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The CID Titling Process—Founded or Unfounded?

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Introduction

All trial counsel have faced the following situation: “Ma’am, this is the United States Army Criminal Investigation Command (CID) Special Agent Holmes.¹ I’m just calling for my final SJA coordination to see if I can get your opinion on some cases so I can close them. I’ll just run the facts of each case by you; let me know if you think there’s enough evidence to title the subject.” What is the trial counsel supposed to do? What is the agent asking? What exactly is “titling”? What ramifications are there for the soldier who is titled?

This article first discusses the definition, significance, and recent history of titling. Major changes to the process were made in 1992, significantly altering the titling analysis. Second, the article analyzes the current titling standard and provides arguments both in favor of and against the standard. Third, this article discusses how a soldier can best challenge a titling decision. Finally, the article provides recommendations to better serve both the soldier and the titling process.

The Definition of Titling

Titling is the decision to place the name of a person or other entity in the “subject” block of a CID report of investigation (ROI).² A “subject” is “[a] person . . . or other legal entity . . . about which credible information exists which would cause a reasonable person to suspect that person . . . or other legal entity . . . may have committed a criminal offense, or otherwise cause

such person . . . or other legal entity . . . to be the object of a criminal investigation.”³

Titling is an operational decision, not a legal or judicial one. For that reason, the responsibility for the decision to title an individual rests with the CID agent.⁴ The basis for a decision to title is the existence of “credible information” that a person or entity “may have committed a criminal offense” or is “otherwise made the object of a criminal investigation.”⁵ “Credible information” is:

Information disclosed or obtained by an investigator which, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to indicate criminal activity has occurred and would cause a reasonable investigator under similar circumstances to pursue further the facts of the case to determine whether a criminal act has occurred.⁶

Titling within the Army must be distinguished from the determination of whether sufficient evidence exists to “found” an offense.⁷ In addition, titling must be distinguished from the determination of whether an offense is “substantiated.”⁸ After an offense is fully investigated, the CID agent must coordinate with the trial counsel to determine, based on probable cause, whether an offense is substantiated.⁹ Unless there is probable cause to believe that the subject actually committed the offense for which he is titled, the CID agent should not substantiate the

1. The United States Army Criminal Investigation Command (USACIDC) is known by the acronym “CID,” which is the historic term for matters specifically identified with USACIDC activities or organizations. See U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES, glossary (30 Oct. 1985) (IO1, 27 Sept. 1993) [hereinafter AR 195-2].

2. *Id.* An ROI is “an official written record of all pertinent information and facts obtained in a criminal investigation.” *Id.* The full definition of titling is “[t]he decision by a properly authorized official possessing credible information of criminal activity to place the name of one or more persons, corporations, or other legal entities into the subject portion of the title section of a CID [ROI].” *Id.*

3. *Id.*

4. U.S. DEP’T OF DEFENSE, INSTR. 5505.7, TITLING AND INDEXING OF SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE (14 May 1992) [hereinafter DOD INSTR. 5505.7].

5. AR 195-2, *supra* note 1, para. 1-5o.

6. *Id.* glossary.

7. “Founded” is defined as “a determination by the [CID] that a criminal offense enumerated in the [Uniform Code of Military Justice (UCMJ)], Federal Criminal Code, or applicable state statute has been committed. The determination that a founded offense exists is an investigative decision and not dependent upon judicial decision.” U.S. ARMY CRIMINAL INVESTIGATION COMMAND, REG. 195-1, CRIMINAL INVESTIGATION OPERATION PROCEDURES, para. 7-25c(1) (1 Oct. 1994) [hereinafter CID REG. 195-1]. Other categorizations of offenses are “unfounded” or “insufficient evidence.” “Unfounded” means that a criminal offense did not occur. *Id.* para. 7-25c(2). “Insufficient evidence is (a) the inability to determine whether or not an offense occurred or (b) the inability to establish probable cause that a certain entity listed in the subject block for an offense enumerated in the UCMJ . . . did or did not commit the offense.” *Id.* para. 7-25c(3)(a)-(b).

offense.¹⁰ Even if the offense is unfounded or not substantiated, the titling decision remains in place, and information about the subject remains retrievable.

The different standards applied to the separate sections of the ROI may lead to some confusing results. For example, soldier *A* reports to the CID that his new television set was stolen from his barracks room. This is “credible information” that a crime was committed, and the CID opens an investigation. Soldier *B* is initially identified as a subject and is “titled” in the initial ROI based on credible information that he was seen near the crime scene at the time of the theft carrying a television set similar to the one stolen from soldier *A*. Further investigation establishes, however, that soldier *B* recently purchased the television he was carrying, and soldier *B* produces a receipt to substantiate his lack of involvement in the theft. As such, no probable cause exists to believe that soldier *B* stole soldier *A*’s television. What is the result?

First, soldier *B* is listed as the subject of the ROI because credible information existed to believe that he had committed the offense. Second, the offense is “founded,” because it did occur. Finally, the investigative summary and staff judge advocate coordination portions of the ROI clearly state that probable cause against soldier *B* is lacking. Therefore, the offense is unsubstantiated as to soldier *B*.

