven-eighths percent or .06875.

⁷⁶ 31 U.S.C. § 3902(c)(1) (1988); OMB Circ. A-125 (Rev.) §§ 4(k), (p), 7(b)(2) (1989); FAR, *supra* note 12, 32.903, 32.907-1(a), (d).

⁷⁷ This is known as "compound interest" in the banking and finance industry, and accrued interest added to the principal amount of the debt after a thirty-day period is "compounded monthly."

⁷⁸ 31 U.S.C. § 3902(e) (1988); FAR, *supra* note 12, 32.907-1(d).

⁷⁹ 31 U.S.C. § 3902(a) (1988); FAR, *supra* note 12, 32.907-1(d). This rule does not apply when calculating interest under the CDA.

⁸⁰ Renner, *supra* note 4, at 226.

⁸¹ S. REP. NO. 302, *supra* note 63, at 11; Renner, *supra* note 4, at 226.

⁸² Renner, *supra* note 4, at 226.

⁸³ *Id.* at 226-27.

⁸⁴ See, e.g., *Library of Congress v. Shaw*, 478 U.S. 310 (1986); Renner, *supra* note 4, at 183-87, 226-27.

⁸⁵ OMB Circ. A-125 (Rev.) § 7(a)(11) (1989).

$$\$20,000 \times \frac{.06875}{360} \times 30 = \$114.58$$

Because the late payment interest penalty is compounded monthly, \$114.58 must be added to the principal amount of the debt.

$$\$20,000 + \$114.58 = \$20,114.58$$

$$\$20,114.58 \times \frac{.06875}{360} \times 30 = \$115.24$$

The final equations capture the remaining five days that invoice payment was late.

$$\$20,114.58 + \$115.34 = \$20,229.82$$

$$\$20,229.82 \times \frac{.06875}{360} \times 5 = \$19.32$$

The sum of the results of the equations is the late payment interest penalty that the F&AO paid to XYZ on 28 August 1992.

$$\$114.58 + \$115.24 + \$19.32 = \$249.14$$

Calculating Late Payment Interest Penalties—the Easy Way

An easier and faster way to calculate late interest penalties under the PPA uses *Army Regulation 37-1 (AR 37-1)*,⁸⁶ which contains a chart entitled "Prompt Payment Act Interest Penalty Chart." The chart is a compendium of factors that reflects consideration of the number of days that an invoice payment may be late and includes the PPA interest rates from six through ten and seven-eighths percent. Each individual factor is adjusted to account for monthly compounding. The horizontal axis of the chart describes the PPA interest rate in effect on the day after an invoice payment is due. The vertical axis describes the number of days that an invoice payment is late. To use the chart to calculate a late payment interest penalty, multiply the amount of the payment due by the factor that appears at the intersection of the horizontal and vertical axes.

In the scenario, assume the invoice was paid thirty days late. The PPA interest rate in effect on the day after the required payment date was .06875. The factor that appears at the intersection of the horizontal (.06875) and vertical (30) axes is .0057292.⁸⁷ Multiply this factor by the amount of the payment due to yield the late payment interest penalty.

$$.0057292 \times \$20,000.00 = \$114.58$$

Calculating Late Payment Interest Penalties—Revisited

If, in the scenario, the FAO had failed to pay XYZ the late payment interest penalty, all of the factors in the calculation would remain the same, but the late payment interest penalty would accrue for the entire year.

$$\$20,000 \times \frac{.06875}{360} \times 30 = \$114.58$$

$$\$20,000 + \$114.58 = \$20,114.58$$

$$\$20,114.58 \times \frac{.06875}{360} \times 30 = \$115.24$$

$$\$20,114.58 + \$115.24 = \$20,229.82$$

$$\$20,229.82 \times \frac{.06875}{360} \times 5 = \$19.32$$

In the following equations, note that the interest is not compounded because unpaid late payment interest penalties are not added to the principal amount of the debt until thirty days have passed.

On 28 August 1992, the F&AO paid XYZ the approved amount of the invoice. The following equations must reflect a reduction of the principal in an amount of \$20,000.

$$\$20,229.82 - \$20,000.00 = \$229.82$$

$$\$229.82 \times \frac{.06875}{360} \times 25 = \$1.10$$

$$\$229.82 + \$19.32 + \$1.10 = \$250.24$$

$$\$250.24 \times \frac{.06875}{360} \times 30 = \$1.43$$

$$\$250.24 + \$1.43 = \$251.67$$

$$\$251.67 \times \frac{.06875}{360} \times 30 = \$1.44$$

$$\$251.67 + \$1.44 = \$253.11$$

$$\$253.11 \times \frac{.06875}{360} \times 30 = \$1.45$$

$$\$253.11 + \$1.45 = \$254.56$$

⁸⁶ AR 37-1, *supra* note 42, at 811.

⁸⁷ *Id.* at 812.

$$\$254.56 \times \frac{.06875}{360} \times 30 = \$1.46$$

$$\$254.56 + \$1.46 = \$256.02$$

$$\$256.02 \times \frac{.06875}{360} \times 30 = \$1.47$$

$$\$256.02 + \$1.47 = \$257.49$$

$$\$257.49 \times \frac{.06875}{360} \times 30 = \$1.48$$

$$\$257.49 + \$1.48 = \$258.97$$

$$\$258.97 \times \frac{.06875}{360} \times 30 = \$1.48$$

$$\$258.97 + \$1.48 = \$260.45$$

$$\$260.45 \times \frac{.06875}{360} \times 30 = \$1.49$$

$$\$260.45 + \$1.49 = \$261.94$$

$$\$261.94 \times \frac{.06875}{360} \times 30 = \$1.50$$

$$\$261.94 + \$1.50 = \$263.44$$

If the FAO had failed to pay XYZ the late payment interest penalty, the Department of the Army would have owed XYZ a late payment interest penalty in the amount of \$263.44.

When an agency fails to pay the late payment interest penalty on the same date that the approved amount of the invoice is paid, it is not possible to calculate the late payment interest penalty the "easy way" without sacrificing accuracy. Using the example above, the shorthand method achieves a result that is very close to the correct amount of the late payment interest penalty.

The first step is to calculate the late payment interest penalty as if it had been paid on the same date that the approved amount of the invoice was paid. The \$20,000 was paid to XYZ sixty-five days late, and the PPA interest rate in effect on the day after payment was due was .06875. The factor that appears at the intersection of the horizontal (.06875) and the vertical (65) axes of the

chart in AR 37-7⁸⁸ is .0124132. Multiply this factor by the approved amount of the invoice.

$$.0124132 \times \$20,000 = \$248.26$$

The next step is to figure the late payment interest penalty on this amount. In the scenario, this amount was not paid for another 295-days. The factor that appears at the intersection of the horizontal (.06875) and vertical (295) axes of the chart in AR 37-7⁸⁹ is .0563368.⁹⁰ Multiply this factor by the late payment interest penalty on the approved amount of the invoice.

$$.0563368 \times \$248.26 = \$13.99$$

The final step is to add the two results.

$$\$248.26 + \$13.99 = \$262.25$$

The result using the shorthand method is within \$1.19 of the correct result.

If, in the scenario, the FAO had paid the approved amount of the invoice twenty-nine days after payment was due and paid the late payment interest penalty on the sixty-ninth day, what would be the amount of the late payment interest penalty?

Once again, the PPA interest rate in effect on the day after the payment was due was .06875. To capture the first thirty days of the late payment interest penalty, two equations are necessary to account for the payment of the approved amount of the invoice on the twenty-ninth day.

$$\$20,000 \times \frac{.06875}{360} \times 29 = \$110.76$$

You can also do the first equation the easy way by multiplying the factor that appears at the intersection of the horizontal (.06875) and vertical (29) axes of the chart in AR 37-7⁹¹ by the approved amount of the invoice.

$$.0055382 \times \$20,000 = \$110.76$$

A late payment interest penalty in the amount of \$110.76 should have been paid automatically to XYZ on the same day that the approved amount of the invoice was paid. Because the FAO paid the approved amount of the invoice on the twenty-ninth day after the required payment due date, but did not automatically pay the late payment interest penalty at the same time,

⁸⁸ *Id.* at 811.

⁸⁹ *Id.*

⁹⁰ *Id.* at 818.

⁹¹ *Id.* at 812.

\$20,000 must be subtracted from the principal for the second equation, which accounts for the last day of the first thirty-day period after the required payment date.

$$\$20,000 - \$20,000 = \$0$$

$$\$0 \times \frac{.06875}{360} \times 1 = \$0$$

On the thirtieth day after the required payment date, the unpaid late payment interest penalty that accrued was added to the principal amount of the debt.

$$\$0 + \$110.76 + \$0 = \$110.76$$

In the modified scenario above, the late payment interest penalty remained unpaid for another thirty-nine days before the FAO paid it.

$$\$110.76 \times \frac{.06875}{360} \times 30 = \$0.63$$

$$\$110.76 + \$0.63 = \$111.39$$

$$\$111.39 \times \frac{.06875}{360} \times 9 = \$0.19$$

$$\$111.39 + \$0.19 = \$111.58$$

When the FAO paid the late payment interest penalty on the sixty-ninth day after the required payment date, it paid a late payment interest penalty to XYZ in the amount of \$111.58.

Conclusion

Various rules and regulations govern the calculation of late payment interest penalties under the PPA, and an attorney's understanding of how late payment interest penalties are calculated can benefit the client. An attorney can never know too much about his or her client's business. Understanding how late payment interest penalties are calculated means that the other legal aspects of the PPA may be mastered without difficulty.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin (Bulletin)* 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 Systems, Environmental Law Conference, with limited distribution of hard copies. Below is the content of the latest issue (volume 2, number 10):

Endangered Species Regulation Upheld by the Supreme Court

On 29 June 1995, the United States Supreme Court ruled in favor of the Department of Interior and environmental groups in *Babbitt, Secretary of Interior v. Sweet Home Chapter of Communities for a Great Oregon*.¹ The Supreme Court upheld the Interior Department's regulation that interprets the "take" provision of the Endangered Species Act (ESA). The Interior Department's

regulation prohibits "taking" a listed species by causing indirect harm to a species through adverse habitat modification.

The Court found that the Interior's prohibition against adverse habitat modification was reasonable, despite its potentially severe economic or social consequences. The Court also found that the regulation furthers the ESA's broad purpose of providing comprehensive protection for threatened and endangered species. Writing for a six to three majority, Justice Stevens rejected the court of appeal's ruling that the ESA only prohibits direct harms to endangered species. The Court's defense of the ESA and implementing regulations confirms the vitality of the ESA and the necessity of continued compliance. Major Ayers.

Clean Water Act Enforcement

The Ninth Circuit recently held that citizen suits seeking enforcement of effluent limitations under the Clean Water Act also can seek enforcement of water quality standards contained in national pollutant discharge elimination system (NPDES). Water quality standards are designed to protect designated uses, such as fishing. In addition to numeric limitations of effluents, water

¹ No. 94-859, 1995 U.S. LEXIS 4463 (June 29, 1995).

quality standards include narrative conditions.² Examples of narrative limits include various aesthetic conditions such as eliminating the presence of oil sheens, odor, and floatables.

The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) based reversal of its prior decision on the Supreme Court's holding in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*.³ The Supreme Court ruled that the Washington Department of Ecology could condition certification of a generating plant on water quality standards and effluent limitations.

Installation NPDES permits likely contain water quality standards. Although this decision is limited to the Ninth Circuit, environmental law specialists should be aware that environmental groups may become more aggressive in challenging violations of water quality standards contained in NPDES permits. This is especially important to keep in mind when negotiating the conditions of these permits. Major Saye.

Water Rights Litigation

Captain Stanton, Litigation Branch, Environmental Law Division (ELD), will now handle issues associated with water rights litigation previously handled by Major Saye. Major Saye will continue to deal with any water rights issues that do not involve litigation. Major Saye.

Discovery Requirements

When the Army is named as a party in an environmental law suit, the case is forwarded to the ELD which assigns an ELD litigator to the case. Early on, the ELD litigator needs information about the Army's position in the case to comply with initial disclosure requirements or to respond to an interrogatory or document request. To obtain that information, the ELD litigator goes directly to the source, the installation attorney.

Support from installation attorneys is essential to the Army's litigation success. When the ELD litigator contacts an installation attorney, the installation attorney needs to remember that the Army is obligated, pursuant to the federal and local rules of civil procedure, to disclose information, documents, and names of potential witnesses to the opposing party. Under Federal Civil Procedure Rule (FCPR) 26(b)(1), the Army (practically speaking, the installation attorney) is obligated to look for relevant information or information likely to lead to relevant information. If an installation attorney identifies possible privileged information, then

the installation attorney must alert the ELD litigator with an explanation why it should be considered privileged information and excluded from discovery. The installation attorney must forward all documents and information to the ELD litigator. The installation attorney should include a memorandum explaining what has been found, the search methodology, and whether the search has been completed. Under FCPR 26 and many local court rules, a timely response is necessary because the ELD litigator must make initial disclosures to the opposing counsel early in the case. Timely responses help the credibility of the ELD litigator if all of the important information is presented early in the case. Under FCPR 26(g)(1), the ELD litigator must sign the interrogatory response, certifying that the Army has completed a thorough search for information, and that the installation attorney copied and forwarded all of the relevant information found. Under FCPR 26(e), the government has a continuing obligation to search for information as it develops to supplement the discovery request. Finally, under FCPR 37, the failure to comply with the rules of discovery can lead to an order for monetary sanctions or contempt orders. Additionally, the installation attorney may have to redo a search. Conversely, if an installation attorney completes the search thoroughly and timely, letters of appreciation should follow. Mrs. Greco.

Clean Air Act

Army Conformity Guidance

The Director of Environmental Programs recently issued policy guidance to the field on meeting the statutory and regulatory Clean Air Act (CAA) general conformity requirements.⁴ This guidance, published through technical channels, provides a detailed explanation of general conformity requirements and establishes Army processing procedures. The guidance requires an installation to prepare a Record of Nonapplicability (RONA), signed by the installation's environmental coordinator. The RONA documents a decision not to prepare a written conformity determination for an action. Installations must forward draft conformity determinations to the Army Environmental Center for review and comment before offering the document for public comment. The Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health) must sign final conformity determinations.

Environmental Protection Agency Guidance on Title V Compliance Assessments

On 3 July 1995, the Environmental Protection Agency (EPA) issued policy guidance⁵ to relieve growing anxiety over Title V

² See *Northwest Environmental Advocates v. City of Portland*, No. 92-35044, 1995 U.S. App. LEXIS 13761 (9th Cir. June 7, 1995).

³ 114 S. Ct. 1900 (1994).

⁴ Memorandum, Headquarters, Department of the Army, DAIM-ED-C, subject: General Conformity Under the Clean Air Act—Policy and Guidance (27 June 1995).

⁵ Memorandum, Kathie A. Stein, Director, Air Enforcement Division and Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, subject: Initial Operating Permit Application Compliance Certification Policy (3 July 1995) [hereinafter Compliance Memorandum].

compliance certification requirements.⁶ Each Title V operating permit application must contain "a description of the compliance status of the source with respect to all applicable requirements."⁷ If an installation is not in compliance, the application must include a compliance plan and schedule. The "responsible official,"⁸ normally the installation or garrison commander, must certify the truth, accuracy, and completeness of the information provided in the application.

Public and private sources have expressed increasing concern over Title V compliance certification. Title V compliance certification is designed to insure that all requirements—like preconstruction reviews and permit requirements—have been met. Public and private sources are concerned that the Title V compliance certification process will require costly and resource intensive reviews of past modifications, which may be numerous and lack documentation. Without these reviews, the responsible official would be at risk in signing the compliance certification.

The EPA's new guidance provides little solace—very little. Essentially, the guidance states that sources "are not federally required to reconsider previous applicability determinations as part of their inquiry in preparing Title V permit applications."⁹ For example, an installation that determined that a preconstruction permit was not required for a facility modification in 1992 does not have to re-evaluate that determination as part of the Title V application process. States, however, may require such a review. Moreover, the EPA guidance provides the following caveat:

[The] EPA expects companies to rectify past noncompliance as it is discovered. Companies remain subject to enforcement actions for any past noncompliance with requirements to obtain a permit or meet air pollution control obligations. In addition, the title V permit shield is not available for noncompliance with applicable requirements that occurred prior to or continues [sic] after submission of the application.¹⁰

Consequently, installations need not look behind previous apparently reasonable applicability determinations, unless otherwise required by the state. The guidance, however, provides no relief in cases where an installation overlooked CAA requirements or made unreasonable applicability determinations. Moreover, an installation must resolve any noncompliance issues discovered in the Title V application process. Major Teller.

⁶ See USALSA Report, Environmental Law Div. Notes, *Clean Air Act (CAA)*, ARMY LAW., June 1995, at 47 (explaining Title V compliance assessment).

⁷ 40 C.F.R. § 70.5(c)(8) (1995).

⁸ *Id.* § 70.2.

⁹ Compliance Memorandum, *supra* note 5.

¹⁰ *Id.*

¹¹ 40 C.F.R. § 70.2.

Major Source Determinations

The Services are working with the EPA to obtain formal guidance to allow more flexibility in making source determinations for military installations under Title V Operating Permit, New Source Review, and Hazardous Air Pollutant programs. Currently, some EPA regions and states are inflexibly treating military installations as single sources. Pending EPA guidance—possibly within the next few months—installations should continue to work with states in appropriate cases to treat installations as multiple sources in deciding the applicability of CAA permit requirements. Source determinations are fact specific and made on a case-by-case basis. Generally, however, the following types of tenant activities should be eligible for separate source treatment under the EPA's definition of "major source."¹¹

a. Tenant activities under the control of a different Service (Navy, Marine Corps, Air Force, National Guard, and Reserve Components), department, agency, or a state or local governmental agency.

b. In special circumstances, collocated Army activities that are separately commanded and funded through separate major command channels.

c. Commercial and retail activities that do not directly support the primary function of the installation, including civilian reuse activities and facilities providing personal services to the public, such as restaurants, commissary facilities, military exchanges, banks, gas stations, movie theaters, and dry cleaners.

d. Contractor-operated facilities, under a lease or agreement, which do not directly support a primary function of the installation. For example, a missile plant operated by a defense contractor producing missiles used primarily at other installations worldwide.

e. Activities that constitute a functionally distinct, major industrial grouping, such as an airport, manufacturing plant, or hospital, and the activity does not directly support a primary mission and function of the installation.

f. Activities that are geographically separated by significant distance or state air quality district or airshed boundaries (considered to be functionally noncontiguous).