Some CID agents might ignore the regulation and would “unfound” the offense in this scenario. This is in direct contravention of *CID Regulation 195-1*, which defines “unfounded” as “a determination . . . that a criminal offense . . . did not occur,” not that the titled subject did not commit the offense.¹¹ This practice confuses the meanings of “founded” and “unfounded” with the meanings of “substantiated” and “unsubstantiated.” This is but one of many confusing areas in the titling arena. In all cases of the scenario set forth here, soldier *B* remains “titled” as a subject of the investigation.

Purpose and Significance of Titling

Upon initiation of an investigation, the CID prepares an initial ROI. “An initial ROI is a report dispatched to advise concerned commanders, CID supervisors, and other designated recipients that a [CID] investigation has been initiated.”¹² The standard to initiate an investigation is “determination that credible information exists that an offense has been committed which falls within [CID] investigative responsibility.”¹³ The decision to initiate an investigation is determined separately from the decision of whether a person should be listed as a subject in the ROI.

A subject may or may not be titled in the initial ROI, depending on the evidence developed at the time. For example, the

8. *Id.* paras. 7-14g, 7-14j(25) (discussing, but not defining, substantiation of an offense). The “investigative summary” portion of the ROI is a brief description of the incident under investigation, including the who, what, where, when, and how. *Id.* para. 7-14g. Examples provided in *CID Regulation 195-1* give the correct wording for this section of the ROI; the examples provided are in “probable cause” language. *Id.* For example, the agent who is drafting the investigative summary is instructed to include certain language:

- (1) Investigation established probable cause to believe that . . .
- (2) Investigation established that the offense of . . . did not occur as alleged.
- (3) Investigation revealed that . . . did not commit the offense of . . . as alleged.
- (4) Investigation established there was insufficient evidence to determine . . .

Id. para 7-14g. Similarly, *CID Regulation 195-1* discusses the “SJA coordination portion of the ROI.” *Id.* para. 7-14j(25). This portion of the ROI describes the investigating agent’s contact with a member of the servicing Office of the Staff Judge Advocate (OSJA), usually the trial counsel assigned to cover the jurisdiction of the offense. This contact occurs near the end of the investigation. The CID agent must seek an opinion from the trial counsel as to whether the evidence against the subject rises to the level of probable cause to believe that the suspect committed the offense alleged. Again, the language examples for ROI inclusion are framed in terms of probable cause. “[F]or example, ‘CPT Jones said there was probable cause to believe SMITH committed the offense of . . .’” *Id.* para. 7-14j(25).

9. The agent is required to coordinate with the OSJA prior to finalizing the investigation “to determine if the investigation is complete and sufficient for legal purposes.” *CID REG. 195-1*, *supra* note 7, para. 5-28. “The primary element to determine during SJA coordination prior to listing an individual in a report of investigation is that probable cause exists to believe the subject committed the offense cited.” *Id.* para. 7-14j(25).

10. The probable cause standard still applies when determining whether or not an offense is substantiated. In 1992, when the titling standard was changed from probable cause to credible information, the CID stated its desire to retain the probable cause standard for determining whether an offense is substantiated. In its message announcing the new titling standard, the CID stated:

[A]ll references to the probable cause standard for listing persons as subjects of ROIs as well as procedures for deleting subjects and victims are rescinded, with the exception of deletions due to mistaken identity. *The probable cause standard will apply only to whether or not there is probable cause to substantiate that a person committed an offense, and may be stated only in the investigative findings and legal coordination portions of the ROI.*

Message, 301258Z Jun 92, Commander, United States Army Criminal Investigation Division, CIOP-PP-PO, subject: Changes to CID REG. 195-1 (Categorization and Listing of Subjects and Victims in CID Reports), para. R (30 June 1992) [hereinafter Changes to CID Reg. 195-1 Message] (emphasis added).

11. See *CID REG. 195-1*, *supra* note 7, para. 7-25c(2).

CID may receive credible information that a murder occurred, based on the discovery of a soldier's mutilated body in his quarters. This discovery triggers the requirement for an initial ROI within three working days. If there is not separate additional credible information as to the identity of the potential murderer, however, the initial ROI would list "unknown" as the subject(s) of the investigation.

If an individual is titled in the initial ROI a commander may "flag" the soldier who is listed as a subject, and may suspend the subject's security clearance.¹⁴ The initial ROI reminds commanders "of their responsibilities to suspend security clearances and favorable personnel actions" whenever the ROI lists Army members or Department of Defense (DOD) civilian employees as subjects.¹⁵ In such cases, the following information must appear in the initial ROI: "Commanders are reminded of the provisions of [*Army Regulation (AR)*] 600-8-2 pertaining to suspension of favorable personnel actions and *AR 380-67* for the suspension of security clearances of persons under investigation."¹⁶

12. *Id.* para. 7-11a. In addition to the "initial ROI," there are final ROIs, status ROIs, interim ROIs, supplemental ROIs, corrected ROIs, referred ROIs, collateral ROIs, and joint investigation ROIs. *Id.* paras. 7-11 through 7-21. The original of all final, referred, collateral, and supplemental ROIs goes to the United States Army Crime Records Center (CRC) at Fort Belvoir, Virginia. *Id.* para. 8-4. A file copy is retained in the case folder of the CID unit that prepared the ROI. *Id.* para. 8-5. The provost marshal(s) responsible for the area(s) where the incident(s) occurred receives a copy. *Id.* para. 8-8.

In addition to the "routine distribution" described above, "special distribution is required when there is an identified subject." *Id.* para. 8-9. For "special distribution," one copy is sent to the action commander (company/battery/troop) of each military or DOD civilian subject or, in the case of a family member, to the installation commander or his designated representative. *Id.* para. 8-10(a)-(b). Also, one copy is sent to the SJA who supports each action commander. *Id.* para. 8-11.

13. *Id.* para. 7-11a. The CID agent must dispatch the initial ROI by the close of business of the third working day following a determination that credible information exists of an offense for which the CID has investigative responsibility. *Id.*

14. *Id.* para. 7-11(o).

15. *Id.*

16. *Id.* "Flagging" is the suspension of favorable personnel actions, such as promotion and permanent change of station. See U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (30 Oct. 1987) (IO1, 15 Apr. 1994). A flag is required when a soldier is under investigation. *Id.* para. 1-12a(1). The flag is removed "when the soldier is released without charges, charges are dropped, or punishment is complete." *Id.* See also U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM, paras. 8-101(b)(1) and 8-102 (9 Sept. 1988) [hereinafter *AR 380-67*]. *Army Regulation 380-67* requires the commander to notify the United States Army Central Personnel Security and Clearance Facility (CCF) "when the commander learns of credible derogatory information on a member of his or her command" falling within certain parameters. *Id.* para. 8-101(b)(1). "Derogatory information" is "[i]nformation that constitutes a possible basis for taking an adverse or unfavorable personnel security action." *Id.* para. 1-304.3. Such derogatory information includes both "adverse loyalty information" and "adverse suitability information" (including criminal conduct). *Id.* para. 1-304.3(a)-(b).

Army Regulation 380-67 gives the commander the authority to suspend an individual's security clearance "when a commander learns of 'significant derogatory information' falling within certain parameters." *Id.* para. 8-102. "Significant derogatory information" is "[i]nformation that could, in itself, justify an unfavorable administrative action, or prompt an adjudicator to seek additional investigation or clarification." *Id.* para. 1-323. The parameters of the "significant derogatory information" covered involves numerous activities that include, but are not limited to, "[c]riminal or dishonest conduct"; "[a]cts of omission or commission that indicate poor judgment, unreliability, or untrustworthiness"; and "[a]cts of sexual misconduct or perversion indicative of moral turpitude, poor judgment, or lack of regard for the laws of society." *Id.* paras. 2-200h, i, q.

See U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION, para. 2-6b (19 Dec. 1986) (IO1 24 Oct. 1994) [hereinafter *AR 600-37*] (requiring the CCF to advise the Department of the Army Suitability Evaluation Board (DASEB) regarding "unfavorable information or cases of denial or revocation of security clearance involving senior enlisted (E6 or above), commissioned, or warrant officer personnel"). The DASEB has the authority to order that unfavorable information be placed in a soldier's official military personnel file (OMPF). *Id.* para. 2-3. "Unfavorable information" is "[a]ny credible derogatory information that may reflect on a soldier's character, integrity, trustworthiness, or reliability." *Id.* glossary (emphasis added).

17. Office of Criminal Investigations Policy and Oversight, *Review of Titling and Indexing Procedures Utilized by the Defense Criminal Investigative Organizations*, DOD IG No. 91FBD013, at 1 (1991) [hereinafter *Review of Titling and Indexing Procedures*]. See *infra* notes 57-67 and accompanying text (discussing the history, methodology, and recommendations of the *Review of Titling and Indexing Procedures*).

18. DOD INSTR. 5505.7, *supra* note 4, para. F-4. See also CID REG. 195-1, *supra* note 7, para. 21-28; AR 195-2, *supra* note 1, para. 1-5o.

19. *Review of Titling and Indexing Procedures*, *supra* note 17, at 3.

"The primary purpose for titling an individual as the subject of a criminal report of investigation is to ensure that information contained in the report can be retrieved at some future point in time for law enforcement and security purposes. This is strictly an administrative function."¹⁷ To facilitate this primary purpose, the identities of subjects of ROIs must be listed or "indexed" in the Defense Clearance and Investigations Index (DCII) when the CID initiates the investigation.¹⁸ The DCII "includes not only criminal investigation files, but background and security investigations as well."¹⁹ The index is a computerized central registry of investigations for all DOD investigative activities.²⁰