Potential to Emit Under CAA Title III

The EPA recently issued important guidance for installations that are considering limiting their potential to emit (PTE) to avoid the emerging maximum achievable control technology (MACT) requirements under the CAA Title III.¹² The guidance states that, any time before the first compliance date established by a MACT standard, facilities may limit their PTE below the major source threshold level through federally enforceable limits called "synthetic minor status." After the first compliance date specified by an MACT standard, sources will not be able to avoid MACT requirements by establishing federally enforceable limits on PTE. Moreover, once a source becomes subject to a MACT standard, it must comply with that standard permanently—"once in, always in"—irrespective of subsequent emissions reductions.¹³ Sources subject to MACT standards also are automatically subject to the Title V Operating Permit program. However, a major source that reduces its emissions below the major source threshold will be considered a minor source for future MACT standards. Thus, a source may be major for some MACT standards and minor for other MACT standards.

Installations should carefully evaluate the feasibility of limiting their PTE for hazardous air pollutants (HAP) below the major source threshold level under Title III. Installations can accomplish this by obtaining federally enforceable limits on HAP emissions through state operating permits, preconstruction permits, or an installation's Title V Operating Permit.¹⁴

The Environmental Protection Agency's White Paper on Title V Applications

On 10 July 1995, the EPA issued major new guidance to streamline the Title V permit application process.¹⁵ The guidance covers many topics relating to permit applications, including: providing emissions estimates; identifying State Implementation Plan (SIP) requirements; excluding trivial activities; group treatment of classes of activities; treatment of short-term activities; incorporation of preconstruction permits; amending the application; and compliance assessments. The new guidance should significantly simplify the application process for installations. Major Teller.

Munitions Rule

On 25 May 1995, the EPA provided the Department of Defense (DOD) a draft of the munitions rule with a request for the DOD's comments by 15 June 1995. On 15 June, the Directorate of the Under Secretary of Defense (Environmental Safety) pro-

vided general comments to Mr. Elliott Laws, the EPA Assistant Administrator for Solid Waste and Emergency Response. The DOD working group forwarded detailed comments to the EPA point of contact. The comments addressed the following areas of concern:

a. The draft munitions rule does not establish a national standard for The Resource Conservation and Recovery Act (RCRA) regulation of waste military munitions. Although the EPA is receptive to a national standard, the EPA feels constrained by the RCRA's state primacy approach. The DOD is considering a legislative fix to this issue.

b. The draft munitions rule scatters the waste munitions requirements throughout the existing RCRA regulations making it difficult for the Services or regulators to determine the applicable requirements. The DOD has proposed that the EPA consolidate all requirements dealing with waste military munitions into a separate part of the Code of Federal Regulations which also would help establish national standards.

c. The draft munitions rule imposes RCRA requirements in areas that are adequately addressed in other statutes and regulations. For example, the storage and transportation standards established by the DOD and the Department of Transportation. These regulations are at least as stringent as those proposed under RCRA. The draft rule also imposes RCRA clean-up requirements on closed or closing ranges. This is an area already addressed under other statutory and regulatory bases, such as the Defense Environmental Restoration Program and The Comprehensive Environmental Response, Compensation, and Liability Act.

d. The draft munitions rule does not specifically exclude the DOD's Resource Recovery and Reuse Program from RCRA regulation. Failure to do so may result in viewing disassembly and recycling activities as treatment activities.

e. The EPA has not addressed the regulatory impact of the proposed munitions rule, despite their acknowledgement that the munitions rule is "significant." The DOD urged that the EPA conduct a full regulatory impact analysis, and an analysis of the munitions rule's integration with other environmental laws.

Additionally, on 15 June 1995, Mr. Laws invited the DOD to submit a draft of the rule as it thought it should read. The DOD working group has drafted a proposed munitions rule and is staffing it with the services. The DOD and the EPA will meet with the Office of Management and Budget staff in late July to discuss remaining issues. The Department of Interior and the Department of Energy expressed interest and also may attend. Lieutenant Colonel Bell.

¹² Memorandum, EPA Office of Air Quality Planning and Standards, subject: Potential to Emit for MACT Standards (16 May 1995).

¹³ *Id.*

¹⁴ See USALSA Report, Environmental Law Div. Notes, *Clean Air Act (CAA), Limiting Potential to Emit*, ARMY LAW., Apr. 1995, at 57 (discussing limiting PTE).

¹⁵ Memorandum, EPA Office of Air Quality Planning and Standards, subject: White Paper for Streamlined Development of Part 70 Permit Applications (10 July 1995).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

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, Virginia 22903-1781.

Office Management Note

37th Legal Assistance Course

The 37th Legal Assistance Course is formally scheduled for the week of 16 to 20 October 1995 at The Judge Advocate General's School, Charlottesville, Virginia. Demand for this course from all services is consistently high. We anticipate that all 150 quotas will be filled well before the course is held. The course will continue to offer a wide spectrum of electives to accommodate all legal assistance practitioners. Expanded participation by instructors from the Navy Justice School and the Air Force Judge Advocate General's School is planned. Interested personnel should refer to the Continuing Legal Education News section of this issue of *The Army Lawyer* for information on obtaining a quota. Major Block.

Family Law Notes

When Is Property Not Really Property?

Military practitioners frequently are involved with division of retired pay as property under the terms of the Uniformed Ser-

vices Former Spouses' Protection Act (USFSPA).¹ Under the terms of the USFSPA, states were expressly authorized to divide disposable retired pay as "property."² Despite use of the term "property," a close look at Title 10 reveals that what is being called property may not meet traditional expectations.

Property in the context of divorce is generally classifiable as marital or community property as opposed to separate or nonmarital property.³ Through the divorce process, marital property is awarded in full or part shares to the parties, at which time it is recharacterized as separate property. Separate property in the classic sense is then freely alienable or devisable as each individual party sees fit.

Military retired pay divided in divorce as property fails to meet these traditional definitional expectations in several regards. First, it is inalienable during the life of the former spouse. A former spouse awarded a share of military retired pay as property is not free to sell or otherwise transfer his or her share.⁴ Second, military retired pay awarded as property cannot be devised after death.⁵ Accordingly, the former spouse's share of retired pay awarded as property reverts to the retiree for as long as the retiree survives the former spouse. All rights to retired pay terminate on the retiree's death.⁶ Survivors can continue to receive payments, not from retired pay, but from an annuity purchased through the Survivor Benefit Plan.⁷

Former spouses will likely continue to press for a share of retired pay as property, at least as long as the interest is allowed to survive remarriage.⁸ Legal assistance attorneys will want to insure that they understand the limitations on the "property" that former spouses will obtain. Major Block.

Child Support Enforcement Against Military Personnel

In February 1995, President Clinton signed an executive order focused on improving the federal government's responsive-

¹ Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451 (1993)).

² 10 U.S.C. § 1408(c) (1993).

³ Although true in the majority of United States jurisdictions, many jurisdictions retain a framework which permits all property of the parties to be divided. See 3 JOAN M. KRUSKOPF & JUDGE JOHN D. MONTGOMERY, FAMILY LAW AND PRACTICE 37-1 to 37-20 (Matthew Bender, Inc., 1994).

⁴ 10 U.S.C. § 1408(c)(2) (1993).

⁵ *Id.*

⁶ DEP'T OF DEFENSE, REG. 7000.14, FINANCIAL MANAGEMENT REGULATION, MILITARY PAY POLICY AND PROCEDURES FOR RETIRED PAY, vol. 7B, para. 70101 (June 1995). One recent example of this point being misunderstood can be found in the 24 July 1995 issue of *The Army Times*, the "Pay Watch" column, that reported that an illegitimate daughter would share the retired pay of a retiree who died in 1992. *Illegitimate Daughter to Share Retired Pay*, ARMY TIMES, Jul. 24, 1995, at 6.

⁷ 10 U.S.C. § 1447 (1993). Under 10 U.S.C. § 1450(f)(4), a court can order a person to elect to participate in the SBP to provide an annuity to a former spouse. An article in the issue of *The Army Times* incorrectly describes the SBP as a plan "that allows service members to bequeath a portion of their retired pay to their families." *Illegitimate Daughter to Share Retired Pay*, ARMY TIMES, Jul. 24, 1995, at 6.

⁸ See *Ex Spouse Debate Renewed*, ARMY TIMES, Jan. 23, 1995, at 20. Reporting Rep. Robert K. Dorman's promise to review the Uniformed Services Former Spouses' Protection Act. Military associations like The Retired Officers Association are specifically seeking a change that would terminate payments to former spouses on remarriage.

ness to child support enforcement efforts.⁹ While the President's order will likely stimulate new initiatives at the national level, some military legal offices already have established progressive relationships with their local state office of child support enforcement (OCSE).

Relationships with the local OCSE have the potential to be mutually reinforcing. For custodial parents, the local OCSE can offer services that can lead to creation and enforcement of court-ordered support obligations at little or no cost. This service is available to welfare and nonwelfare recipients and may be of particular interest to our significant military sole-parent population.

Military personnel who are the subject of child support enforcement efforts also may benefit from a relationship between the local OCSE and their legal office. Inquiries handled informally may result in reduced court costs and possibly greater willingness to cost share on blood testing. A fuller understanding of military support regulations and pay systems also can ensure that income and obligations are fairly stated.

One vehicle for opening a relationship with a local OCSE is to offer, or respond to an offer, to provide military support enforcement training. The TJAGSA Legal Assistance Branch has developed training materials for this purpose. The materials are updated regularly and have been used to train child support enforcement caseworkers, prosecutors, and even judges at state and national conferences.

The TJAGSA training materials are incorporated into a guide titled *Support Enforcement Against Military Personnel*, which has been uploaded onto the Legal Automation Army-Wide Systems (LAAWS) Bulletin Board System. Two versions have been uploaded: "CHILDSPT.ASC" in ASCII format and "CHILDSPT.WP5" in WordPerfect 5.0 format. Attorneys interested in incorporating the guide into training, or who have questions or suggestions regarding the guide, are encouraged to contact TJAGSA. Major Block.

Mobilization and Deployment Note

LAAWS Competence—A Readiness Issue

Mobilization and deployment inevitably draw on all of our legal resources. For example, surges in demand for wills fre-

quently create situations where all attorneys become legal assistance attorneys. Unfortunately, except for attorneys who work in legal assistance on a regular basis, few practitioners are familiar with the LAAWS will preparation software.¹⁰

Keeping attorneys competent to provide LAAWS-related services is not a new problem. Inadequate LAAWS training for active and Reserve Component attorneys was a common experience during Desert Shield/Storm mobilization and was formally observed by the Desert Storm Assessment Team (DSAT).¹¹ In response to this observation, TJAGSA incorporates LAAWS training into many of its significant active and Reserve Component courses.¹² The DSAT Report also anticipated the need for devotion of local continuing legal education time to LAAWS training. However, post-Desert Shield/Storm experiences have proven that this may not be enough.

As a practical matter, experience continues to be the best means of insuring LAAWS competence. Subject to conflicts constraints, legal offices should seek to involve *all attorneys*, and not just those assigned to legal assistance, in will preparation efforts using LAAWS software. Nonlegal assistance attorneys can be on rotating duty during preparation for overseas movement or sealift readiness program exercises, take legal assistance appointments for will preparations, and even prepare wills for office personnel.

Innovative solutions to recurring mobilization and deployment problems must remain a priority in legal assistance operations. Offices with successfully implemented programs are encouraged to share their experiences with TJAGSA's Legal Assistance Branch. Major Block.

Tax and Estate Planning Notes

Earned Income Credit

For the first time, eligible members of the United States Armed Forces stationed overseas will be able to receive the earned income credit when they file their 1995 income tax returns next year.¹³ This is good news for junior soldiers previously denied this credit because they did not live in the United States.

However, retirees recently have received some bad news. In *Franklin v. Commissioners*,¹⁴ the United States Tax Court ruled that military retirement pay does not constitute earned income

⁹ Exec. Order No. 12,953, 60 Fed. Reg. 11,013 (1995).

¹⁰ See also Legal Assistance Practice Note *Servicemen's Group Life Insurance (SGLI) Counseling—TJAGSA Training Outline Now on the BBS*, ARMY LAW., Sept. 1995, at 30.

¹¹ UNITED STATES ARMY LEGAL SERVICES AGENCY, DESERT STORM ASSESSMENT TEAM'S REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY, 25, 26 (22 Apr. 1992) [hereinafter DSAT REPORT].

¹² The LAAWS will preparation instruction is part of the Judge Advocate Triennial Training (JATT), Judge Advocate Officer Advanced Course (JAOAC), Judge Advocate Officer Basic Course (JAOBC), and Judge Advocate Officer Graduate Course.

¹³ I.R.C. § 32(c)(4) (RIA 1995) (amending I.R.C. § 32(c) (1994)).

¹⁴ *Franklin v. Commissioner*, 70 T.C.M. (CCH) 304 (1995).

within the meaning of the Internal Revenue Code (I.R.C.) § 32 and the earned income credit.¹⁵ Thus, a military retiree receiving no other compensation besides military retirement pay will not be eligible for the earned income credit.

Although the I.R.C. specifically excludes "pension" from the definition of earned income for purposes of determining entitlement to the earned income credit,¹⁶ the taxpayer in *Franklin* argued that military retirement pay is not a pension, but reduced compensation for current services.¹⁷ In rejecting the taxpayer's position, the Tax Court relied on *Barker v. Kansas*,¹⁸ which stated that "military retirement benefits are to be considered deferred pay for past services."¹⁹ Major Henderson.

Servicemen's Group Life Insurance (SGLI) Counseling— TJAGSA Training Outline Now on the BBS

Federal law treats insurance proceeds as part of the gross federal estate subject to taxation on death. For many soldiers, a significant contribution to this estate will come from SGLI. For most soldiers who elect full SGLI coverage (\$200,000), SGLI will represent their single largest estate asset.

Understanding the tax impact of SGLI and competently designating beneficiaries is critical to comprehensive estate planning. With the elimination of "by law" designations, this responsibility is not necessarily straightforward. Designation of minor beneficiaries further complicates the process.

In response to the need to provide considered, professional advice on disposition and tax impacts of SGLI, TJAGSA has developed and offered training specifically focused on SGLI coun-

seling. This training is offered as part of TJAGSA's biannual Legal Assistance Course.

For attorneys who have been unable to attend the Legal Assistance Course, a copy of the SGLI Counseling class outline has been uploaded on the LAAWS BBS under the title "SGLIOUT." Two versions of the outline are on the board: "SGLIOUT.ASC" in the ASCII format and "SGLIOUT.WP5" in WordPerfect 5.0 format. Attorneys with questions or suggestions regarding these materials are encouraged to contact TJAGSA's Legal Assistance Branch. Major Henderson.

International and Operational Law Notes

International Operational Law Augmentation Team Concept

"We have to prepare ourselves for wars we haven't seen yet and that we don't understand. We are not just changing what we think. We are changing how we think."²⁰

As the Revolution in Military Affairs (RMA) continues, its impact will affect how America's Armed Forces will fight.²¹ The armed forces of the "third wave" will be more mobile, flexible, and aware of the battle space in which they operate.²² The staff judge advocate assigned to joint combined interagency task forces will have to provide legal coverage over a wide-ranging operational area.²³

An operational support concept that a staff judge advocates should consider as they plan their operational law program is the operational law augmentation team. Initially developed in 1991

¹⁵ I.R.C. § 32(c)(2)(B)(ii) (RIA 1995).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 503 U.S. 594 (1992).

¹⁹ *Id.* at 605.

²⁰ David Wood, *Unlikely Radical Inspires Army to Do More with Less*, SUNDAY PATRIOT NEWS, Apr. 2, 1995, at A-12.

²¹ See Earl H. Tilford, Jr., *The Revolution in Military Affairs* (Strategic Studies Institute, June 23, 1995). The United States Army has been a leading force in this concept of rapid technological change through its Force XXI studies. Tilford warns in his monograph that America's fascination with the "silver bullet" of technology needs to be considered as the RMA moves forward into the 21st Century.

²² See *America's Army of the 21st Century*, Office of the Chief of Staff, United States Army, Wash. D.C. (Jan. 15, 1995). See also *Army Focus 94—Force XXI* at 9. As the United States Army Chief of Staff, Gordon R. Sullivan declared:

Force XXI will leverage the capabilities of the latest technologies to optimize the skill and courage of our soldiers. We will integrate information age technology with our tactical units. We will redesign units, built around people and new technologies, to enhance their agility, versatility, and lethality. *Id.*

²³ See INTERNATIONAL AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK, ch. 2, at 1-1; app. E-1 (June 1995) [hereinafter OPERATIONAL LAW HANDBOOK].

by the Office of the Staff Judge Advocate, United States Army Special Forces Command (Airborne), this package supports group judge advocates deploying with their groups on operational or training missions.²⁴ Because of the large distances that a special forces group covers operationally, the single judge advocate assigned to the group could not provide operational coverage, as well as other legal support on a twenty-four hour basis to that deployed group. An augmentation team was sent to support that judge advocate.²⁵

The operational law augmentation package is simple in design and execution and can be developed to support any task force. The staff judge advocate designates one, two, or three teams in the office consisting of a judge advocate and a legal specialist who are ready to deploy in support of a task force along with its assigned judge advocate or a trial counsel. These augmentation teams can be tailored to fit the size of the task force and the mission by adding personnel where necessary.

The augmentation team is attached to a deploying headquarters with the mission of providing operational law support to the tactical operations center (TOC), freeing the assigned judge advocate to provide legal support to the commander and his soldiers.²⁶

This concept allows the staff judge advocate to provide support to both the operational mission as well as the installation. The augmentation teams can be rotated so that young judge advocates can be trained in the nuances of operational law and be given an opportunity to deploy.²⁷

As an office of the staff judge advocate is redesigned to support the armed forces of the Twenty-first Century, the Operational

Law Augmentation Team concept, already operationally tested, is a force package capable of continued legal support forward. Lieutenant Colonel Crane.

Criminal Law Notes

The Remedy for Violations of R.C.M. 707: Dismissal With Prejudice or Without Prejudice?

Rule for Courts-Martial (R.C.M.) 707(d), *Manual for Courts-Martial*, 1984,²⁸ was amended in 1991. This amendment leaves it to the discretion of the military judge to dismiss courts-martial charges with prejudice or *without* prejudice for violations of the R.C.M. 707 120-day speedy trial clock.²⁹ In *United States v. Edmond*³⁰ the United States Court of Appeals for the Armed Forces (CAAF) addressed the new R.C.M. 707(d). According to the rule, the military judge must consider four factors in choosing between dismissal with or without prejudice: (1) the seriousness of the offense; (2) the facts and circumstances that lead to dismissal; (3) the impact a reprosecution would have on the administration of justice; and (4) any prejudice to the accused resulting from denial of a speedy trial.³¹ In *Edmond*, the CAAF reviewed for the first time a military judge's exercise of that discretion. The CAAF affirmed the military judge's decision to dismiss the charges, without prejudice, for violation of the 120-day speedy trial clock.