The primary significance of the titling decision is indexing in the DCII. The information indexed in the DCII is "personal identifying data of individuals or entities who appear as the subjects, victims, or incidentals in the investigative reports of DOD criminal, counterintelligence, fraud, and personnel security investigative activities."²¹ The personal identifying data

includes names; aliases; social security numbers; and the date, state, and country of birth of individuals.²² The DCII does not disclose the results of an investigation, nor does it disclose action taken by the command, a court-martial, or any other adjudicative body.²³ As of 1994, the last year for which published statistics are available, the DCII contained over twenty-nine million indices on approximately nineteen million individuals, and it was growing at a rate of about two million indices per year.²⁴

Within the Army, at the same time that a subject is indexed in the DCII, the subject is also indexed in the United States Army Crime Records Center (CRC), a separate repository solely for Army investigative reports.²⁵ Unlike the DCII, the CRC maintains more than just identifying data; the entire ROI is retained, including a report of any action taken against the subject.²⁶ The CRC, on its own, exchanges information with numerous organizations “as it pertains to the exchange of criminal investigation reports or information in support of the Exec-

utive Branch of the United States Government.”²⁷ One of the organizations with which the CRC exchanges information is the Department of the Army Suitability Evaluation Board (DASEB), which has the authority to file “unfavorable information” in a soldier’s official military personnel file (OMPF).²⁸

To search the DCII, a requester must enter personal identifying data of an individual or entity, for example, a social security number.²⁹ The DCII indices identify, consolidate, and provide a list of all investigations conducted in the DOD on the individual or entity concerned. The DCII then refers the requester to the appropriate agency or agencies (the CRC for Army criminal investigations) from which the complete file(s) of the investigation(s) may be obtained.³⁰ “The files are owned, maintained, and controlled by the contributing user organizations.”³¹ The agency that contributes and maintains the investigative files determines the length of time during which a file is retrievable from the DCII files. For Army criminal investigations, the

20. *Id.* See also DOD INSTR. 5505.7, *supra* note 4, para. D-2. The DCII was established to constitute an automated, computerized central index of investigations for all DOD investigations. Office of Criminal Investigations Policy and Oversight, *Review of Operating Policies and Procedures for Users of the Defense Central Index of Investigations*, DOD IG No. 86FRR006, at 1 (1987) [hereinafter *Review of DCII Policies and Procedures*]. The Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (C3I), has operational responsibility for the DCII. The Defense Security Service (DSS), formerly the Defense Investigative Service, operates the system. The DOD Inspector General (IG) is responsible for overseeing the use of the DCII by the Defense Criminal Investigative Organizations (DCIOs), including the CID. 2 REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE 89 (U.S. Government Printing Office 1994) [hereinafter *ADVISORY BOARD REPORT*]. There are four DCIOs: the Defense Criminal Investigative Service (DCIS); the CID; the United States Naval Criminal Investigative Service (NCIS); and the United States Air Force Office of Special Investigations (AFOSI). 1 *ADVISORY BOARD REPORT*, *supra*, at v n.1. Military criminal investigative organizations (MCIOs) include the CID, the NCIS, and the AFOSI. *Id.*

21. 2 *ADVISORY BOARD REPORT*, *supra* note 20, at 89. An “incidental” is “any person or entity associated with a matter under investigation and whose identity may be of subsequent value for law enforcement or security purposes.” DOD INSTR. 5505.7, *supra* note 4, encl. 1 (definitions).

22. 2 *ADVISORY BOARD REPORT*, *supra* note 20, at 89.

23. *Review of DCII Policies and Procedures*, *supra* note 20, at 6.

24. *Id.* Information on the indices rate of growth was obtained from the historical files on titling retained at the Office of Criminal Investigative Policy and Oversight, DOD Inspector General, 400 Army Navy Drive, Alexandria, Virginia [hereinafter *DOD IG Historical File—Titling*]. The *DOD IG Historical Files—Titling* are those materials collected while the DOD IG was conducting its investigation into titling procedures. The investigation resulted in the *Review of Titling and Indexing Procedures* (see note 17) and *DOD Instruction 5505.7* (see note 4). See *infra* 57-74 and accompanying text (discussing the investigation, the *Review of Indexing and Titling Procedures*, and *DOD Instruction 5505.7*).

25. CID REG. 195-1, *supra* note 7, ch. 21.

26. Interview with Philip McGuire, Director, U.S. Army Criminal Records Center, at Fort Belvoir, Va. (Feb. 27, 1998).

27. CID REG. 195-1, *supra* note 7, para. 21-9. The organizations include, but are not limited to, the following: the DSS; United States Army Intelligence and Security Command; Department of the Army Suitability Evaluation Board; the CCF; United States Army Military Police School; National Security Agency; Central Intelligence Agency; Federal Bureau of Investigation; Office of Personnel Management; Immigration and Naturalization Service; Department of State; the NCIS; the AFOSI; United States Treasury Enforcement Agencies (Internal Revenue Service; Secret Service; United States Customs; Bureau of Engraving and Printing; and Bureau of Alcohol, Tobacco, and Firearms); and the DCIS. *Id.* paras. 21-9(b)(1)-(15). See AR 195-2, *supra* note 1, para. 5-1.