This case is particularly instructive to trial practitioners on how best to litigate this issue. First, it illustrates the heightened appellate standard of review of a military judge's decisions. Although the standard of review is abuse of discretion, appellate courts must apply the "particular factors" set forth in the rule.³² Appellate courts will undertake a substantive scrutiny to insure that the judge's decision is supported by the factors.³³ If the appellate court finds the judge's conclusions lacking on a factor, it

²⁴ Originally approved for implementation by the Commanding General of the United States Special Forces Command (Airborne) who directed the author to send an augmentation team with the 10th Special Forces Group (Airborne) on Operation Provide Comfort, Northern Iraq, in April of 1991. The augmentation team, consisting of a judge advocate captain and a noncommissioned officer, deployed to assist the 10th Special Forces Group (Airborne) Group Judge Advocate. The augmentation team returned after three weeks, when the United States Army, Europe, legal assets began to close in to support the operation. The test was a success and operational law augmentation teams deployed over a dozen more times in support of armed forces in England, Korea, Kuwait, Thailand, and in various continental United States location such as the Joint Readiness Training Center and Joint Task Force-6.

²⁵ See DEP'T OF ARMY, FIELD MANUAL 100-25, DOCTRINE FOR ARMY SPECIAL OPERATIONS FORCES (Dec. 1991) (general discussion of the role of a judge advocate in special operations forces (SOF)). See generally OPERATIONS LAW HANDBOOK, *supra* note 23, ch. 15.

²⁶ For example, during Operation Provide Comfort, Northern Iraq, April 1991, the 10th Special Forces Group (Airborne) had an operational area of several hundred square miles. The Operational Law Augmentation Team provided support to the tactical operations center while freeing the group judge advocate to travel through out the operational area in support of the special forces soldiers.

²⁷ *Id.*

²⁸ MANUAL FOR COURTS-MARTIAL, United States (1984) (C5, 6 July 1991) [hereinafter MCM].

²⁹ Prior to MCM Change 5, the remedy for a violation of R.C.M. 707 was dismissal of the affected charge or specification with prejudice.

³⁰ 41 M.J. 419 (1995).

³¹ MCM, *supra* note 28, R.C.M. 707(d).

³² *Edmond*, 41 M.J. at 421.

³³ *Id.* (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)).

may find an abuse of discretion.³⁴ Counsel should understand the high level of scrutiny on appeal and assist military judges in articulating the foundations for their conclusions on each factor and advocate how the four factors should be weighed against one another.

Second, the case highlights that it is crucial for counsel, especially defense counsel, to present every fact that rationally supports each factor. If the defense does not marshal all of its evidence to show how a factor weighs in favor of the accused, the factor most certainly will, by default, weigh in favor of the government. Third, both a systematic approach to case management by the government and detailed recordkeeping by both sides continue to be key components of speedy trial practice. Finally, the case hints that dismissals with prejudice will be justified only when the defense can present evidence of substantial prejudice to the accused or prosecutorial misconduct in the form of bad faith or a clear pattern of neglect.

This note will discuss the language of R.C.M. 707 and its application in the *Edmond* case. It will focus on each factor which military judges review and suggest practice strategies based on the CAAF's analysis in *Edmond*, and the large body of federal cases interpreting similar factors embodied in the Speedy Trial Act.³⁵

The Edmond Case History

Fire Control Technician Third Class Jon E. Edmond was convicted, among other things, of being an accessory after the fact to attempted sodomy and committing an indecent act.³⁶ These events

occurred on 1 March 1990 at a going-away party for a fellow Coast Guardsman where the victim, an attendee at the party, became intoxicated and disabled. The accused and several others took advantage of her condition to engage in sexual misconduct.³⁷

On 25 June 1991, charges were preferred against the accused for numerous offenses arising from the night of the party, including two indecent assaults on the victim. The first session of the accused's trial did not occur until 18 December 1991.³⁸ Prior to entering a plea, the defense moved to dismiss the charges under R.C.M. 707³⁹ for lack of speedy trial. According to the trial judge's calculations, 176 days had elapsed between preferal of the charges and the first session of the trial.⁴⁰ The trial judge held the government accountable for 161 days of that period.⁴¹ Because the government neglected to arraign the accused within 120 days of preferal, R.C.M. 707(a)(1) was violated, and the military judge dismissed the charges without prejudice.⁴²

The government reinitiated charges and successfully prosecuted the accused. On appeal, the accused alleged that the military judge abused his discretion in dismissing the charges without, instead of with, prejudice. The Coast Guard Court of Military Review affirmed,⁴³ finding the military judge did not abuse his discretion in deciding to dismiss without prejudice.

The CAAF also affirmed. Writing for the majority, Judge Crawford found that the trial judge had not abused his discretion because he had provided a foundation for his conclusions regarding each factor, and he had appropriately balanced the opposing considerations.⁴⁴

³⁴ See *United States v. Taylor*, 487 U.S. 326, 344 (1988). In a prosecution for federal narcotics charges, the government exceeded the Speedy Trial Act deadline between indictment and trial. The district court judge dismissed the charges with prejudice, finding that although the offense was serious, the government had an inexcusable, lackadaisical attitude which warranted a stern response from the court. The United States Supreme Court disagreed, finding that the factors which the trial judge relied on were unsupported by factual findings or evidence in the record. Accordingly, the Court determined that the trial judge had abused her discretion and reversed.

³⁵ 18 U.S.C. §§ 3161-3162 (1994). The Speedy Trial Act requires that the trial judge to consider the following factors in determining whether to dismiss a case with or without prejudice: (1) the seriousness of the offense; (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of reprosecution on both the administration of the Act and on justice. In *Taylor*, the Supreme Court held that trial courts also must factor in the prejudice to the accused. *Taylor*, 487 U.S. at 333-334. These factors are nearly identical to those in R.C.M. 707(d). See *supra* note 28.

³⁶ *Edmond*, 41 M.J. at 419.

³⁷ *Id.* at 420.

³⁸ *United States v. Edmond*, 37 M.J. 787, 790 (C.G.C.M.R. 1993).

³⁹ Title 10 U.S.C. § 810 (1988) (UCMJ art. 10 (1988)) was not implicated in this case because the accused was never placed in pretrial confinement. *Edmond*, 41 M.J. at 421.

⁴⁰ *Edmond*, 41 M.J. at 421.

⁴¹ *Id.*

⁴² The accused also claimed that he had been deprived of his Sixth Amendment right to a speedy trial. The military judge denied the accused's motion to dismiss on that ground. Courts must examine four factors in the face of a Sixth Amendment challenge: (1) length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right; (4) and prejudice to the defendant. *Barko v. Wingo*, 407 U.S. 514, 530 (1972). Two of these factors, reason for the delay and prejudice to the accused—are nearly identical to the R.C.M. 707(d) factors. Although not delineated as separate R.C.M. 707(d) factors, the length of the delay and assertion of an accused's rights are relevant to the R.C.M. 707(d) determination.

⁴³ *United States v. Edmond*, 37 M.J. 787 (C.G.C.M.R. 1993).

⁴⁴ *Edmond*, 41 M.J. at 422.

Analysis of the Four Factors

Prejudice to the Accused

In *Edmond*, the accused presented evidence that, as a result of the forty-one day speedy trial violation, he suffered anxiety, had lost his security clearance and concomitant normal duty position, and was disenrolled from a school.⁴⁵ The military judge characterized this prejudice as "slight" and weighed this factor in favor of the government.⁴⁶ The appellate courts agreed.⁴⁷

If the accused's prejudice was not sufficient to weigh this factor on his side, what amount of prejudice is necessary before the factor favors a dismissal with prejudice? In the majority opinion, the CAAF focused on whether there was an impact on the accused's right to a fair trial and found none.⁴⁸ In his concurring opinion, Judge Wiss noted the absence of "substantial" prejudice.⁴⁹

The message is clear: the prejudice to the accused must be substantial before the factor will weigh in favor of the accused, and personal prejudice to the accused is only a part of the equation.⁵⁰ Counsel should argue the existence of or absence of an impact upon the accused's ability to defend against the charges, such as a shift in the tactical advantage from one party to another;

the loss or destruction of physical evidence; or the death or unavailability of key witnesses. Another key factor which counsel for both side should address is the presence or absence of pretrial restraint and the nature of the restraint.⁵¹

Counsel should still point out whether evidence of personal prejudice to the accused is present. Examples of areas counsel could explore include: the length of the delay itself,⁵² whether the accused continued to draw full pay and allowances,⁵³ other drains on financial resources,⁵⁴ extraordinary stress which exceeds that of any other accused facing similar charges,⁵⁵ removal of security clearance and change of duties as a result,⁵⁶ disenrollment from schools,⁵⁷ and the total length of time it takes to bring the accused to trial in cases with an intervening dismissal or reset of the clock.⁵⁸

The Facts and Circumstances That Lead to Dismissal

The military judge in *Edmond* reviewed the facts and circumstances that led to dismissal. The military judge concluded there was no intentional governmental noncompliance with the rule.⁵⁹ He determined that the government had several legitimate reasons for delaying the prosecution. The government delayed the prosecution to secure the testimony of co-accuseds and other re-

⁴⁵ *Id.* at 422; *Edmond*, 37 M.J. at 791.

⁴⁶ *Edmond*, 37 M.J. at 792.

⁴⁷ *Edmond*, 41 M.J. at 422; *Edmond*, 37 M.J. at 791-92.

⁴⁸ *Edmond*, 41 M.J. at 422.

⁴⁹ *Id.* at 423.

⁵⁰ *Id.* at 423. Judge Wiss implied that substantial prejudice may be a *prerequisite* to a dismissal with prejudice, even in the face of government conduct which is "lackadaisical." He was highly critical of the government's excuses in this case. He stated that, as a whole, the case presented a lackadaisical approach to military justice. The reason that he did not dissent from the majority's disposition was because of the absence of convincing proof that the accused suffered substantial prejudice. *Id.* If confronted with this argument in practice, defense counsel should counter that the Supreme Court has specifically held that the absence of prejudice in a speedy trial violation is merely a consideration in favor of permitting re prosecution—it is not dispositive. *United States v. Taylor*, 487 U.S. 326, 340 (1988).

⁵¹ See *United States v. Grom*, 21 M.J. 53, 57 (C.M.A. 1985) (lack of oppressive pretrial incarceration, in part, leads to conclusion of no prejudice to accused in a Sixth Amendment analysis).

⁵² The longer the delay, the greater the actual or presumptive prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 537 (1972) (White, J., concurring) (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)). Occasionally a delay, by itself, has been enough to justify dismissal with prejudice. See *United States v. Stayton*, 791 F.2d 17, 21 (2d Cir. 1986) (twenty-three month delay between indictment and trial warranted dismissal with prejudice).

⁵³ See *United States v. Edmond* 37 M.J. 787, 791 (C.G.C.M.R. 1993).

⁵⁴ See *Barker v. Wingo*, 407 U.S. 514, 537 (1972) (White, J., concurring) (quoting *United States v. Marion*, 404 U.S. 307 (1971)).

⁵⁵ See *Edmond*, 37 M.J. at 791. See also *Grom*, 21 M.J. 53, 57 (C.M.A. 1985) (lack of anxiety and concern which exceeded the norm indicated, in part, lack of prejudice to accused in Sixth Amendment analysis).

⁵⁶ See *Edmond*, 37 M.J. at 791.

⁵⁷ *Id.*

⁵⁸ See *United States v. Giambrone*, 920 F.2d 176, 182 (2d Cir. 1990) (delays, dismissal, and retrial prejudiced accused when he was indicted but untried for more than one year), *contra*, *United States v. Godoy*, 821 F.2d 1498, 1506 n.2 (11th Cir. 1987) (period between dismissal and retrial irrelevant to Speedy Trial Act, but could raise Fifth Amendment due process concerns).

⁵⁹ *United States v. Edmond*, 41 M.J. 419, 422 (1995).

mote witnesses and to locate an Article 32 investigating officer.⁶⁰ The government also delayed on the mistaken belief that it was relieved of responsibility for a period of time covered by a retroactive delay. The military judge did not hold the government accountable for its mistake because he thought the legality of retroactive delays was not clearly settled at the time the government obtained the retroactive delay from the convening authority.⁶¹ In light of these "legitimate" reasons for the government's delay, the military judge weighted this factor against dismissal with prejudice.

In the majority opinion, the CAAF agreed that this factor weighed in favor of the government.⁶² The CAAF cited an absence of truly neglectful government attitudes, intentional violations, or a pattern of neglect. Writing for the majority in *United States v. Taylor*,⁶³ Justice Blackmun elaborated on what types of facts and circumstances would alter the balance in favor of dismissal with prejudice: government conduct undertaken in bad faith; proof of the government's antipathy toward an accused; or a pattern of neglect⁶⁴ by the local United States Attorney.⁶⁵

Counsel should focus on showing the presence or absence of these three circumstances.⁶⁶ Recordkeeping by both parties is crucial. For the defense, to prove systemic neglect, the entire Trial Defense Service office must consolidate information from all of its cases to assess whether it can prove a pattern of dilatory practices by the military justice office in question.

The government's best weapon is not to exceed the 120-day deadline in any case. Offices which use an *ad hoc* approach to

managing cases are more likely to exceed the deadline than those which use a systematic approach to all cases. Keeping detailed records from the inception of the 120-day clock is crucial. For example, in *Edmond*, the government documented the efforts it made in contacting seven different Coast Guard legal offices in an effort to locate a "suitable" Article 32 investigating officer for the multiparty investigation. Although the government was accountable for the resulting twenty-eight day delay, the documentation enabled the government to show that it acted in good faith. The government prevailed in convincing the military judge that such a showing should be factored in favor of the government.⁶⁷

Seriousness of the Offense

The offenses in *Edmond* included indecent assaults on an inebriated and disabled victim. The appellate courts agreed with the military judge's conclusion that these were serious offenses, which weighed against dismissal with prejudice.⁶⁸

Felonies routinely are found to be serious, and the government should always argue that they are serious, to include drug-related offenses.⁶⁹ Even if a crime is not a felony-level offense, trial counsel should argue that it is serious by articulating the adverse impact that the offense has on good order, morale, and discipline. In addition to the level of the offense, trial counsel should point out the duration of the criminal conduct⁷⁰ or the repetitive nature of the offense.⁷¹ The neutralizing reply for defense counsel is that the protections of R.C.M. 707 are nullified if every offense is considered serious.

⁶⁰ *Edmond*, 37 M.J. at 791-92.

⁶¹ *Id.* at 791. This issue is now well settled; all delays must be granted in advance. If a delay is granted retroactively, the government still will be accountable for the time for speedy trial purposes. See MCM, *supra* note 28, R.C.M. 707(c); *United States v. Duncan*, 38 M.J. 476 (C.M.A. 1993).

⁶² Judge Wiss, in his concurring opinion, did not agree with this characterization. *Supra* note 50.

⁶³ 487 U.S. 339 (1988).

⁶⁴ The pattern can consist of "unwitting violations" if it is repetitive. See *United States v. Wright*, 6 F.3d 811, 813 (D.C. Cir. 1993) (court admonished government that more isolated unwitting violations would constitute pattern of neglect weighing in favor of dismissal with prejudice).

⁶⁵ *Taylor*, 487 U.S. at 339 (1988).

⁶⁶ Occasionally, dismissal with prejudice can be proper for inadvertent or neglectful errors that fall short of showing a pattern. Some federal courts take the position that a Speedy Trial Act violation caused by the court or the prosecutor should automatically favor the accused. See *United States v. Hasting*, 847 F.2d 920, 925 (prosecutor or court-caused violations weighted in favor of dismissal with prejudice), *cert. denied* 488 U.S. 925 (1990); *United States v. Caprella*, 716 F.2d 976, 980 (2d Cir. 1983) (administrative oversight weighted in favor of accused); *United States v. Ramirez*, 973 F.2d 36, 39 (1st Cir. 1992) (lack of malice does not ameliorate gravity of delay's effects). The rationale is that negligent violations which are overlooked can often result in deeply ingrained dilatory practices by the prosecutor and court. See Martha L. Wood, *Determination of Dismissal Sanctions Under the Speedy Trial Act of 1974*, 56 *FORDHAM L. REV.* 509 (1987). This argument may prove helpful to defense counsel, but it is a minority position in federal courts.

⁶⁷ *Edmond*, 41 M.J. 419, 422 (1995).

⁶⁸ *Id.*

⁶⁹ Generally, felony drug offenses have been treated as serious offenses. See *Hastings*, 847 F.2d at 925 (drugs-for-profit offenses always extremely serious), *cert. denied* 488 U.S. 925 (1990); *United States v. Giambone*, 920 F.2d 176, 181 (2d Cir. 1990) (dealing in and conspiring to deal in narcotics is serious); *Wiley*, 997 F.2d at 385 (storage and sale of marijuana serious offense), *cert. denied* 114 S. Ct. 600 (1993); *Wright*, 6 F.3d at 814 (that drug offenses are commonplace makes them no less serious).

⁷⁰ See *United States v. Cobb*, 975 F.2d 152, 157 (5th Cir. 1992) (offenses serious when extended across state lines and lasting over two years).

⁷¹ See *United States v. Wells*, 893 F.2d 535 (2d Cir. 1990) (prior conviction for same offense is sufficient ground for determining that current offense is serious).

Impact of a Re prosecution on the Administration of Justice⁷²

As to *Edmond's* third factor—the effect of re prosecution on the administration of justice—the military judge summarily concluded that dismissal with prejudice would not contribute to a better or more fair administration of military justice in the Coast Guard. In its review, the CAAF did not mention, much less analyze, how this factor fit into the case.⁷³ It remains to be seen whether this was an oversight or a message that—just like the military judge found to be “neutral”⁷⁴—will seldom have an impact on a military case.

The defense should continue to argue that, in the face of intentional or dilatory conduct by the government, this factor should weigh in favor of dismissal with prejudice. The obvious rationale is that dismissal with prejudice is necessary to send a strong message to the government that it must comply with its responsibility to administer justice swiftly. Counsel should make this argument only in appropriate cases because the Supreme Court has stated that dismissal *without* prejudice is a sufficient deterrent in most cases to remedy dilatory government conduct.⁷⁵

In spite of the Supreme Court's analysis in *Taylor*, defense counsel can argue that, in the military, this factor always weighs on the side of the accused. Unlike the civilian criminal justice systems, our system of military justice includes the unique aspects of discipline and morale.⁷⁶ The disciplinary and morale elements of our system are undermined unless there is swift justice; both the interests of the accused and the military public are harmed. If the accused is innocent, he or she has an interest in early vindication. Early vindication is also beneficial to military discipline and morale, which depend on the demonstrated integrity of our

legal system. If the accused is guilty, the military public and the command, in particular, have an interest in expeditious resolution. The closer in time the punishment is to the crime, the greater the disciplinary impact for the command and the morale-building impact on the military public.

In cases where the government conduct is intentionally or systematically neglectful, this factor can become a strong weapon in the defense counsel's arsenal because of the need to deter such government conduct. Defense counsel should be prepared to present proof that the government has jeopardized prompt justice repeatedly, risked the loss of important evidence by delay, or repeatedly wasted assets by replication of effort. In response to the defense argument that this factor favors the accused, government counsel should point to *Taylor*. Counsel also should counter that this factor favors the government in all cases because re prosecution furthers the interest of the public and the Army by justly resolving the issue by trial.⁷⁷

Conclusion

The majority and concurring opinions in *Edmond* provide definite guidance to practitioners on how to litigate speedy trial/R.C.M. 707(d) issues. Counsel for both sides need to be aggressive and detailed in arguing how each factor is supported by the facts. These facts will enable the military judge to articulate a basis for a decision that will withstand appellate review. However, counsel should particularly focus on the presence or absence of substantial prejudice to the accused, and of a governmental pattern of neglect, antipathy toward the accused, or bad faith. Finally, a systematic approach for managing cases and detailed recordkeeping continues to be a crucial part of speedy trial practice. Major Frisk.

⁷² The corresponding Speedy Trial Act factor is not identical to the extent it requires a trial judge to consider the impact of re prosecution on the administration of the Speedy Trial Act, as well as on justice. 18 U.S.C. § 3162(a)(2) (1988). Many federal courts consider this to be a unitary standard and do not differentiate between the prongs of the factor. See *Taylor*, 487 U.S. at 342; *Giambone*, 920 F.2d at 181; *United States v. Kottmyer* 961 F.2d 569, 573 (6th Cir. 1992).

⁷³ At one point, the CAAF summarized the four factors and completely left out this factor. The CAAF instead substituted “the reasons for the delays” for this factor. *Edmond*, 41 M.J. at 422.

⁷⁴ *United States v. Edmond*, 37 M.J. 787, 792 (C.G.C.M.R. 1993).

⁷⁵ *United States v. Taylor*, 487 U.S. 326, 342 (1988). Both majority and the dissenters explored this argument in detail and came to sharply divergent views. The dissent characterized the statute as nothing more than a “hollow guarantee” unless judges felt they could respond sternly to violations without fear of being overturned on appeal. *Id.* at 352. The majority did acknowledge that dismissal with prejudice “[a]lways sends a stronger message than without prejudice, and is more likely to induce salutary changes in procedures, reducing pretrial delays.” *Id.* at 342. These considerations alone, however, will not warrant dismissal with prejudice because every case would then have to be dismissed with prejudice, regardless of the weight accorded the other factors. *Id.* According to the majority, dismissal without prejudice is underrated. It, too, can be a strong deterrent because of the adverse effect it has on the government. The government is forced to re-indict. It may encounter a statute of limitations bar to re prosecution. The delays from the dismissal may make re prosecution unlikely. Finally, dilatory conduct on the part of the government can be remedied by the liberal use of sanctions. *Id.* Other federal courts, likewise, have found dismissal without prejudice to be a sufficient deterrent to unintentional or isolated neglectful conduct on the part of the government. See *Kottmyer*, 961 F.2d at 573.

⁷⁶ See generally, William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1971); Walter T. Cox, III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987).

⁷⁷ Some courts have noted that the standard defense argument on this factor—dismissal without prejudice has no teeth—neutralizes the standard government argument, and therefore, this factor has little practical effect. See *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984).

The CAFC Attempts to Streamline the CDA Claims Process

Thus far in 1995, the Court of Appeals for the Federal Circuit has issued two decisions which significantly affect the manner in which government contracting offices can process contractor claims. In *Reflectone, Inc. v. Dalton*,⁷⁸ the Federal Circuit eliminated the requirement that a Contract Disputes Act⁷⁹ (CDA) claim must be in dispute at the time of submission. This decision expressly overrules almost four years of case law and enhances the overall efficiency of the CDA claims resolution process. On the other hand, unfortunately, in *H.L. Smith, Inc. v. Dalton*,⁸⁰ the Federal Circuit created what appears to be yet another obstacle in the effort to expedite the resolution of CDA claims. This note will briefly review each decision.

One of the overall goals of the CDA is to encourage the efficient and quick resolution of contractor claims, while avoiding formal litigation. The CDA's legislative history indicates that Congress wanted to develop a "comprehensive system of legal and administrative remedies [that, in part, would] induce [the] resolution of more contract disputes by negotiation prior to litigation."⁸¹ The *Federal Acquisition Regulation*⁸² (FAR) reinforces this philosophy by providing that it is the "[g]overnment's policy . . . to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level."⁸³ Additionally, the Federal Circuit has long highlighted this important quality of the CDA.⁸⁴

Although the goal of establishing a system which efficiently processes contractor claims is laudable, the Federal Circuit occasionally has stumbled in its effort to interpret the CDA and relevant FAR provisions accordingly. Indeed, on numerous occasions, the Federal Circuit has wrestled with defining the keystone of the contract disputes process—the CDA claim. The CDA is silent on what specifically constitutes a claim. Consequently, to determine the elements of a CDA claim, one must look to the FAR. In part, FAR 33.201 defines a claim as:

[A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract . . . [a] voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim . . .⁸⁵

When examining this definition, the Federal Circuit has had the greatest impact on how contracting officers treat contractor claims.

The Case of Reflectone, Inc. v. Dalton

In 1991, in a decision which sent shock waves throughout the federal contracting community, the Federal Circuit addressed the manner in which CDA claims were processed. In *Dawco Construction, Inc. v. United States*,⁸⁶ the Federal Circuit held that a dispute as to liability must exist at the time a contractor submits its claim to the contracting officer. Hence, despite the seemingly clear language of the FAR, which requires the existence of a dispute for only routine vouchers and invoices, the Federal Circuit declared that a contractor must establish the existence of a dispute with the agency before it could have its day in court.

This dispute requirement not only thwarted the expeditious processing of claims but resulted in an awkward, if not illogical, sequence of events. Under *Dawco*, a contractor would submit a request for equitable adjustment (REA) to the contracting officer. The contracting officer would then review the REA and deny it, usually by issuing a contracting officer's final decision. The contractor, quite logically, would then appeal the final decision and take its claim to the appropriate board of contract appeals or to the Court of Federal Claims. Because no dispute existed at the time the contractor submitted the REA, the relevant board or court was required to dismiss the appeal, usually in response to a government jurisdictional motion.⁸⁷

⁷⁸ No. 93-1373, 1995 WL 441907 (Fed. Cir. July 26, 1995).

⁷⁹ 41 U.S.C. §§ 601-613 [hereinafter CDA].

⁸⁰ 49 F.3d 1563 (Fed. Cir. 1995).

⁸¹ S. REP. NO. 1118, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 5235 (emphasis added).

⁸² GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (Mar. 1, 1994) [hereinafter FAR].

⁸³ *Id.* 33.210.

⁸⁴ See, e.g., *Pathman Constr. Co., Inc. v. United States*, 817 F.2d 1573 (Fed. Cir. 1987).

⁸⁵ FAR, *supra* note 82, 33.201.

⁸⁶ 930 F.2d 872 (Fed. Cir. 1991).

⁸⁷ In some corners of the government contracts community, such a motion was referred to as a "Dawco motion."

In *Reflectone, Inc. v. Dalton*, the Federal Circuit expressly overruled *Dawco*.⁸⁸ The Federal Circuit observed that the *Dawco* dispute requirement resulted in a process that "is a waste of the contractor's time and money . . . [t]he taxpayers' money . . . [and is] seriously inefficient, unfair and wasteful." Consequently, the Federal Circuit characterized the dispute requirement as "contrary to the goals of the CDA."⁸⁹ In reaching the *Reflectone* decision, the Federal Circuit specifically focused on the *FAR* language defining a CDA claim.

The Federal Circuit stated that there are two fundamental categories of potential contractor claims: routine requests for payment and nonroutine requests for payment. Regarding routine requests for payment—such as vouchers or invoices—the *FAR* requires that they be disputed by the agency before they can be characterized as CDA claims.⁹⁰ This disputes requirement is quite logical. The contracting officer generally has no reason to issue a final decision in response to a routine request and, in all likelihood, will not give it the same level of thought and seriousness as *bona fide* CDA claims.

Alternatively, in *Reflectone*, the Federal Circuit stated that nonroutine requests—such as requests for equitable adjustment—were anything but routine. The Federal Circuit noted that unlike vouchers or invoices, REAs are comparable to an assertion by the contractor of a breach of contract by the government:

It is a remedy payable only when unforeseen or unintended circumstances, such as government modification of the contract, differing site conditions, defective or late-delivered government property or issuance of a stop work order cause an increase in contract performance costs.⁹¹

Practically speaking, a contracting officer is almost always certain to treat such a request vastly differently than a routine voucher or invoice.

A cursory review of the hundreds of cases decided since *Dawco* reveals that time and again the contracting officer renders a final decision on an REA. In many of these cases, the contractor believed that it had submitted a claim, and the contracting officer usually treated the submission accordingly by issuing a final decision.⁹² Only the knowledgeable contracts attorney knew that, under *Dawco*, no CDA claim existed. Thus, the elimination of the disputes requirement not only serves to enhance the processing of CDA claims but comports with the actual perceptions of the parties involved with the contract claims process.

The Case of H.L. Smith, Inc. v. Dalton

Unfortunately, the Federal Circuit is not always effective in facilitating the resolution of contract disputes. For example, in the recent decision in *H.L. Smith, Inc. v. Dalton*,⁹³ in addressing the requirement for supporting documentation that should accompany a contractor's claim, the Federal Circuit not only overlooked the goal of enhancing the efficiency of the CDA claims process, but actually promoted a process which contorts the goal of resolving CDA claims short of formal litigation.

To have a valid CDA claim, a contractor must submit a demand to the contracting officer which: (1) is written; (2) asserted "as a matter of right;" and (3) includes a sum certain.⁹⁴ Implicit in this process is the requirement that the contractor provide the contracting officer enough information in support of its request to intelligently evaluate the claim. On many occasions, the contractor is asking the contracting officer for thousands, if not millions, of dollars.

Recently, however, the Federal Circuit appears to have overlooked this and announced a position that may well result in unnecessary legal gamesmanship. At issue in *H.L. Smith* were nine REAs totalling almost \$1.5 million.⁹⁵ The contractor alleged that it had incurred these costs because of government-caused delays.⁹⁶ According to the Armed Services Board of Contract Appeals'

⁸⁸ Interestingly, Judge Paul Michel, the author of *Dawco*, wrote the majority opinion in *Reflectone*.

⁸⁹ *Reflectone, Inc. v. Dalton*, No. 93-1373, 1995 WL 441907, at *8-9 (Fed. Cir. July 26, 1995).

⁹⁰ *Id.* at *6.

⁹¹ *Id.* at *5.

⁹² The contracting officer in *Reflectone* had issued a final decision on the contractor's claim. *Id.* at *2.

⁹³ 49 F.3d 1563 (Fed. Cir. 1995).

⁹⁴ *FAR*, *supra* note 82, 33.201.

⁹⁵ See *H.L. Smith, Inc.*, ASBCA No. 45111, 94-2 BCA ¶ 26,723.

⁹⁶ *Id.* at 132,931.

(ASBCA) decision, the REAs consisted of "broad allegations . . . without linking a specific assertion of delay or disruption to the actual dollar amounts requested through specific documentation."⁹⁷ Despite specific requests by the contracting officer for additional information, the contractor instead appealed its claims on a deemed denial basis.⁹⁸ Noting that the contractor had "not submitted any supporting documentation" for its REAs, the ASBCA had little difficulty in finding that the submissions did not constitute valid CDA claims and dismissed the associated appeals.⁹⁹

On review, the Federal Circuit concluded differently. The Federal Circuit agreed that a contractor must submit in writing "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim."¹⁰⁰ However, it further noted that neither the CDA nor the FAR require the submission of "a detailed breakdown or other specific cost-related documentation."¹⁰¹ Although the contracting officer may have found the REAs lacking in supporting cost data, the Federal Circuit concluded that the absence of such information did not invalidate the actual "claim" status of the contractor's submissions. Hence, the Federal Circuit held that the ASBCA improperly dismissed Smith's appeals and noted that the Board had two options:

It may decide Smith's claims on the existing record. Alternatively it may stay Smith's claims pending a decision by the contracting officer. If the Board chooses to stay, it may direct the contracting officer to obtain additional information that would facilitate a decision.¹⁰²

Unfortunately, this approach does not promote an efficient disputes resolution process. Instead, it places the contracting officer in a "no-win" position. The contracting officer can either

issue a final decision founded on a claim that lacks sufficient supporting documentation, or the contractor can treat the government's request for additional information as a deemed denial. In either instance, the contracting officer is deprived of the opportunity to intelligently review a CDA claim before it is the subject of litigation.

Conclusion

Twice this year the Federal Circuit has had the opportunity to review the CDA claims process. In each case, the Federal Circuit alluded to the overall goal of the CDA—to facilitate the resolution of contract disputes. In *Reflectone*, the Federal Circuit exhibited a degree of intellectual fortitude and correctly eliminated the requirement for a pre-existing dispute. However, in *H.L. Smith*, the Federal Circuit seemed to condone the premature appeal of contractor claims before the contracting officer had all the information necessary to render an educated final decision. It is in everyone's interest to minimize litigation gamesmanship. The *Reflectone* decision achieves this goal and perhaps the Federal Circuit will review its position in *H.L. Smith* and act accordingly. Major Ellcessor.

Administrative and Civil Law Notes

The FLRA Expands Application of Privacy Act Protection

In *Department of Defense v. Federal Labor Relations Authority*¹⁰³ (*DOD v. FLRA*), the United States Supreme Court held that the Privacy Act¹⁰⁴ prevented release of names and home addresses of federal employees to labor unions.¹⁰⁵ The Federal Labor Relations Authority (FLRA) recently decided two cases which expanded the application of the Privacy Act to information requests by labor unions.¹⁰⁶ In both cases, the FLRA cited the Privacy Act in denying union requests for unsanitized copies of employee performance appraisals.

⁹⁷ *Id.* at 132,933.

⁹⁸ *Id.*

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ *H.L. Smith, Inc.*, ASBCA No. 45111, 94-2 BCA ¶ 26,723, at 1565, citing *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987).

¹⁰¹ *Id.*

¹⁰² *Id.* at 1566. Interestingly, at least one commentator has questioned the Federal Circuit's position that a board of contract appeals can order a contracting officer to obtain additional information. See 37 *GOVERNMENT CONTRACTOR* 12, ¶ 184 (Mar. 29, 1995). Although the CDA allows a board to order a contracting officer to issue a final decision, the statute is silent with respect to directing a contracting officer to seek further documentation surrounding a contractor claim. See 41 U.S.C. § 606(c)(4). At least one board has read its authority narrowly in this regard and held that it may not even direct the contracting officer to issue a more detailed final decision than issued already. See *A.D. Roe, Co.*, ASBCA No. 26078, 81-2 BCA ¶ 15,231. Whether the same approach will continue in light of the *H.L. Smith* decision remains to be seen.

¹⁰³ 114 S. Ct. 1006 (1994).

¹⁰⁴ 5 U.S.C.A. § 552a (West 1977 & Supp. 1995).

¹⁰⁵ See TJAGSA Practice Notes; Administrative and Civil Law Notes, *Union Access to Information: The Name and Home Address Controversy*, *ARMY LAW.*, Sept. 1995, at 40, for a discussion of *DOD v. FLRA* and the issues concerning the release of names and home addresses to union representatives.

¹⁰⁶ *United States Dep't of Transp., Fed. Aviation Admin. New York TRACON, Westbury, NY and Nat'l Air Traffic Controllers Assoc.*, 50 FLRA 338 (1995); *United States Dep't of Transp., Fed. Aviation Admin. Jacksonville Air Traffic Control Tower*, 50 FLRA 388 (1995).

In the first case, *New York TRACON*, the union requested unsanitized copies of all bargaining unit employee performance appraisals. When the agency refused to provide the information, the union filed an unfair labor practice charge. The Administrative Law Judge ruled against the agency, and the agency filed exceptions to the decision with the FLRA. While the case was pending before the FLRA, the Supreme Court decided *DOD v. FLRA*.

The parties in *New York TRACON* submitted supplemental briefs addressing the applicability of the holding in *DOD v. FLRA* to union requests for information other than names and home addresses. The FLRA then issued a decision embracing the Supreme Court's holding in *DOD v. FLRA*. The FLRA also announced a framework for assessing Privacy Act claims as they relate to union requests for information under the Federal Service Labor-Management Relations Statute (FSLMRS).¹⁰⁷

The framework announced by the FLRA is the same as that used in determining the release of information under the Freedom of Information Act (FOIA).¹⁰⁸ The agency seeking to withhold information in reliance on the Privacy Act "bears the burden of demonstrating:

(1) that the information requested is contained in a system of records under the Privacy Act;

(2) that disclosure of the information would implicate employee privacy interests; and

(3) the nature and significance of those privacy interests."¹⁰⁹

If the agency meets these requirements, then the burden shifts to the General Counsel of the FLRA (on behalf of the union) to:

"(1) identify a public interest that is cognizable under the FOIA; and

(2) demonstrate how disclosure of the requested information will serve the public interest."¹¹⁰

Once the respective interests are identified, the FLRA then balances the respective interests to determine releasability.