28. AR 600-37, *supra* note 16, para. 2-3. The standard for inclusion in the OMPF is that “[t]he unfavorable information is of such a serious nature as to apparently warrant, unless adequately explained or rebutted, filing in a recipient’s OMPF.” *Id.* para. 6-3c(3). “Unfavorable information” is “[a]ny credible derogatory information that may reflect on a soldier’s character, integrity, trustworthiness, or reliability.” *Id.* glossary (emphasis added). On its face, this definition includes the mere titling of a soldier. Upon request, the CID will transmit to the DASEB “copies of final CID . . . ROIs . . . reflecting known subjects.” AR 195-2, *supra* note 1, para. 5-1L. See AR 600-37, *supra* note 16, para. 2-6.

The soldier is entitled to notification of the intent to place the information in the OMPF and an opportunity to respond prior to the DASEB’s final determination. *Id.* Completed investigative reports, including ROIs, however, can be filed in the soldier’s OMPF without referral to the soldier. *Id.* para. 3-3c. This provision does not exclude ROIs that have not resulted in disciplinary or administrative action against the soldier. *Id.*

29. 2 *ADVISORY BOARD REPORT*, *supra* note 20, at 90.

30. *Id.* at 92. See *Review of DCII Policies and Procedures*, *supra* note 20, at 2.

information is kept at the CRC and the DCII and is retrievable for forty years.³²

Access to information in the DCII is widespread. The DCII receives an average of 35,000 requests per day.³³ Twenty-seven agencies are authorized access and input to the DCII, with a total of 1179 terminals.³⁴ An additional 129 terminals have “read only” capability.³⁵ A working group was recently established to examine whether access should be extended to an even greater number of agencies.³⁶ The information retrieved may be used to determine promotions, to make employment decisions, to assist in assignment decisions,³⁷ to make security determinations,³⁸ and to assist criminal investigators in subsequent investigations.

Once the CID enters a subject’s name in the DCII, that name can only be removed in the case of mistaken identity, such as when the CID entered the wrong person’s name into the DCII.³⁹ “Mistaken identity” does not mean that someone other than the subject is found to have committed the offense. Rather, it means that someone with the same name as the listed subject should have been entered as the subject instead. For example, SPC Joe Smith, SSN 123-456-7890 was entered as the listed subject of a report of investigation by mistake, instead of SPC Joe Smith, 123-456-7899, the correct subject. In this scenario, SPC Smith should be able to have his name removed from the title block, but, in order to do so, he must follow the amendment procedure.⁴⁰

31. 2 ADVISORY BOARD REPORT, *supra* note 20, at 92 (quoting *Review of DCII Policies and Procedures*, *supra* note 20).

32. *Review of Titling and Indexing Procedures*, *supra* note 17, at 6. The CID has access to data in the CRC and can retrieve information concerning investigations and individuals. Other law enforcement agencies, however, do not have direct access to the CRC and must access those materials via the DCII. *Id.* The Army justifies the lengthy retention period for criminal investigation files because “experience has shown that recidivism by criminal offenders requires the retention of criminal history records for at least 40 years.” *Review of DCII Policies and Procedures*, *supra* note 20, at 19. For comparison, the AFOSI retains personnel security investigation reports for 15 years, espionage and sabotage files permanently, and criminal files for 15 years. The AFOSI’s rationale for the 15-year retention of criminal files is that they “have always felt that the purpose of retaining a file was to satisfy the needs of the Air Force. It appeared that 15 years was sufficient to meet those needs.” *Id.* at 20. The DCIS maintains criminal files for 15 years, or for one year after a person loses his military affiliation, whichever is sooner. If adverse action is taken, however, the DCIS retains the information for 25 years. *DOD IG Historical Files—Titling*, *supra* note 24.

33. 2 ADVISORY BOARD REPORT, *supra* note 20, at 90. The report surveyed the week of 4-8 April 1994, to obtain an average daily number of requests. Attempts to obtain more recent information from the DSS were unsuccessful.

34. *Id.* The *Advisory Board Report* notes that, in reality, greater than 27 agencies may access and input to the DCII, as some DOD organizations input data for more than one agency. For example, the CID inputs data for itself and the military police (MP). The agencies with access and input capabilities include the Army and Air Force Exchange System; Defense Information System; Defense Contract Agency; Defense Finance and Accounting Service; Defense Intelligence Agency; Defense Industrial Security Clearance Review; Defense Logistics Agency; Defense Mapping Agency; Defense Nuclear Agency; Office of the Joint Chiefs of Staff; National Agency Check Center; Navy Intelligence Command; National Security Agency; Naval Security Group; On Site Inspection Agency; and Washington Headquarters Service. *Id.* at 92, n.318.

35. *Id.* at 92. Those organizations with “read only” capability include: Defense Commissary Agency; Naval Personnel Command; U.S. Army Field Support Center; U.S. Army Field Intelligence and Security Command; Department of the Army, Office of the Deputy Chief of Staff for Intelligence; Naval Systems Supply Command; military records centers; Battle Creek Defense Logistics Service Center; Wright Patterson Air Force Base; Military Traffic Management Command; Naval Military Personnel Command; and Naval Security Group Command. *Id.*

36. Interview with Bruce Drucker, DOD IG Office of Criminal Investigations Policy and Oversight, in Alexandria, Va. (Mar. 2, 1998). Granting access to the unified and specified commands, as well as the major commands, has also been considered. 2 ADVISORY BOARD REPORT, *supra* note 20, at 93.