In *New York TRACON*, the FLRA began by reciting the federal labor union's statutory right to information contained in the FSLMRS and the limitation "to the extent not prohibited by law."¹¹¹ The FLRA determined that this limitation brings requests for information under the FSLMRS within the protections of the Privacy Act. In past decisions, the FLRA used the statutory right to information contained in the FSLMRS to find a public interest that justifies releasing information.¹¹² However, as a result of the Supreme Court's decision in *DOD v. FLRA*, the FLRA no longer considers this statutory right to information in determining the applicable public interest to be weighed against the individual's privacy concern. Rather, the FLRA only considers how the information sheds light on the agency's performance of its statutory duties or informs the public about what the government is doing.¹¹³

In *New York TRACON*, the FLRA rejected two other interests that it had previously used to tip the balance in favor of disclosure. The FLRA no longer considers the early resolution of grievances in defining the public interest.¹¹⁴ Early resolution of grievances does not shed light on how the agency functions. Similarly, the FLRA no longer considers "the proper administration of a collective bargaining agreement" as a public interest to be used in the balancing process, absent a showing that the disclosure would permit an assessment of how the agency administers its labor contract.¹¹⁵ Taking these statutory "weights" out of the balancing process makes it more difficult for unions to overcome the employee's privacy interests.

The FLRA rejected the argument that the Supreme Court's decision in *DOD v. FLRA* was limited to requests for names and home addresses. The FLRA could not find any basis for defining public interest differently in cases involving other kinds of infor-

¹⁰⁷ 5 U.S.C. §§ 7101-7135 (West 1994).

¹⁰⁸ *New York TRACON*, 50 FLRA 388, at 345; Freedom of Information Act, 5 U.S.C. § 552.

¹⁰⁹ *New York TRACON*, 50 FLRA 388, at 345.

¹¹⁰ *Id.*

¹¹¹ 5 U.S.C. § 7114(b)(4).

¹¹² See *New York TRACON*, 50 FLRA at 344 n.6, for a list of cases where the FLRA has applied this analysis.

¹¹³ *Id.* at 344 (citing *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989)).

¹¹⁴ *New York TRACON*, 50 FLRA 388, at 348.

¹¹⁵ *Id.* at 348 n.10.

mation requested by a union. Under the FSLMRS, unions have a variety of statutory rights and responsibilities. These interests are unique to the union, and the FLRA will not consider them in assessing public interest under the Privacy Act.¹¹⁶

Applying the new framework to the requested information in *New York TRACON*, the FLRA found a significant privacy interest in information that reveals how a supervisor assesses an employee's work performance. Favorable information in an employee evaluation report, if released, might embarrass an employee or incite jealousy among coworkers. Releasing unfavorable information in an employee evaluation report could lead to embarrassment and injury to the reputation of the employees concerned. In *New York TRACON*, the FLRA balanced this privacy interest in an employee's appraisal against the public interest in knowing that the agency was carrying out its personnel functions fairly and in accordance with the law.¹¹⁷ After balancing the private and public interests, the FLRA found that the invasion of employee privacy substantially outweighed the public interest in releasing the information.

The FLRA reached the same result in *Jacksonville ATCT*,¹¹⁸ a case with similar facts. After applying the above framework to a similar request for information, the FLRA refused to order the release of unsanitized performance appraisals. The FLRA found that the invasion of employee privacy substantially outweighed the public interest served by knowing how the agency administers its performance appraisal system. The FLRA again emphasized that the public interest is measured in relation to a member of the public rather than a union. No specific benefit to a union can be factored into the equation.

The FLRA has fully embraced the Supreme Court's holding and rationale in *DOD v. FLRA*. The decisions in *New York TRACON* and *Jacksonville ATCT* clearly signal the FLRA's intent to strictly apply the Privacy Act to all union requests for information. The new framework for analyzing these cases makes it difficult for unions to justify release of personal information. Major Keys.

Union Access to Information: The Name and Home Address Controversy

Introduction

Under the Federal Service Labor-Management Relations Statute (FSLMRS), an agency is under a duty to provide the exclusive representative with information necessary to represent the bargaining unit.¹¹⁹ The FSLMRS, however, limits an agency's obligation to furnish information. One limitation is that information need only be shared "to the extent not prohibited by law."¹²⁰ This statutory restriction has caused considerable litigation on whether a union is entitled to the names and home addresses of all bargaining unit employees.

The litigation over home addresses has focused on whether the Privacy Act's exception for information obtainable under the Freedom of Information Act (FOIA) allows release of home addresses to union representatives.

From 1983 until 1994, the Federal Labor Relations Authority (FLRA) considered over 250 unfair labor practice cases that addressed this issue.¹²¹ The FLRA's position was that the release of

¹¹⁶ "[A]ll FOIA requestors have an equal, and equally qualified, right to information." *Dep't of Defense v. Federal Labor Relations Authority*, 114 S. Ct. 1006, 1014 (1994).

¹¹⁷ The public interest also had adverse consequences associated with disclosure. The FLRA cited the possibility of unhealthy comparisons of evaluations by employees leading to workplace discord and a chilling effect on candor in the evaluation process. *New York TRACON*, 50 FLRA 388, at 349-50.

¹¹⁸ *United States Dep't of Transp., Fed. Aviation Admin. v. Jacksonville Air Traffic Control Tower*, 50 FLRA 388 (1995).

¹¹⁹ See 5 U.S.C.A. § 7114(b)(4) (West 1980), which provides:

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

¹²⁰ The statute contains other requirements that must be met before an agency must give information to the union. See 5 U.S.C.A. § 7114 (West 1980). For example, the information must be "necessary" for the union to carry out its responsibilities in representing the bargaining unit. Concerning the name and home address issue, the Federal Relations Labor Authority established a per se rule that names and addresses are "necessary" for collective bargaining. See *Farmers Home Administration Finance Office v. American Federation of Government Employees*, 23 FLRA 788, 796 (1986). The propriety of this rule, as well as the "other requirements" of the statute, are not discussed in this article. Instead, this article focuses on the statutory restriction of providing information "to the extent not prohibited by law."

¹²¹ See 7 FEDERAL LABOR & EMPLOYEE RELATIONS UPDATE 12, Dec. 1994, at 2. "We tracked 252 ULP cases involving [the name and home address] issue since 1983. At a conservative estimate of \$10,000 expended per case, that amounts to more than \$2.5 million of the taxpayers' dollars expended on this one issue." *Id.*

names and home addresses was not prohibited by law—the Privacy Act. Not surprisingly, many agencies challenged the FLRA's position in federal courts.

Challenges to the FLRA's position resulted in a significant split among the Federal Circuit courts of appeals, which persisted until early 1994 when the United States Supreme Court rendered its decision in the *Department of Defense v. Federal Labor Relations Authority (DOD v. FLRA)*.¹²² In that case, the Supreme Court held that the Privacy Act prohibits union access to home addresses of bargaining unit employees.

This note reviews the FLRA's position on the home address issue, briefly discusses the split that resulted in the circuit courts, and examines the *DOD v. FLRA*. Finally, this note discusses the Privacy Act's "routine use" exception and its applicability to the release of home addresses—especially in light of Federal Personnel Manual (FPM) Letter 711-164.¹²³

The Interplay Between The Privacy Act and The FOIA

The interplay between the Privacy Act and the FOIA as it pertains to the release of names and home addresses must be examined. In general, the Privacy Act prohibits the disclosure of personal information about federal employees without their consent.¹²⁴ The Privacy Act, however, does enumerate several exceptions to the disclosure prohibition. There is no dispute that a federal employee's home address is the type of information prohibited from disclosure under the Privacy Act, unless a specific exception applies. The Privacy Act exception at issue here authorizes an agency to release information otherwise obtainable pursuant to the FOIA.¹²⁵ Therefore, if the FOIA does not require

release of this information, disclosure is prohibited by the Privacy Act.

The FOIA, in contrast to the Privacy Act, embodies "a general philosophy of full agency disclosure."¹²⁶ The FOIA exemption (b)(6), however, allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹²⁷

The FOIA exemption (b)(6) requires a balancing test to determine whether the public interest in disclosure outweighs the privacy interest of the employees.¹²⁸ The ensuing litigation over the release of home addresses has evolved into a dispute over the proper identification of the relevant "public interest" for purposes of the FOIA exemption (b)(6) balancing test.

The FLRA's Position

Now, the analysis turns to the FLRA's position that an agency is not prohibited by law from releasing employees's names and home addresses to the exclusive representative, and thus required disclosure of the information to the exclusive representative. This view, however, was not the FLRA's initial position. In 1985, in *Farmers Home Administration Finance Office v. American Federation of Government Employees Local 3354 (Farmers I)*,¹²⁹ the FLRA originally held that there was no disclosure requirement. The FLRA concluded that names and addresses are not the types of records that must be disclosed under FOIA's (b)(6) exemption. The FLRA agreed with the reasoning expressed in a decision from the United States Court of Appeals for the Fourth Circuit that home addresses "have nothing to do with the agency's work, and disclosure thereof would shed no significant light on the agency's

¹²² 114 S. Ct. 1006 (1994).

¹²³ FPM Letter 711-164, Guidance for Agencies in Disclosing Information to Labor Organizations Certified as Exclusive Representatives under 5 U.S.C. Chapter 71 (Sept. 17, 1992). The Office of Personnel Management published FPM Letter 711-164 to "provide guidance to agencies on the application of the Privacy Act to information requested by certified unions and contained in systems of records administered by OPM." *Id.* Specifically, it addressed what was necessary to release home addresses under the Privacy Act's routine use exception. The FPM, along with FPM 711-164 expired December 31, 1994. Nevertheless, the Office of Personnel Management's guidance set forth in FPM 711-164 concerning the application of the Privacy Act's routine use exception is still valid. See *infra* notes 175-178 and accompanying text.

¹²⁴ See 5 U.S.C.A. § 552a (West 1977 & Supp. 1995). The Privacy Act provides in part:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . (2) required under section 552 of this title [FOIA].

Id. § 552a(b)(2).

¹²⁵ See *id.* § 552a(b)(2). Another relevant Privacy Act exception allows release of personal information, such as home addresses, if for a "routine use." See *id.* § 552a(b)(3). The routine use exception is discussed in this article.

¹²⁶ *Department of the Air Force v. Rose*, 425 U.S. 352, 360 (1976).

¹²⁷ 5 U.S.C.A. § 552(b)(6) (West 1977).

¹²⁸ See *Farmers Home Administration Finance Office v. American Federation of Government Employees Local 3354*, 19 FLRA 195, 197 (1985) (citing *Department of the Air Force v. Rose*, 425 U.S. 352, (1976)).

¹²⁹ 19 FLRA 195 (1985).

inner workings."¹³⁰ Therefore, in conducting the FOIA exemption (b)(6) balancing test, the FLRA concluded that "the employees' strong privacy interest in their home addresses outweighs the necessity of the data for the Union's purposes."¹³¹

In 1986, the FLRA reversed its position in *Farmers Home Administration Finance Office v. American Federation of Government Employees Local 3354 (Farmers II)*.¹³² The FLRA's reversal was a direct result of the decision of the United States Court of Appeals for the Second Circuit in *American Federation of Government Employees Local 1760 v. Federal Labor Relations Authority (AFGE Local 1760)*.¹³³ In *AFGE Local 1760*, the Second Circuit determined that the FLRA's position, that the release of names and home addresses was prohibited by law, was in error.¹³⁴ In light of this case, the FLRA re-evaluated its application of the balancing test under the FOIA exemption (b)(6).

In examining the public interest side of the balancing test, the FLRA, like the Second Circuit, focused on the FSLMRS where Congress indicated that collective bargaining is in the public interest.¹³⁵ The FLRA reasoned that disclosure of home addresses would contribute to the union's ability to communicate with members of the bargaining unit. The union would therefore be better able to fulfill its responsibilities under the FSLMRS. Based on this reasoning, the FLRA determined that:

the public interest to be furthered by providing the Union with an efficient method to communicate with employees it must represent far outweighs the privacy interests of individual employees in their names and home addresses.¹³⁶

Accordingly, the FLRA held that the release of this information was not prohibited by law.

The Split In The Circuit Courts

With *Farmers II* as precedent, the FLRA consistently, and rather routinely, decided over 250 name and address cases.¹³⁷ As a result of agency challenges to the FLRA's order to release this information, the federal courts got deeply involved. Subsequently, a significant split developed among the circuit courts as to whether disclosure of home addresses was prohibited by law.

A majority of the federal circuit courts of appeals (the D.C. Circuit, First, Second, Sixth, Seventh, Tenth, and Eleventh Circuits)¹³⁸ determined that the law prohibited disclosure of names and home addresses. These circuits based their decisions on the Supreme Court's analysis in *Department of Justice v. Reporters Committee for Freedom of the Press*.¹³⁹

¹³⁰ *Id.* at 198, citing *American Federation of Government Employees v. United States Department of Health and Human Services*, 712 F.2d 931, 933 (4th Cir. 1983). The FLRA also noted that the Union has alternative means of communicating with bargaining unit employees. For example, the union could have communicated with employees through "desk drops" of information, direct distributions at entrances, meetings in conference rooms, bulletin boards, and by using their union stewards. *Id.* at 198 n.7.

¹³¹ *Id.* at 198. Because the privacy interest prevailed in the balancing test, the FOIA exemption (b)(6) applied. The FOIA therefore would not require disclosure. As a result, the Privacy Act would prohibit disclosure because no exception would apply. Thus, disclosure of home addresses would be prohibited by law.

¹³² *Farmers Home Administration Finance Office v. American Federation of Government Employees Local 3354*, 23 FLRA 788 (1986).

¹³³ 786 F.2d 554 (2d Cir. 1986).

¹³⁴ *Id.* at 557. In *AFGE Local 1760*, the Second Circuit concluded that the privacy interest of the average employee in his address was not particularly compelling. On the other hand, the Second Circuit noted that the public interest in release this information is great. This is due to a congressional determination that collective bargaining in federal employment is in the public interest. Therefore, the Second Circuit held that the release of employees' addresses is not prohibited by law. *Id.* at 556-57.

¹³⁵ *Id.* at 792.

¹³⁶ *Id.* at 793. The FLRA also noted that its decision is consistent with private sector precedent where unions routinely receive this type of information. *Id.* at 797 n.3. There is no question that the FLRA's position was a direct result of the Second Circuit's decision in *AFGE Local 1760*. In an ironic twist, in 1992 the Second Circuit reversed its own position and determined that the release of home addresses was prohibited by law. The change of position for the Second Circuit was due to the Supreme Court decision of *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (The Supreme Court determined that the only public interest to be recognized in a FOIA balancing test is that of "open[ing] agency action to the light of public scrutiny" and helping citizens to be "informed about 'what their government is up to.'"). Nevertheless, the damage was done. Over the years, the FLRA remained steadfast in its position that the release of home addresses was not prohibited by law. Consequently, in unfair labor practice cases, the FLRA repeatedly ordered agencies to release to the exclusive representative the names and home addresses of all bargaining unit employees.

¹³⁷ See 7 FEDERAL LABOR & EMPLOYEE RELATIONS UPDATE 12, Dec. 1994, at 2. Because of the Supreme Court's decision in *Reporters Committee*, the FLRA re-examined its position on the release of names and home addresses in *Portsmouth Naval Shipyard v. International FPT Employees Local 4*, 37 FLRA 515 (1990). In *Portsmouth*, the FLRA distinguished the standard of "public interest" as defined in *Reporters Committee*. Thus, the FLRA reaffirmed its position that the release of names and home addresses was not prohibited by law.

¹³⁸ See *FLRA v. Department of Defense*, 984 F.2d 370 (10th Cir. 1993); *Federal Labor Relations Authority v. Department of Defense*, 977 F.2d 545 (11th Cir. 1992); *Department of the Navy v. Federal Labor Relations Authority*, 975 F.2d 348 (7th Cir. 1992); *Federal Labor Relations Authority v. Department of the Navy*, 963 F.2d 124 (6th Cir. 1992); *Federal Labor Relations Authority v. Department of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992); *Federal Labor Relations Authority v. Department of the Navy*, 941 F.2d 49 (1st Cir. 1991); *Federal Labor Relations Authority v. Department of the Treasury*, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990).

¹³⁹ *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). See discussion *supra* note 136.

In *Reporters Committee*, the Supreme Court determined that the only public interest recognized in a FOIA balancing test is that of "open[ing] agency action to the light of public scrutiny" and helping citizens become "informed about 'what their government is up to.'"¹⁴⁰ Because of *Reporters Committee*, the majority of the circuits have held that the public interest involved in collective bargaining could not be recognized as a "relevant public interest" for purposes of the FOIA (b)(6) exemption balancing test.¹⁴¹

The minority circuits (Third, Fourth, Fifth, and Ninth Circuits) held that disclosure was required.¹⁴² These circuits contended that *Reporters Committee* did not apply to FSLMRS cases. The minority circuits argued that a different public interest analysis was appropriate for FSLMRS cases because *Reporters Committee* involved a balancing test under FOIA exemption 7(C) rather than exemption (b)(6).¹⁴³

The Supreme Court's Decision in DOD v. FLRA

In *DOD v. FLRA*,¹⁴⁴ the Supreme Court agreed with the majority circuits' approach that the release of home addresses is prohibited by law. Specifically, the Supreme Court determined that the analysis of *Reporters Committee* applies to FOIA exemption (b)(6) cases.¹⁴⁵ The Court stated that:

[w]e must weigh the privacy interest of bargaining unit employees in nondisclosure of their addresses against the only relevant public interest in the FOIA balancing analysis—

the extent to which disclosure of the information sought would "she[d] light on an agency's performance of its statutory duties" or otherwise let citizens know "what their government is up to."¹⁴⁶

The Court concluded that "[d]isclosure of addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further 'the citizens' right to be informed about what their government is up to.'"¹⁴⁷ Thus, the privacy interests of employees in nondisclosure of their home addresses clearly outweighed a "virtually nonexistent FOIA-related public interest in disclosure."¹⁴⁸ Consequently, the Court held that the Privacy Act prohibited disclosure of home addresses.¹⁴⁹

With *DOD v. FLRA*, the law has come "full circle" on the name and home address issue. As discussed, the FLRA's initial position in *Farmers I* was that disclosure was prohibited.¹⁵⁰ The similarity between the reasoning of the Supreme Court in *DOD v. FLRA* and that of the FLRA in *Farmers I* is remarkable. Both identify the exact same relevant public interest for a FOIA (b)(6) balancing test.¹⁵¹ Unfortunately, because of the FLRA's change of position in *Farmers II*, millions of dollars of taxpayer money was spent litigating this issue.¹⁵²

The Routine Use Exception

The question now remaining is whether *DOD v. FLRA* has finally laid to rest the name and home address issue. This issue is

¹⁴⁰ *Id.* at 772-73 (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

¹⁴¹ *See supra* note 138.

¹⁴² *See* *Federal Labor Relations Authority v. Department of Defense*, 975 F.2d 1105 (5th Cir. 1992); *FLRA v. Department of the Navy*, 966 F.2d 747 (3d Cir. 1992); *Federal Labor Relations Authority v. Department of the Navy*, 958 F.2d 1490 (9th Cir. 1992); *Federal Labor Relations Authority v. Department of Commerce*, 954 F.2d 994 (4th Cir.), *vacated and reh'g granted*, 966 F.2d 134 (4th Cir. 1992).

¹⁴³ *See supra* note 142.

¹⁴⁴ 114 S. Ct. 1006 (1994).

¹⁴⁵ *Id.* at 1013 n.6. In this regard, the Supreme Court stated:

the fact that *Reporters Committee* dealt with a different FOIA exemption than the one we focus on today is of little import. Exemption 7(C) and 6 differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions. . . . however, the dispositive issue here is the *identification* of the relevant public interest to be weighed in the balance, not the *magnitude* of that interest.

Id.

¹⁴⁶ *Department of Defense v. Federal Labor Relations Authority*, 114 S. Ct. at 1013 (citing *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

¹⁴⁷ *Id.* at 1013-14.

¹⁴⁸ *Id.* at 1015.

¹⁴⁹ *Id.* at 1016.

¹⁵⁰ *See* *Farmers Home Administration Finance Office v. American Federation of Government Employees Local 3354*, 19 FLRA 195 (1985).

¹⁵¹ For example, both the Supreme Court and the FLRA concluded that the relevant public interest in the FOIA exemption (b)(6) balancing test is whether disclosure reveals the agency's inner workings; in other words, what the government is up to.

¹⁵² *See* 7 FEDERAL LABOR & EMPLOYEE RELATIONS UPDATE 12, Dec. 1994, at 2.

"dead" with respect to the Privacy Act exception for information obtainable under the FOIA. Unions can still, however, attempt to gain access to home addresses under the "routine use" exception to the Privacy Act.¹⁵³ The Privacy Act defines routine use as "the use of such record for a purpose which is compatible with the purpose for which it was collected."¹⁵⁴

For years, the FLRA's position was that unions could obtain home addresses under the routine use exception. The Office of Personnel Management's (OPM's) publication of FPM Letter 711-164 questioned this position.¹⁵⁵ As a result, the FLRA modified its position on the releasability of home addresses under the routine use exception.¹⁵⁶ To understand the FLRA's change of position, one must first examine the FLRA's reasoning for its initial position.

The FLRA expressed its initial position in *Farmers II*, in which the FLRA analyzed the applicability of the routine use exception to justify disclosure of home addresses. The FLRA noted that the OPM is responsible for personnel records which contain federal employees' home addresses. In examining this matter, the FLRA stated that:

The Office of Personnel Management publishes notices defining the routine uses of personnel records of Federal employees. One notice [routine use exception "j"] defines a routine use as the disclosure of information to "officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation."¹⁵⁷

The FLRA concluded that the disclosure of home addresses to the exclusive representative was "necessary" within the meaning of the FSLMRS.¹⁵⁸ As a result, the FLRA found that disclosure of the addresses falls within the routine use "j" notice established by the OPM. Thus, according to the FLRA, home addresses may be released under the Privacy Act's routine use exception.

In *Federal Labor Relations Authority v. Department of Treasury, Finance, and Management Service (DOT)*, the D.C. Circuit rejected the FLRA's position.¹⁵⁹ The D.C. Circuit noted that the OPM had not provided guidelines to aid agencies in determining whether releases to unions were appropriate under the OPM's routine use "j" notice.¹⁶⁰ Nevertheless, the D.C. Circuit accepted the OPM's July 1986 *amicus* brief to the FLRA expressing the "OPM's views as to the meaning of paragraph j of its routine use notice."¹⁶¹

The OPM's official interpretation was that disclosure cannot be "necessary" within the meaning of the FSLMRS if "adequate alternative means exist for contacting employees."¹⁶² Moreover, the OPM required a showing of both "relevance" and "necessity" for release. In *DOT*, the union failed to show that alternate means of communication were insufficient. Thus, considering the OPM guidance, the D.C. Circuit concluded that the FLRA's determination—that the routine use exception applied and allowed release of home addresses—was in error.

The FLRA revisited and reaffirmed its application of the routine use exception in *Portsmouth Naval Shipyard v. Federal Labor Relations Authority*.¹⁶³ In *Portsmouth*, the FLRA disagreed with the D.C. Circuit's reliance on the OPM *amicus* brief to justify prohibiting disclosure.¹⁶⁴ The FLRA reasoned that it was in-

¹⁵³ See 5 U.S.C.A. § 552a(b)(3) (West 1977 & Supp. 1995).

¹⁵⁴ *Id.* § 552a(a)(7). Under the Privacy Act, agencies maintaining personnel records must describe the routine uses of such records in the Federal Register. See *id.* § 552a(e)(4)(D).

¹⁵⁵ See *supra* note 123.

¹⁵⁶ See *Department of Veterans Affairs v. National Federation of Federal Employees*, 46 FLRA 1243 (1993).

¹⁵⁷ *Farmers Home Administration Finance Office v. American Federation of Government Employees Local 3354*, 23 FLRA at 794. See also OPM Privacy Act Systems of Records Notice, 57 Fed. Reg. 35,698 (1992)—the notice for routine use "j" remained identical to the previous OPM notice and provides:

To disclose information to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

¹⁵⁸ *Farmers Home Administration Finance Office v. American Federation of Government Employees Local 3354*, 23 FLRA at 794.

¹⁵⁹ 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 863 (1990). Several other circuits have rejected the FLRA's interpretation of the OPM routine use "j" notice. For a complete list of those circuits see *National Treasury Employees Union v. Dep't of Treasury*, 46 FLRA at 242 n.10 (1992).

¹⁶⁰ *Federal Labor Relations Authority v. Department of Treasury, Finance, and Management Service*, 884 F.2d at 1454 (D.C. Cir. 1989); for text of the OPM's routine use "j" notice, see *supra* note 157.

¹⁶¹ *Id.* at 1455. The D.C. Circuit was presented with the Director of the OPM's letter of June 25, 1987, which stated that the official OPM position was set forth in the 1986 OPM *amicus* brief. The letter and *amicus* brief were attached to the government agencies's brief in the *DOT* case. *Id.* at 1454.

¹⁶² *Id.* at 1455.

¹⁶³ 37 FLRA 515 (1990); see discussion *supra* note 137.

¹⁶⁴ *Id.* at 538-41.

appropriate to rely on the *amicus* brief for several reasons. First, in the *amicus* brief, the OPM supported a litigation posture on behalf of agency employers. The FLRA noted, however, that the OPM, in setting guidance, should act in "its capacity as an executive agency applying law outside a litigation setting."¹⁶⁵

Secondly, the FLRA determined that the OPM's use of an *amicus* brief was not a proper method to promulgate interpretations of its routine use notice. Instead, the FLRA reasoned that the OPM must publicly articulate its interpretation, before being embroiled in litigation, as it had done in the past through FPM publication.¹⁶⁶ Indeed, the FLRA noted that the OPM missed a perfect opportunity to promulgate its new interpretation of routine use "j" notice in the recent Federal Register.¹⁶⁷

It was not until 1992, in FPM Letter 711-164,¹⁶⁸ that the OPM issued regulatory guidance on its interpretation of the routine use "j" notice. This guidance was essentially the same as reflected in the OPM *amicus* brief. The guidance calls for a case-by-case evaluation of disclosure. It requires unions to demonstrate that home addresses are both "relevant" and "necessary." The OPM defined "necessary" as "there are no adequate alternative means or sources for satisfying the union's information needs."¹⁶⁹

In light of FPM Letter 711-164, it would have been difficult for the FLRA to continue to follow its initial interpretation of the OPM routine use "j" notice. Indeed, the FLRA had an opportunity to discuss the "new" OPM interpretation in *National Treasury Employees Union v. Department of Treasury (NTEU v. Department of Treasury)*.¹⁷⁰ In examining FPM Letter 711-164, the FLRA focused on routine use "a" concerning release of disciplinary records rather than "j". The FLRA concluded "that FPM

711-164 governed interpretation of routine use "a" and previous [FLRA] decisions applying a different interpretation will no longer be followed."¹⁷¹

The FLRA's reasoning in *NTEU v. Department of Treasury*, signaled that it would only be a matter of time before the FLRA reached the same conclusion concerning routine use "j" notice. It took only three months after *NTEU v. Department of Treasury* for the FLRA to address this matter. In *Department of Veterans Affairs v. National Federation of Federal Employees*, the FLRA concluded that FPM Letter 711-164 would govern interpretation of the routine use "j" notice.¹⁷² The FLRA added that it would no longer follow *Portsmouth* insofar as it rejected the OPM's interpretation of the relevant routine use statement (as reflected in the *amicus* brief).¹⁷³

Interestingly, if the FLRA had been reluctant to alter its initial interpretation, the concurring opinion of Justice Ginsburg in *DOD v. FLRA* would have provided great incentive to do so. Justice Ginsburg noted that the Court did not reach the issue of whether the routine use exception might justify disclosure. However, she stated that "[t]he 'routine use' exception is not a secure one for the unions."¹⁷⁴

Nevertheless, there is a possibility that unions could qualify under routine use "j" notice for release of home addresses. Realistically, unions will find it difficult to meet the OPM routine use "j" notice requirement of demonstrating there are no adequate alternative means of communicating with bargaining unit employees. The FPM Letter 711-164 does identify a number of "recognized alternatives, such as union bulletin boards, desk drops, delivery via an agency mail distribution system, meetings, or hand-billing in non-work areas frequented by employees."

¹⁶⁵ *Id.* at 540.

¹⁶⁶ *Id.* The Third Circuit affirmed the FLRA's refusal to defer to the OPM's interpretation of routine use "j" in *FLRA v. Department of the Navy*, 966 F.2d at 762 (3d Cir. 1992), which held that "until the OPM publishes its interpretation in a manner sufficient to place the public on notice of both the existence and content of that interpretation, we will not defer to the OPM's interpretation." The majority of the circuits, however, have disagreed with the FLRA's refusal to defer to OPM's interpretation of routine use "j." For a complete list of those circuits see *NTEU v. Department of Treasury*, 46 FLRA 234, 242 n.10 (1992).

¹⁶⁷ The FLRA stated that OPM's failure to modify its routine use notice through the Federal Register procedures when presented the opportunity "gives rise to the inference that the position taken by OPM in litigation before the Authority and the D.C. Circuit reflected a litigation stance adopted for particular cases rather than an official change in policy." 37 FLRA at 541 (1990).

¹⁶⁸ See *supra* note 123.

¹⁶⁹ *Id.*

¹⁷⁰ 46 FLRA 234 (1992).

¹⁷¹ *Id.* at 243.

¹⁷² 46 FLRA at 1245 (1993).

¹⁷³ *Id.* at 1245. See also *American Federation of Government Employees v. Department of the Navy*, 47 FLRA at 320; *Department of Transportation v. FAA*, 47 FLRA 110, 129 n.2 (1993). Despite the sunset of the FPM on December 31, 1994, the OPM's official interpretation of the routine use "j" notice, as reflected in FPM Letter 711-164, is still valid. See *infra* notes 57-60 and accompanying text.

¹⁷⁴ *Department of Defense v. Federal Labor Relations Authority*, 114 S. Ct. at 1018 n.3. Justice Ginsburg further explained that the routine use exception is not secure for unions because: (1) the agency determines which uses warrant the classification "routine," and (2) the courts ordinarily defer to agency assessments of this type. *Id.*

The restrictive nature of FPM Letter 711-164 is further demonstrated by the OPM's example of when home addresses may be released under the routine use "j" notice. It provides that only if an employee spends most of his or her time away from the workplace and thus cannot be reached by the union through existing alternative means of communication, then the agency can release that one home address to the union. Unions have a slim chance of obtaining home addresses under the routine use exception of the Privacy Act.

It could be argued that with the sunset of the FPM on December 31, 1994,¹⁷⁵ the OPM's official interpretation of the routine use "j" notice as reflected in FPM Letter 711-164 is no longer valid. The courts and the FLRA will not accept that argument for several reasons. First, the majority of the courts have already deferred to the OPM's interpretation of the routine use "j" notice as reflected in the OPM *amicus* brief.¹⁷⁶ Secondly, the FLRA accepted OPM's official interpretation of the routine use "j" no-

tice when the OPM published FPM Letter 711-164.¹⁷⁷ The fact that the FPM has gone away will not change the OPM's official interpretation of the routine use "j" notice. Finally, due to the statement of Judge Ginsburg in *DOD v. FLRA* concerning the inapplicability of the Privacy Act's routine use exception for this information, it is inconceivable that the FLRA or any court would now find that home addresses could be released to unions under the routine use exception.¹⁷⁸

Conclusion

That the issue of release of home addresses could consume over ten years of litigation is hard to believe. Unions have numerous ways to communicate with bargaining unit employees. In light of *DOD v. FLRA*, the issue is finally resolved. Major Timothy J. Saviano, Chief, Administrative and Civil Law, 4th Infantry Division (Mechanized), Fort Carson, Colorado.

¹⁷⁵ See 59 Fed. Reg. 66,629 (1994).

¹⁷⁶ See *supra* note 166; see also accompanying text to notes 161-167.

¹⁷⁷ See *supra* note 172 and accompanying text.

¹⁷⁸ See *supra* note 174 and accompanying text.

Claims Report

United States Army Claims Service

Claims Regulation Update

Army Regulation 27-20

Army Regulation 27-20, Claims (28 February 1990), has been revised and republished with an effective date of 1 September 1995. This regulation prescribes the procedures for investigating, processing, and settling claims against and in favor of the United States. All claims judge advocates, claims attorneys, and other claims office personnel are encouraged to read the new regulation. Listed below are some of the most significant changes.

Chapter 1

The Army Claims System

(1) Paragraph 1-6 deletes the requirement for the United States Army Claims Service Commander to designate claims attorneys.

(2) Paragraph 1-7g replaces "Commanding General, U.S. Army Health Services Command (CG, HSC)" with "Commanding General, U.S. Army Medical Command (CG, MEDCOM)."

(3) Paragraph 1-8c(3) replaces the Staff Judge Advocate, Health Services Command, Quality Assurance Division, Office of the Surgeon General, and the Department of Legal Medicine, Armed Forces Institute of Pathology with the SJA, United States Army Medical Command (MEDCOM), and MEDCOM Quality Management Division, and the Consultation Case Review Branch, Army Health Professional Support Agency, or its successor in the MEDCOM, as the agencies to which medical malpractice claims will be forwarded.

(4) Paragraph 1-10 provides greater clarity on release of information from claims files.

(5) Paragraphs 1-11 and 1-12 now contain the provisions formerly in Chapter 10 concerning single service claims responsibility.

Chapter 2

Investigation and Processing of Claims

(1) Paragraph 2-4 changes guidance on investigations. Unit officers are now required to initially investigate all claims arising

in the unit regardless of the actual or potential amount of the claim and are prohibited from making findings on liability and damages.

(2) Paragraph 2-8 of the former publication, concerning "Report of Claims Officer," has been omitted.

(3) Paragraphs 2-8a(5), 2-18f, 2-20a(3), and 2-24 permit split payments for property damage and personal injury claims arising from the same incident.

(4) Paragraph 2-9d clarifies the mirror file requirement.

(5) Paragraph 2-9g permits command claims services or area claims offices to request authority to settle small value blast damage claims after consultation and concurrence by the action officer at Tort Claims Division, USARCS, who is responsible for the geographic area of the claim.

(6) Paragraph 2-10c(1) replaces the Office of the Surgeon General with the United States Army MEDCOM as the agency that will task subordinate commands to forward health care provider information on settled medical malpractice claims.

(7) Paragraph 2-12a clarifies the compromise settlement of damages under the Military Claims Act.

(8) Paragraph 2-23c(3) changes the amount that requires the Attorney General or his or her designee's approval from \$25,000 to \$200,000 for claims settled under the Federal Tort Claims Act.

(9) Paragraph 2-23f changes the Army comptroller to the local servicing Defense Finance and Accounting Services as the office for referrals for inquiries from payee or endorsees of Army-issued checks.

(10) Paragraph 2-25b states not to cite contributory negligence in a denial letter as the basis for denial of a claim.

(11) Paragraph 2-29b increases the amount of tort claims payable under small claims procedures from \$1000 to \$2500.

(12) Paragraph 2-29g states to consider using the small claims procedure when adjudicating Chapter 10 claims.

(13) Paragraph 2-33 states that there is no statutory authority for making advanced payments for claims payable under Chapter 4.

Chapter 3

Claims Cognizable Under the Military Claims Act

(1) Paragraph 3-8 significantly revises the Army's implementation of the Military Claims Act by setting forth general principles of adjudication and allowable elements of damage and measure of proof.

(2) Paragraph 3-11a clarifies who reviews appeals of final offers made under the Military Claims Act.

Chapter 4

Claims Cognizable Under the Federal Tort Claims Act

(1) Paragraph 4-7x of the former publication was omitted concerning claims not payable relating to the Federal Civil Defense Act of 1950.

(2) Paragraph 4-12a(2) increases the authority of area claims offices to pay tort claims from \$15,000 to \$25,000.

Chapter 6

Claims Arising from the Activities of the Army National Guard (ARNG)

Paragraph 6-9 of the former regulation relating to "Claims against the ARNG tortfeasor individually" is deleted.

Chapter 7

Claims Under Status of Forces and Other International Agreements

A new Section III, Chapter 7, is established which contains new provisions on handling claims arising overseas. These provisions clarify that, while exceptions may be allowed in unusual circumstances, a treaty provision for host country adjudication of "within scope" claims is the exclusive remedy for all eligible claimants, to include American inhabitants visiting overseas.

Chapter 8

Maritime Claims

(1) Paragraph 8-8 clarifies the requirements for filing of administrative claims and the application of the Limitation of Shipowners' Liability Act.

(2) Paragraph 8-9c gives increased approval authority to the United States Army Claims Service and gives denial and approval authority of tort claims for \$25,000 or less to Corps of Engineers area claims offices and overseas command claims services. This revision also gives similar authority over affirmative maritime claims.

Chapter 9

Claims Under Article 139, Uniform Code of Military Justice

Paragraph 9-6b permits the General Court Martial Convening Authority to approve a pay assessments in an amount not to exceed \$10,000.

Chapter 10

Claims Cognizable Under the Foreign Claims Act

(1) Paragraph 10-7b(2) clarifies which family members of American soldiers or employees continue to be covered by the Foreign Claims Act after overseas marriage or adoption.

(2) Paragraph 10-11f provides a twenty percent limitation on attorneys fees for claims under the Foreign Claims Act, to correspond with Federal Tort Claims Act and Military Claims Act limits.