37. Titling decisions and the mandatory filing of those decisions in the DCII can affect promotions. There are several categories of information that promotion selection boards review. 10 U.S.C.A. § 615 (West 1998). Those categories include: (1) information contained in the soldier’s official military personnel file; (2) information communicated to the board by the officer; and “other information . . . determined . . . to be substantiated, relevant information that could reasonably and materially affect the deliberations of the selection board.” *Id.* § 615(a)(A)-(C) (emphasis added). See U.S. DEP’T OF DEFENSE, INSTR. 1320.4, MILITARY OFFICER ACTIONS REQUIRING APPROVAL OF THE SECRETARY OF DEFENSE OR THE PRESIDENT, OR CONFIRMATION BY THE SENATE (14 Mar. 1995) [hereinafter DOD INSTR. 1320.4] (implementing the statute). See also U.S. DEP’T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS (30 Nov. 1994) [hereinafter AR 600-8-29].

In the Army, there are several categories of officers for whom there must be a check for adverse information outside of that included in the officer’s OMPF. Those categories are all officers being considered for promotion to brigadier general or higher; all officers in the rank of lieutenant colonel and colonel being considered for battalion or brigade command; and all officers selected for promotion to colonel. Telephone Interview with Major Mike Klein, Captain Mike Lutton, and Major Hal Baird, Action Attorneys, Administrative Law Division, Office of the Judge Advocate General (Feb. 23, 1998).

38. See *supra* note 16 (describing the commander’s responsibility to suspend the security clearances of soldiers who are under investigation). In addition to the commander’s responsibility, the CCF has direct access to the DCII. “DCII records will be checked on all subjects of DOD investigations.” AR 380-67, *supra* note 16, para. 1-304. In addition, the CCF may advise a commander to suspend a security clearance, even when the commander has decided not to do so. *Id.* para. 8-102.

39. DOD INSTR. 5505.7, *supra* note 4, para. F-b. See AR 195-2, *supra* note 1, para. 4-4b; CID REG.195-1, *supra* note 7, para. 7-6a.

40. Interview with Major Dan Kelly, judge advocate advisor to the CID Command 1995-1997, in Charlottesville, Va. (Feb. 25, 1998) [hereinafter Kelly Interview]; Interview with Philip McGuire, Director, U.S. Army Crime Records Center, at Fort Belvoir, Va. (Feb. 27, 1998) [hereinafter McGuire Interview].

The above scenario is distinguished from that where SPC Joe Smith is the listed subject, but CPT Ron Howard is later found to have committed the offense. In the latter scenario, SPC Joe Smith remains titled and listed in the CRC and the DCII as the subject of the investigation. If CPT Howard's responsibility is discovered prior to the CID finalizing the investigation, however, the offense should be "unsubstantiated" as to SPC Smith, as no probable cause existed to believe that Smith committed the offense. If CPT Howard's involvement were discovered after the CID finalized the investigation, SPC Smith would have to seek to amend the ROI to reflect that the offense was unsubstantiated. "The fact that the person is found not to have committed the offense under investigation or that the offense did not occur" is not grounds to remove the person's name from the DCII.⁴¹

Recent History of the Titling Standard

The Titling Standard Prior to 1992

Prior to 1992, the CID used a probable cause standard to title "subjects" in a final ROI and to index the subject's name and other personal identifying data in the DCII.⁴² The CID could initiate an investigation, however, based on "credible information" and could list a "suspect" in an initial ROI based on that same credible information standard.⁴³ The initial investigation was indexed within the CID channels at the CRC in an automated index that was separate from the DCII.⁴⁴ The CID forwarded information to the DCII, such as the name of the suspect or the victim, but, in some instances, the CID transmitted the

report under a code name or file number that was not retrievable by the suspect's name.⁴⁵ The CID forwarded the entire initial ROI to commanders and the SJA, among other recipients. The command could take actions such as "flagging" or suspending security clearances based on an initial ROI that was initiated solely on credible information.

If an individual was listed as a "suspect" based on credible information, but subsequent investigation determined that probable cause to title the individual as a "subject" was lacking, that the offense did not occur, or that the suspect did not commit the offense, the individual was deleted from the title block of the report.⁴⁶ All recipients of the initial ROI were notified of the change by a "status report."⁴⁷

Under the pre-1992 titling standard, the CID temporarily indexed information in the DCII about the suspect or the offense upon completion of the initial ROI. The CID did not complete permanent indexing until they completed the investigation and determined that probable cause existed to believe that an offense was committed and that the "suspect" committed that offense.⁴⁸ Once the CID made this determination, the "suspect" could then properly be called a "subject." The CID agent and the trial counsel determined probable cause during a "final coordination." The CID required the CID agent to seek advice from the servicing trial counsel on the issue of whether probable cause existed to title a suspect, although the final decision as to whether to title rested with the CID.⁴⁹ Only when the CID determined that probable cause existed was the individual permanently listed as a "subject" in the title block of the final

41. DOD INSTR. 5505.7, *supra* note 4, para. F-b. *See also* AR 195-2, *supra* note 1, para. 1-5o(2); CID REG. 195-1, *supra* note 7, para. 7-6a.