(3) Paragraph 10-12 now includes paragraph 10-16 "Reconsideration" of the former publication.

(4) Paragraph 10-17 discusses solatia payments in accordance with local custom.

Chapter 11

Personnel Claims and Related Recovery Actions

(1) Paragraph 11-4f provides that, if the claimant is absent without leave and is subsequently dropped from the rolls, any pending claim will be denied.

(2) Paragraph 11-5e(3) creates a presumption that vehicle theft or vandalism did not occur on post, unless the claimant proves that it occurred at quarters.

(3) Paragraph 11-5g provides that only victims of crimes can submit claims for property held as evidence.

(4) Paragraph 11-6c provides that no payment is authorized for inability to use nonrefundable airline tickets or for lease or utility deposits.

(5) Paragraph 11-6k codifies the rule on substantial fraud—claims involving substantial fraud can be denied entirely.

(6) Paragraph 11-7a provides that a claim is "presented" when it is received at a military installation, not when the claimant mails it.

(7) Paragraph 11-8 provides that claims will not be rejected or returned as "lacking documentation."

(8) Paragraph 11-11f requires claimants with private insurance to settle with the insurer first before filing a claim.

(9) Paragraph 11-15c provides for allowance of sales tax and/or drayage before actual cost is incurred if the total for these items does not exceed fifty dollars.

(10) Paragraph 11-16b authorizes the Chief, Personnel Claims and Recovery Division, to force a claimant to accept missing property recovered after a claim has been approved for payment.

(11) Paragraph 11-20 reduces the period of time for a claimant to request reconsideration—from one year to sixty days from the settlement date of the claim. A claimant must be advised in writing of this time limit. The head of an area claims office may waive this period in exceptional cases. The Chief, United States Army Claims Service, Europe, may take final action on any reconsideration request that does not request a waiver of the maximum allowance.

(12) Paragraph 11-21b(7) requires claims personnel to take an active and continuing role in publicizing claims information to soldiers.

(13) Paragraph 11-21d requires the claims judge advocate or claims attorney to take an active role in managing claims funds.

(14) Paragraph 11-24a(11) requires that demand packets be prepared for all files forwarded to the USARCS because of incidents of bankruptcy.

(15) Paragraph 11-30c provides that only the USARCS can refund money to carriers, contractors, or warehouse companies.

Chapter 12

Nonappropriated Fund Claims

(1) Paragraph 12-3c increases the dollar amount from \$15,000 to \$25,000 for those claims that require an information copy to be forwarded to the Army and Air Force Exchange Service.

(2) Paragraph 12-5c clarifies when claims payable from appropriated funds will not be considered or paid from nonappropriated (NAFI) funds due to negligent maintenance of an appropriated funds facility.

(3) Paragraph 12-12b(2) increases the authority of area claims offices to pay non-NAFI risk management program claims in the amount of \$25,000 or less.

Chapter 14

Affirmative Claims

(1) Paragraph 14-4 details the current delegations of authority for field claims offices and command claims services. The amounts have remained unchanged from the revised amounts printed in *The Army Lawyer*, June 1991.

(2) Paragraph 14-5b provides guidance on calculating the statute of limitations for property damage and medical care claims.

(3) Paragraph 14-6c describes when field claims offices can assert claims against soldiers, government employees, family members, and retirees. The critical factors are whether the individual was acting in the scope of employment, if he or she has applicable insurance, and if he or she exhibited gross negligence.

(4) Paragraph 14-10b, c, and d provides guidance on processing medical care claims for servicemembers, family members, and retirees of the Air Force, Navy, Marine Corps, and Coast Guard and for care provided by the Veterans Administration.

(5) Paragraph 14-13a requires claims personnel to use the potentials database in the affirmative Claims Management Program to track potential claims.

(6) Paragraph 14-13f details how claims personnel calculate the amount to be asserted in a medical care claim. This amount is based on: diagnostic related group rates for inpatient care provided in an MTF; a single per visit rate for outpatient care provided in an MTF; CHAMPUS costs; costs of operating military vehicles and air craft that provide ambulance services; and burial expenses.

(7) Paragraph 14-14 provides guidance on working with an injured party and an attorney and prescribes appropriate actions for failure to cooperate.

(8) Paragraph 14-15 addresses the MTF Third-Party Collection Program and the responsibilities of hospital and claims personnel.

(9) Paragraph 14-16b requires claims personnel to review the status of all pending claims at least every sixty days and to follow up as appropriate.

(10) Paragraph 14-18 provides general information on preparing cases for litigation. *Army Regulation 27-40, Litigation* (19 September 1994), Chapter 5, provides detailed guidance on litigation issues.

(11) Paragraphs 14-19c and d provide updated guidance on depositing property damage and medical care recoveries. Monies recovered for damage to government housing will be deposited into the family housing operation and maintenance account of the installation responsible for the housing. Lieutenant Colonel Millard, Lieutenant Colonel Kennerly, Captain Park, and Captain McConnon.

Personnel Claims Notes

Claims Adjudication Problems

Clothes Missing from Cartons

If a claimant lists as one line item on a Department of Defense (DD) Form 1844, List of Property and Claims Analysis Chart (February 1989), "a carton of missing clothes," the claims office should request that the claimant resubmit the DD Form 1844 to identify the individual pieces of clothing and to state the individual purchase prices and purchase dates. It is difficult to justify an award (even the maximum allowable) based on the general description of "a carton of clothes missing." A general description also leads to challenges by the carriers when a demand is asserted against them.

Maximum Allowables

When awarding a maximum allowable (M/A) for particular items, be sure to continue to adjudicate all of the items in the maximum allowable category. Do not stop adjudicating at the point when the maximum allowable is reached. Maximum allowables do not apply to carriers, and the amount of the loss or damage in which the carrier is liable will be asserted. To assert the full amount of liability, all items must be fully adjudicated.

If a claimant does not substantiate tender to the carrier for shipment and/or ownership and value of an item, the claim should be adjudicated based on the evidence provided. Claims examiners should not automatically award the maximum allowable for a line item when the amount claimed exceeds the maximum allow-

able that is authorized for the item in the Allowance-List-Depreciation Guide.

For example, if a claimant claimed \$6000 for missing manual tools, the claimant is not automatically entitled to \$6000 or \$1500, the maximum allowable for manual tools. Claims examiners must insure that the origin inventory indicated that tools were tendered to the carrier for shipment and insure that the claimant provided sufficient proof of ownership of \$6000 of tools (or an amount in excess of the maximum allowable) before awarding the maximum allowable. If the claimant substantiated ownership and value of \$6000 worth of manual tools, and no depreciation is applicable, \$6000 should be entered in the "Amount Allowed" block of DD Form 1844, a notation that there is a \$1500 M/A involved for this line item should be entered in the "Adjudicator's Remarks" block, and the M/A overage of \$4500 should be deducted from the total adjudicated amount at the end of the last page of the DD Form 1844. Additionally, the \$6000 amount will be asserted against the carrier and entered in the "Carrier Liability" block.

If, on the other hand, a claims examiner determines that a claimant has substantiated ownership and value of only \$1500 worth of manual tools, then \$1500 should be entered in the "Amount Allowed" block. Use the symbol "RC," for replacement cost, or "F&R," for fair and reasonable, in the "Adjudicator's Remarks" block with an explanation of the adjudication entered in the chronology sheet. In this case, the carrier would only be liable for \$1500, and that amount would be entered in the "Carrier Liability" block. Do not use the maximum allowable symbol (i.e., "M/A") because it implies that the claimant was not paid the full "adjudicated" amount for those items. Lieutenant Colonel Kennerly.

Claims Note

Claims Video Teleconference Schedule

The next Claims Video Teleconference (VTC) will be held on 13 October 1995 between 1000 and 1200 Eastern time. The focus of this VTC will be on personnel claims and recovery. The target audience will be personnel claims adjudicators, recovery clerks, claims judge advocates, and claims attorneys. Claims offices whose personnel will not be able to attend a live claims VTC video broadcast may join through audio hookup, or may request a videotape of the broadcast by sending a standard 120-minute VHS videotape to the USARCS Administrative Officer. Live broadcast sites for all Claims VTCs are: Fort Benning, Fort Bliss, Fort Gordon, Fort Huachuca, Fort Jackson, Fort Knox, Fort Leavenworth, Fort Leonard Wood, Fort McClellan, Fort Rucker, Fort Sill, Fort Eustis, Fort Lewis, Fort Hood, Fort Bragg, Fort Riley, Fort Carson, Fort Drum, Fort Stewart, Fort Campbell, Fort Irwin, Fort Polk, Fort McPherson, and Fort Sam Houston. Lieutenant Colonel Millard

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Reserve Component Quotas for Resident Graduate Course

Two student quotas in the 45th 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 29 July 1996 to 8 May 1997. Successful graduates will be awarded the degree of Master of Laws in Military Law. Any troop program unit (TPU) Reserve Component JAGC captain or major who will have at least four years JAGC experience by 29 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 officer efficiency reports and academic efficiency reports.

Awards and decorations. List 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:

United States Army Reserve (USAR) TPU:
Legal Support Organization (LSO)
Commander or Staff Judge Advocate.

Army National Guard (ARNG): Staff Judge Advocates

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 Guard and Reserve Affairs Division, OTJAG, no later than 31 December 1995.

ARNG. Forward the packet through the state chain of command to Office of The Judge Advocate, ATTN: NGB-JA, 2500 Army, Pentagon, Washington, D.C. 20310-2500. Subject to state funding. The National Guard Bureau will not fund this quota.

USAR CONUS TPU. Forward the packet through the MUSARC chain of command, to Commander, ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, Missouri 63132-5200. No later than 30 November 1995.

Dr. Mark Foley, Ed.D, (804) 972-6382.

Professional Development Education for Reserve Judge Advocates During Fiscal Year 1996

The Army Reserve Personnel Center's (ARPERCEN) Fiscal Year 1996 professional development education (PDE) funding priorities for Reserve judge advocates (JAs) are: (1) JAs assigned to troop program unit (TPU) positions; (2) JAs assigned to individual mobilization augmentee (IMA) positions; and (3) JAs assigned to the individual ready reserve (IRR). The "required PDE" and "other PDE" are ARPERCEN's additional priorities within the PDE category.

"Required PDE" is needed for promotion or branch qualification—the JA Officer Basic Course, the JA Officer Advanced Course, and the Command and General Staff Officer Course are the only *required* courses.

"Other PDE" includes functional courses at The Judge Advocate General's School, United States Army (TJAGSA), Combined Arms Service Staff School, on-sites, and education required for the officer's position. Judge Advocates assigned to TPUs must obtain funding for "other PDE" from their commands. Although ARPERCEN does not have sufficient funds for IMA JAs to attend "other PDE" on separate orders, IMA JAs may be able to attend an "other PDE" on orders for their annual two weeks of training as described in the next paragraph. The ARPERCEN has no funds for IRR JAs to attend "other PDE" courses.

Individual mobilization augmentee JAs may attend functional courses at TJAGSA or on-sites as part of their annual training with prior approval of their IMA agency/command. The IMA agency/command forwards officers' requests to the ARPERCEN IMA Division. If sufficient funds are available, the ARPERCEN IMA Division authorizes funding of travel and per diem to the PDE course and the IMA agency/command on one set of orders.

For example, an IMA JA assigned to the Office of The Judge Advocate General (OTJAG) and living in Alexandria, Virginia, wants to attend the TJAGSA sponsored on-site in Washington, D.C. and the five-day environmental law course at TJAGSA, Charlottesville, Virginia. The IMA JA initiates his request by sending a completed DA Form 1058-R, Application for Active Duty for Training, Active Duty for Special Work, and Annual Training, to his usual point of contact for annual training at OTJAG. The IMA JA includes on the DA Form 1058-R the request to attend the two-day on-site followed by the five-day functional course and ending with five days at OTJAG. If OTJAG approves the officer training at other locations for seven days, then OTJAG forwards the request to ARPERCEN's IMA Division for funding. If funds are available, the ARPERCEN IMA Division authorizes the program management office to issue the

order and obtain a quota for the functional course at TJAGSA. The tour would be no more than twelve days—like the typical annual training tour—with travel and per diem to TJAGSA funded by ARPERCEN. The officer must choose an on-site within commuting distance of his home.

The usual restrictions apply to IMA JA requests as described in the preceding paragraph. The ARPERCEN IMA Division's cut-off for receipt of training requests from the IMA agencies/commands is 31 March 1996. The ARPERCEN IMA Division must receive the training request from the IMA agency/command at least sixty days prior to the beginning of the tour. The ARPERCEN IMA Division will consider a request for exception to either restriction with appropriate justification. "Other PDE" training is subject to the availability of funds and school quotas.

The above example addresses ARPERCEN's funding of "other PDE" for IMA JAs. All IMA JAs are cautioned, however, that they must have eleven consecutive duty days to be eligible for an officer efficiency report (OER). An officer who splits his twelve-day tour between PDE courses and duty at the agency/command will not be eligible for an OER for the period. Reserve JA Personnel Management Office.

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 96

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
14-15 Oct	Willow Grove, PA 153d LSO/79th ARCOM Willow Grove Naval Air Station Reserve Prgms Bld 601 Willow Grove, PA 19090	LTC Donald Moser 153d LSO Willow Grove USAR Center
21-22 Oct	Minneapolis, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th St. Bloomington, MN 55425	LTC Donald Betzold 6160 Summit Drive, #425 Brooklyn Center, MN 55430 (612) 566-8800
21-22 Oct	Newport, RI 94th RSC/3d LSO Naval Justice School Naval Education & Tng Ctr 360 Elliott Street Newport, RI 02841(508) 796-6332	MAJ Donald C. Lynde 94th RSC ATTN: AFRC-AMA-JA 695 Sherman Ave. Fort Devens, MA 01433
27-29 Oct Note: 2.5 days	Dallas, TX 90th RSC Souffer-Dallas 2222 Stemmons Freeway Dallas, TX 75207	MAJ Barry Woofter 90th RSC 8000 Camp Robinson Rd. N Little Rock, AR 72118 (501) 771-7901

**THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 96**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
18-19 Nov	NYC 77th RSC/4th LSO Fordham University School of Law 160 West 62d Street New York, NY 10023	LTC Myron J. Berman 77th RSC Bldg. 637 Fort Totten, NY 11359 (718) 352-5703
06-07 Jan 96	Long Beach, CA 78th LSO	LTC Andrew Bettwy 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (702) 876-7107
20-21 Jan	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 782205	LTC Matthew L. Vadnal 6th LSO, Bldg. 572 4505 36th Ave., W. Seattle, WA 98199 (206) 281-3002
24-25 Feb	Denver, CO 87th LSO Doubletree Inn 13696 East Iliff Pl. Aurora, CO 80014	MAJ Kevin G. Maccary 87th LSO Bldg. 820, Fitzsimons AMC McWethy USARC Aurora, CO 80045-7050 (303) 977-3929
24-25 Feb	Salt Lake City, UT HQ, UTARNG National Guard Armory 12953 South Minuteman Dr. Draper, UT 84020	LTC Michael Christensen HQ, UTARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682
24-25 Feb	Indianapolis, IN National Guard Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	MAJ George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
02-03 Mar	Columbia, SC 12th LSO/120th RSG	LTC Robert H. Uehling 12th LSO 5116 Forest Drive Columbia, SC 29206-4998 (803) 790-6104
09-10 Mar	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	CPT Robert J. Moore 10th LSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475

**THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 96**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
16-17 Mar	San Francisco, CA 75th LSO	LTC Joe Piasta Shapiro, Galvin, et. al. 640 Third St., Second Floor P.O. Box 5589 Santa Rosa, CA 95402 (707) 544-5858
23-24 Mar	Chicago, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Rd. Rolling Meadows, IL 60008	LTC Tim Hyland P.O. Box 6176 Lindenhurst, IL 60046 (708) 688-3780
27-28 Apr	Columbus, OH 9th LSO Clarion Hotel 7007 N. High St. Columbus, OH 43085 (614) 436-0700	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434
26-28 Apr Note: 2.5 days	St. Louis, MO 89th ARCOM/MO ARNG	LTC John O'Mally 8th LSO ATTN: AFRC-AMO-LSO 11101 Independence Ave. Independence, MO 64054
04-05 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Eugene E. Stoker Counsel, MS JW-10 Boeing Defense Space Group Missiles Space Division P.O. Box 240002 Huntsville, AL 35806 (205) 461-3629 FAX: 3209
18-19 May	Tampa, FL 174th LSO/65th ARCOM	LTC John J. Copelan, Jr. Broward County Attorney 115 S Andrews Ave, Ste 423 Fort Lauderdale, FL 33301 BPN: (305) 357-7600

Professional Responsibility Notes

Standards of Conduct Office, OTJAG

Ethical Awareness

*Army Rule 1.1
(Competence)*

*Army Rule 1.6
(Confidentiality)*

*Army Rule 5.5
(Unauthorized Practice of Law)*

*Army Rule 7.1
(Communications concerning a Lawyer's Services)*

*Army Rule 7.5
(Firm Names and Letterheads)*

*Army Rule 8.1
(False Statements in Bar Disciplinary Matters)*

*Army Rule 8.4
(Misconduct)*

A United States law school graduate posing as licensed lawyer in Germany was suspended from practice in Army courts for practicing law without a license, targeting the United States military community in Europe with false advertisements, incompetently representing an Army accused, improperly disclosing client information, and making false statements to The Judge Advocate General's preliminary screening official.

Military commanders declared a United States law school graduate posing as licensed lawyer in Germany off limits, barred him from United States military facilities, deleted his name from attorney referral lists, and reported him to the German police. The European Stars and Stripes withdrew his false advertisements.

The United States law school graduate's conduct included practicing law without a license, taking referral fees for passing clients to legitimate practitioners, charging excessive and unearned fees, and procuring ineffective Mexican divorces for United States service members.

Facts

Mr. Fester Snopes¹ was admitted to practice law in Maryland in 1957. In 1973, the Court of Appeals of Maryland disbarred Mr. Snopes for charging an excessive fee and improperly claiming to specialize in international law. In 1976, the disbarment was commuted to suspension terminating in 1977. Maryland began a Client Security Trust Fund Program in 1977, but because Mr. Snopes never paid Maryland bar dues, he was ineligible to practice law in the state or represent himself as a licensed Maryland lawyer. On March 21, 1995, after the delinquency was brought to the Maryland Court of Appeals, the court decertified Mr. Snopes from the practice of law in Maryland.

While living in Germany between 1992 and 1994, Mr. Snopes held himself out to be an American attorney, practicing under fictitious firm names—"Varner, Compson, and Snopes," and "Varner and Snopes." Mr. Snopes falsely claimed to have law offices in the United States. He sought and obtained legal work involving military justice matters. He made false statements to his clients about being a specialist in federal law and about having a law partner in the United States. Mr. Snopes charged unearned, excessive fees, and provided incompetent representation in military justice matters. Mr. Snopes was not authorized to practice law in Germany.

Mr. Snopes moved from Germany in December 1994, leaving no forwarding address.

Analysis

United States Military Justice Matters

Involvement with Army military justice matters subjected Mr. Snopes to the *Army Rules of Professional Conduct for Lawyers (Army Rules)*² and The Judge Advocate General's authority to regulate practice before Army courts pursuant to Rule for Courts-Martial (RCM) 109.³

Examples of Civil Law Matters

Mr. Snopes practiced law in Germany without a license and procured ineffective Mexican divorces for at least three United States service members stationed in Germany. He also routinely took large referral fees for passing his "clients" off to legitimate

¹ Real names have been changed in order to preserve privacy. The fictional Snopes family, synonymous with opportunism, predation, and ruthlessness, was memorialized in American Nobel laureate William Faulkner's trilogy: *The Hamlet, The Town, and The Mansion*.

² DEP'T OF ARMY., REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

³ MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 109 (1984) [hereinafter MCM]; DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ch. 16, sect. II, suspension of counsel (8 Aug. 1994).

practitioners. He seldom actually worked on the clients's cases. Often, the only work he did was when he telephoned attorneys trying to get them to take a case.

One egregious example occurred when Mr. Snopes charged excessive and unearned fees to a Mr. Anse Bundren, who contacted Mr. Snopes in December 1993 to find a knowledgeable and experienced attorney to probate his wife's estate in Washington, D.C. A primary reason for his call was Mr. Snopes's advertising "offices in the USA." Mr. Snopes's initially claimed fee of \$9400 was excessive, violating *Army Rule 1.5(a)* (Fees).⁴ Mr. Bundren told the preliminary screening official that Mr. Snopes became verbally abusive when Mr. Bundren said he needed work product to justify a \$9400 bill. Only after multiple requests was he able to obtain an itemized listing of his charges. Mr. Snopes's failure to provide written fee documentation to Mr. Bundren in a timely manner violated *Army Rule 1.5(b)* (Fee Information to Client).⁵ When Mr. Snopes finally presented documentation, the documented charges totaled \$1912.50, rather than \$9400. Mr. Bundren's investigation into the validity of the charges revealed that certain charged calls were never made—some calls were made after Mr. Snopes was formally released from the case, and others simply requested an attorney to take the case, after Mr. Snopes already had represented to Mr. Bundren that he and his firm were handling the case.

Even though Mr. Snopes's civil "practice" fell outside the scope of The Judge Advocate General's authority to regulate private attorneys, United States Army commanders took action to refer Mr. Snopes's civil wrongdoing to the following:

- (1) German Police (investigating unauthorized practice);
- (2) *European Stars and Stripes* (suspending advertisements);
- (3) Trial Defense Service (removing from referral list);
- (4) United States Army, Europe, Armed Forces Disciplinary Control Board (placing off limits to personnel within Germany, France, and Belgium); and
- (5) Commanders of the 1st Armored Division and United States Army, Europe, (barring Mr. Snopes from military facilities).

⁴ AR 27-26, *supra* note 2, Rule 1.5(a).

⁵ *Id.*, Rule 1.5(b).

⁶ DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICES (3 Feb. 1995).

⁷ AR 27-26, *supra* note 2, Rule 1.1.

Preliminary Screening Findings

The allegations of professional impropriety made against Mr. Snopes were subjected to a preliminary screening inquiry (PSI) conducted under *Army Regulation 27-1*.⁶ The preliminary screening official (PSO) interviewed thirty witnesses and took written statements from seventeen witnesses. She also interviewed Mr. Snopes.

Private Andy B. McCaslin, United States Army

The PSO found that Mr. Snopes provided incompetent legal advice at a court-martial while representing a soldier. According to the attorneys who had been involved in the case, Mr. Snopes did not understand either procedural or substantive law. For example, he was confused regarding the elements of the conspiracy charge. After indicating that he was through presenting his case, he did not understand that he could not argue matters not admitted as evidence. He did not understand that he should have offered his evidence before the close of his case.

The military judge said the case would not have proceeded if Mr. Snopes had been the sole defense counsel. However, he believed that the joint defense efforts of Mr. Snopes and a captain from the United States Army Trial Defense Service met the competence standards of *Army Rule 1.1* (Competence).⁷

The division staff judge advocate (SJA) said that following the court-martial, Mr. Snopes repeatedly apologized, saying, "McCaslin is only in jail because I [Snopes] am incompetent." The SJA's conversation with Mr. Snopes also revealed Mr. Snopes's lack of familiarity with procedures such as deferment of confinement.

False Advertising

Mr. Snopes's advertisement in the May 5, 1994, *European Stars and Stripes* included falsehoods such as "American Attorneys-at-Law," "German Attorney," and practice in "Civilian, Military Justice, D.O.D. Matters, Divorce, Criminal Law, International Law [emphasis added]." The ad falsely stated, "Offices in Europe and the U.S.A." The ad gave a false firm name, "Varner, Compson, and Snopes."

The officer in charge of a division SJA branch office, asked Mr. Snopes why he advertised the firm name "Varner, Compson, & Snopes," when Mr. Snopes was the only lawyer. Mr. Snopes said he was in the Merchant Marine with Varner and Compson

during World War II; after the war, they all attended the University of Baltimore Law School together and studied admiralty law. Mr. Snopes said that Varner and Compson had died in a sailboat accident while sailing from Vietnam to Manila during the Vietnam War. Mr. Snopes said he had not seen them since the Vietnam War.

Mr. Snopes falsely advertised having offices in the United States. When questioned by the PSO, Mr. Snopes insisted that it was proper for him to advertise United States offices solely based upon his ability to contact firms through Martindale-Hubbell. This was totally inconsistent with his representations to Mrs. Oates (involving a civilian personnel matter) that Mr. Snopes was associated with attorneys in Washington, D.C., and that he had partners in the United States of America.

Many of the witnesses whom the PSO interviewed had been told contradictory stories by Mr. Snopes concerning the composition of his firm, the education and background of his alleged partners, and Mr. Snopes's own level of experience.

Mr. Snopes's Breach of Client Confidentiality and False Statements Made to the PSO

When interviewed by the PSO, Mr. Snopes openly began disclosing, without solicitation from the PSO, protected client information regarding his former United States Air Force client, Technical Sergeant Blue. The PSO decided that Mr. Snopes's revelations, which pertained to the guilt of his client, were not justified under *Army Rule 1.6* (Confidentiality).⁸ At that point, the PSO interrupted Mr. Snopes to remind him of his responsibilities of confidentiality. It was clear to the PSO that Mr. Snopes did not understand his obligations regarding client confidentiality. The unwarranted disclosures violated the standards represented by *Army Rule 1.6(a)* (Confidentiality), which states: "(a) A Lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . ."⁹

Mr. Snopes told the PSO that he had been a member of the Maryland Bar for forty years. Mr. Snopes said his law partner,

Varner, attended Hastings Law School in the early 1950s and that Compson attended the Eastern College of Commerce and Law in Maryland. Mr. Snopes said they both died in 1970. He told the PSO that he had practiced law with Varner and Compson in the Philippines.

Mr. Snopes's unpersuasive attempt to convince the PSO that he could properly use deceased attorneys's names in his firm name failed to meet the level of candor required by *Army Rule 8.1* (Bar Disciplinary Matters).¹⁰ Neither Varner nor Compson had ever practiced military law in Germany. Mr. Snopes had no justification for "continuing" to practice in a deceased partner's firm name, other than to deliberately mislead those targeted by his *European Stars and Stripes* advertisements.

Fraud is "[c]onduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."¹¹ Mr. Snopes's repeated contradictory representations to innumerable people proved that his representations clearly moved beyond "mere negligent misrepresentation." His numerous falsehoods clearly amounted to dishonesty, fraud and deceit, and violated *Army Rule 8.4* (Misconduct).¹²

The Judge Advocate General's Jurisdiction Founded on Military Justice Representation in General

Involvement with military justice matters subjected Mr. Snopes to the *Army Rules*¹³ and The Judge Advocate General's authority to regulate practice before Army courts pursuant to RCM 109.¹⁴

Mr. Snopes was subject to, and violated, the *Army Rules* in three areas: (1) unauthorized practice and incompetent representation in an Army court-martial, *United States v. McCaslin*;¹⁵ (2) unauthorized practice and false advertising by targeting a military justice audience in the *European Stars and Stripes* claiming to be experienced in criminal law and military justice;¹⁶ and (3) disclosing client information and making false statements in connection with the PSI.¹⁷

Such conduct violated a lawyer's most basic professional obligations to the public and clients, the pledge to maintain personal honesty, integrity, and unimpaired loyalty. The American

⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (Maryland, Mr. Snopes's ostensible bar, generally follows the American Bar Association *Model Rules of Professional Conduct*); AR 27-26, *supra* note 2, Rule 1.6.

⁹ AR 27-26, *supra* note 2, Rule 1.6.

¹⁰ *Id.*, Rule 8.1.

¹¹ *Id.* glossary at 35.

¹² *Id.*, Rule 8.4.

¹³ *Id.*

¹⁴ MCM, *supra* note 3, R.C.M. 109.

¹⁵ In that case, Mr. Snopes violated *Army Rules 1.1* (Competence), 5.5 (Unauthorized Practice), and 8.4 (Misconduct).

¹⁶ Five *Army Rules* were violated: 5.5 (Unauthorized Practice); 7.1 (Communications Concerning a Lawyer's Services); 7.4 (Communication of Fields of Practice); 7.5 (Firm Names and Letterheads); and 8.4 (Misconduct).

¹⁷ Mr. Snopes violated *Army Rules 1.6* (Confidentiality), 8.1 (False Statements in Bar Disciplinary Matters), and 8.4 (Misconduct).

Bar Association Model Standards for Imposing Lawyer Sanctions indicate that disbarment is generally appropriate for such violations upon a finding that the conduct "seriously adversely reflects upon the lawyer's fitness to practice." However, matters in aggravation and mitigation can affect the level of sanction.

Matters in Aggravation

Matters in aggravation included Mr. Snopes's 1973 Maryland disbarment, later commuted to a suspension through 1977; his 1977 default in Maryland client security fund dues payments; and his deceptive ads attempting to gain legal business from United States citizens in Europe.

Matters in Mitigation

Mr. Snopes mentioned to the PSO that he was a disabled veteran. He said he was in the United States Coast Guard from January to November of 1942 and in the Navy for four months

for flight training. He said that he had been in the Merchant Marine at some point after that and got out in 1946. He said that he rejoined the Merchant Marine for both the Korean (1950-51) and Vietnam Wars (1967-68).

Action

Although Mr. Snopes's case involved significant violations of the Army Rules, referral to the Professional Responsibility Committee was unnecessary. In December 1994, Mr. Snopes left Germany, leaving no forwarding address, and avoiding German prosecution for practicing law without a license. However, because the allegations against Mr. Snopes arose while he was targeting United States service members needing military justice services, on April 26, 1995, The Assistant Judge Advocate General suspended him indefinitely from practicing before Army courts-martial and the United States Army Court of Criminal Appeals. Mr. Eveland.

CLE News

1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys 5F-F10

Class Number—133d Contract Attorneys' Course 5F-F10

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

2. TJAGSA CLE Course Schedule

1995

2-6 October: 1995 JAG Annual Continuing Legal Education Workshop (5F-JAG).

10-13 October: 2d Ethics Counselors' CLE Workshop (5F-F201).

16-20 October: USAREUR Criminal Law CLE (5F-F35E).

16-20 October: 37th Legal Assistance Course (5F-F23).

16 October-21 December: 138th Basic Course (5-27-C20).

23-27 October: 132d Senior Officers' Legal Orientation Course (5F-F1).

30 October-3 November: 43d Fiscal Law Course (5F-F12).

13-16 November: 19th Criminal Law New Developments Course (5F-F35).

13-17 November: 61st Law of War Workshop (5F-F42).

4-8 December: USAREUR Operational Law CLE (5F-F47E).

4-8 December: 133d Senior Officers' Legal Orientation Course (5F-F1).

1996

8-12 January: 1996 Government Contract Law Symposium (5F-F11).

9-12 January: USAREUR Tax CLE (5F-F28E).

22-26 January: 48th Federal Labor Relations Course (5F-F22).

22-26 January: 23d Operational Law Seminar (5F-F47).

31 January-2 February: 2d RC Senior Officers' Legal Orientation Course (5F-F3).

5-9 February: 134th Senior Officers' Legal Orientation Course (5F-F1).

5 February-12 April: 139th Basic Course (5-27-C20).

12-16 February: PACOM Tax CLE (5F-F28P).

12-16 February: 62d Law of War Workshop (5F-F42).

12-16 February: USAREUR Contract Law CLE (5F-F18E).

26 February-1 March: 38th Legal Assistance Course (5F-F23).

4-15 March: 136th Contract Attorneys' Course (5F-F10).

18-22 March: 20th Administrative Law for Military Installations Course (5F-F24).

25-29 March: 1st Contract Litigation Course (5F-F102).

1-5 April: 135th Senior Officers' Legal Orientation Course (5F-F1).

15-19 April: 1996 Reserve Component Judge Advocate Workshop (5F-F56).

15-26 April: 5th Criminal Law Advocacy Course (5F-F34).

22-26 April: 24th Operational Law Seminar (5F-F47).

29 April-3 May: 44th Fiscal Law Course (5F-F12).

29 April-3 May: 7th Law for Legal NCOs' Course (512-71D/20/30).

13-17 May: 45th Fiscal Law Course (5F-F12).

13-31 May: 39th Military Judge Course (5F-F33).

20-24 May: 49th Federal Labor Relations Course (5F-F22).

3-7 June: 2d Intelligence Law Workshop (5F-F41).

3-7 June: 136th Senior Officers' Legal Orientation Course (5F-F1).

3 June-12 July: 3d JA Warrant Officer Basic Course (7A-550A0).

10-14 June: 26th Staff Judge Advocate Course (5F-F52).

17-28 June: JATT Team Training (5F-F57).

17-28 June: JAOAC (Phase II) (5F-F55).

1-3 July: Professional Recruiting Training Seminar

1-3 July: 27th Methods of Instruction Course (5F-F70).

8-12 July: 7th Legal Administrators' Course (7A-550A1).

8 July-13 September: 140th Basic Course (5-27-C20).

22-26 July: Fiscal Law Off-Site (Maxwell AFB) (5F-12A).

24-26 July: Career Services Directors Conference.

29 July-9 August: 137th Contract Attorneys' Course (5F-F10).

29 July-8 May 1997: 45th Graduate Course (5-27-C22).

30 July-2 August: 2d Military Justice Management Course (5F-F31).

12-16 August: 14th Federal Litigation Course (5F-F29).

12-16 August: 7th Senior Legal NCO Management Course (512-71D/40/50).

19-23 August: 137th Senior Officers' Legal Orientation Course (5F-F1).

19-23 August: 63d Law of War Workshop (5F-F42).

26-30 August: 25th Operational Law Seminar (5F-F47).

4-6 September: USAREUR Legal Assistance CLE (5F-F23E).

9-13 September: 2d Procurement Fraud Course (5F-F101).

9-13 September: USAREUR Administrative Law CLE (5F-F24E).

16-27 September: 6th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

November 1995

2-3, GWU: Best-Value Source Selection, San Diego, CA.

2-3, GWU: Procurement Law Research Workshop, Washington, D.C.

- 2-3, ALIABA: Water Law, Portland, OR.
- 7-8, GWU: Subcontract Law in Federal Procurement, San Diego, CA.
- 9-10, ALIABA: 1995 Employment Law Conference, Chicago, IL.
- 9-11, ALIABA: ERISA Litigagin, Chicago, IL.
- 13-17, GWU: Cost-Reimbursement Contracting, Washington, D.C.
- 20-21, GWU: Procurement Ethics, Washington, D.C.
- 29-1 December, GWU: ADP Contract Law, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1995 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
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 triennially
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

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 A281240 Office Directory/JA-267(94) (95 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A282033 Preventive Law/JA-276(94) (221 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 A280725 Office Administration Guide/JA 271(94) (248 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 A283734 Consumer Law Guide/JA 265(94) (613 pgs).
- *AD A289411 Tax Information Series/JA 269(95) (134 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 A285724 Federal Tort Claims Act/JA 241(94) (156 pgs).
- AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).
- AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).
- AD A283503 Government Information Practices/ JA-235(94) (321 pgs).
- AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

- AD A286233 The Law of Federal Employment/JA-210(94) (358 pgs).
- *AD A291106 The Law of Federal Labor-Management Relations/JA-211(94) (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 and Operational Law

- AD A284967 Operational Law Handbook/JA 422(94) (273 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:

- ADA145966 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, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

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

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

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (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 judge advocates 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 Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (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 by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and 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 currently is 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, PROCOMM, 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 asked to view other conference members.

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

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

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

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

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

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

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

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging 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 Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

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

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

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

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

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

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

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

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.	JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.	JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
ALAW.ZIP	June 1990	Army Lawyer/Military Law Review Database ENABLE 2.15. Updated through the 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.	JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.	JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
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.	JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.
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 1994	Federal Tort Claims Act, August 1994.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.	JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.	JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
FOIAPT2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.	JA262.ZIP	April 1994	Legal Assistance Wills Guide.
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	JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.	JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.	JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
			JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
			JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
			JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
			JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
			JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.	JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA275.ZIP	August 1993	Model Tax Assistance Program.	JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.	JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.	JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.	JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.	JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.	JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.	JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.	JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.	JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.	JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA422.ZIP	May 1995	OpLaw Handbook, June 1995.	1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.	1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.	1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.	1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.	JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.			

FILE NAME	UPLOADED	DESCRIPTION
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 and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/2-inch or 3 1/4-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, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)(h), above.

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4. TJAGSA Information Management Items

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

"postmaster@jags2.jag.virginia.edu"

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

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

5. Articles

The following information may be of use to judge advocates in performing their duties:

Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN L. REV. 789 (1995).

Carolyn D. Richmond, *The Rehnquist Court: What Is in Store for Constitutional Law Precedent*, 39 N.Y.L. SCH. L. REV. 511 (1994).

Gail Johnston, *It's All in the Cards: Serial Killers, Trading Cards, and the First Amendment*, 39 N.Y.L. SCH. L. REV. 549 (1994).

6. The Army Law Library Service

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. Nell Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

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