42. *See* U.S. ARMY CRIMINAL INVESTIGATION COMMAND, REG. 195-1, OPERATIONAL PROCEDURES, para. 7-6a (1 Nov. 1986) (Io1, 1 Apr. 1989) [hereinafter OLD CID REG. 195-1]. A "subject" was a "person, corporation, or other legal entity . . . about whom probable cause exist[ed] to believe that the person committed a particular criminal offense. Only subjects [were] listed in the title section of the final report of investigation." *Id.*

43. *Id.* para. 7-5. A "suspect" was "a person, corporation, or other legal entity about whom some credible information exist[ed] that the person, corporation, or entity may have committed a criminal offense." *Id.*

44. 2 ADVISORY BOARD REPORT, *supra* note 20, at 91.

45. *Review of Titling and Indexing Procedures*, *supra* note 17, at 4.

46. OLD CID REG. 195-1, *supra* note 42, para. 7-5a-c.

47. *Id.*

48. *See id.* glossary.

Probable cause to title a person or an entity in a criminal investigation exist[ed] when, considering the quality and quantity of all available evidence, without regard to its admissibility in a court of law, the evidence point[ed] toward the commission of a crime by a particular person or entity and would cause a reasonably prudent person to believe that the person or entity committed the crime. Probable cause must be distinguished from proof beyond a reasonable doubt, the latter being the evidentiary standard followed at criminal trials. The existence of probable cause to title [was] a determination made by the investigating organization.

Id.

49. *Review of Titling and Indexing Procedures*, *supra* note 17, at 4. In the example provided at the introduction of this article, the agent is seeking a titling opinion based on the pre-1992 standard described herein. Agent Holmes is awaiting a determination of probable cause before he titles an individual. After 1992, that would no longer be the case.

report of investigation and indexed as such in the CRC and the DCII.

Hence, if an investigation [was] closed by the CID as unfounded, no information concerning the identity of the individual who was the subject of the investigation remain[ed] in the DCII. Further, the initially reported code name or sequence number for an investigation originally submitted in that manner [was] deleted from the DCII.⁵⁰

The 1992 Change to the Titling Standard

In 1990, the House Armed Services Committee reviewed the military investigative commands. This review “revealed that a standardized policy for ‘titling’ a person need[ed] to be developed.”⁵¹ The Committee defined titling as “the process where an individual is listed as the subject of an investigation (titled) because probable cause has been established that the person has committed a crime.”⁵² The Committee determined that individuals were being titled in the absence of probable cause and that, once titled, “the individual’s name is included in law enforcement records ‘ad infinitum’ and usually is not expunged unless the individual prove[d] his innocence.”⁵³

The Committee directed the “services to revise their procedures along the lines used by the Army to ensure that probable cause has been proven before ‘titling’ occurs.”⁵⁴ In addition,

the Committee directed the services to “expunge from their records the names of all individuals who have been ‘titled’ without probable cause.”⁵⁵ The Committee tasked the Department of Defense Inspector General (DOD IG) to monitor the services’ implementation of the Committee’s instructions.⁵⁶

In response to the Committee’s concerns, the DOD IG Office of Criminal Investigations Policy and Oversight conducted a review of the titling procedures used by the Defense Criminal Investigative Services (DCIO).⁵⁷ In addition, the DOD IG reviewed analogous procedures of non-DOD criminal investigative organizations, such as the Federal Bureau of Investigation (FBI); the Bureau of Alcohol, Tobacco, and Firearms; the United States Secret Service; and the Internal Revenue Service Criminal Investigation Division and Inspection Service.⁵⁸ The review resulted in the May 1991 publication of a DOD IG report, titled *Review of Titling and Indexing Procedures Utilized by the Defense Criminal Investigative Organizations*,⁵⁹ and the publication in May 1992 of *DOD Instruction 5505.7*.⁶⁰ The DOD instruction dramatically changed the titling process in the Army from the probable cause to title standard to the credible information standard described earlier.

The DOD IG report recommended a uniform standard for titling decisions. It further recommended that the DOD IG establish the uniform policy for titling “based on a determination that sufficient evidence exists to warrant an investigation.”⁶¹ The rationale for the recommendation was that a DOD-wide standard based on a lower than probable cause determina-

50. *Review of Titling and Indexing Procedures*, *supra* note 17, at 5. Even if deleted from the DCII, the information remained in the CRC and was retrievable within the CID channels for 40 years. *Id.* at 4. The CID adhered to a probable cause standard to title “in order to prevent an unreasonable abridgement to the right to privacy” and stressed that “care must be exercised when naming individuals within the ROI.” OLD CID REG. 195-1, *supra* note 42, para. 7-4. The Army was, however, the only DCIO to adhere to the probable cause standard. Other DCIOs permanently indexed subjects in the DCII when they determined that there was “merit to the complaint” and that the “information provided by the complaint was credible” or “there was sufficient evidence to determine an investigation was warranted.” 2 ADVISORY BOARD REPORT, *supra* note 20, at 91 (quoting *Review of DCII Policies and Procedures*, *supra* note 20). The names of those indexed were not removed, except in cases of mistaken identity. *Id.*

51. H.R. REP. NO. 101-665, at 216 (1990).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Although the Committee intended for the titling procedures of the various services to comport with the Army’s, the DOD IG nonetheless conducted a study and directed the services to do just the opposite. The DOD IG justified its actions on several grounds. First, the Committee report “recommended” that the uniform DOD titling standard be probable cause, and the DOD IG “was tasked to determine the *feasibility* of the recommendation.” *Review of Titling and Indexing Procedures*, *supra* note 17, executive summary (emphasis added). Second, the Inspector General Act provides that the DOD IG is to develop policy, to monitor and evaluate program performance, and to provide guidance to all DOD activities relating to the criminal investigation program. In carrying out those responsibilities and the Committee’s request to monitor this issue, the DOD IG “conducted a study of titling policies and procedures in the DOD investigative organizations.” *Id.* at 1.

58. *Id.* executive summary.

59. *Id.*

60. DOD INSTR. 5505.7, *supra* note 4.

tion would “result in uniformity in the information going into the DCII, and [would] promote efficiency in the criminal investigative process.”⁶² The report rejected the House Armed Services Committee’s recommendation of the probable cause standard because “it would have a significant negative impact on DOD investigative operations and would be inconsistent with the policies of the law enforcement community.”⁶³

The DOD IG report found that the CID was the only law enforcement or investigative agency to use the probable cause standard for titling subjects of investigations. “The standards for titling for the other law enforcement agencies range[d] from a credible evidence standard to the mere receipt of an allegation or complaint. Evidence sufficient to warrant an investigation was found to be the predominate standard for titling decisions.”⁶⁴ The primary purpose for titling is to ensure the future availability of the information contained in the report for law enforcement and security uses.⁶⁵ The DOD IG report found that adoption of the probable cause standard would have “significant negative impact on the DOD and upon the ability of non-DOD law enforcement agencies, such as the FBI, to access and [to] use DOD investigative information as it would severely limit the entry of names into the DCII.”⁶⁶ This limitation would result in the loss of valuable law enforcement information.

In its report, the DOD IG argued that if the CID previously investigated an individual, the existence of the investigation, by itself, is valuable investigative information that should not be deleted from the DCII.

The identification of numerous investigations of the same company or individual, for

a similar crime, allows the Government to identify a pattern and practice of misconduct. Such patterns can provide a basis for the Government to coordinate appropriate criminal, civil, contractual, and administrative remedies for procurement fraud. Further, previous investigations, regardless of their outcome, can be used to: establish a modus operandi in subsequent investigations of the same person; avoid duplicate investigations; record previous allegations; update security clearances; and provide a starting point for follow-on investigations on the same individuals or entities.⁶⁷

Department of Defense Instruction 5505.7, which became effective on 14 May 1992, implemented the recommendations of the DOD IG report.⁶⁸ The instruction established the credible information standard for titling and indexing the subject of a criminal investigation, as well as the mistaken identity standard for removal of a subject’s name from the DCII.⁶⁹ *Department of Defense Instruction 5505.7* states that titling and indexing shall occur at the start of an investigation.⁷⁰

“[T]he act of titling and indexing shall not, in and of itself, connote any degree of guilt or innocence.”⁷¹ In addition, the instruction cautions that “judicial or adverse administrative actions shall not be taken SOLELY on the basis of the fact that a person has been titled in an investigation.”⁷² Changes to *CID Regulation 195-1* followed the DOD instruction and became effective on 1 July 1992.⁷³ An interim change to *AR 195-2* became effective on 27 September 1993.⁷⁴

61. *Review of Titling and Indexing Procedures*, *supra* note 17, executive summary. In addition, “[t]he policy will further provide that indices of investigations will be maintained with more stringent requirements limiting removal of names from such indices.” *Id.*

62. *Id.* at 2.

63. *Id.*

64. *Id.* at 2.

65. *Id.* at 1.

66. *Id.* at 2.

67. *Id.* at 11.

68. DOD INSTR. 5505.7, *supra* note 4, para. F-1.

69. *Id.* paras. D-3, F-4(b).

70. *Id.* para. F-4.

71. *Id.* para. F-1.

72. *Id.* para. F-2 (emphasis in original). Action may be based on any information found in the investigation, which may be located solely because titling occurred based on whether credible information existed.

73. Changes to CID Reg. 195-1 Message, *supra* note 10, para. 2.

74. AR 195-2, *supra* note 1, at IO1. Much of the change’s language is taken verbatim from *DOD Instruction 5505.7*.

Arguments in Favor of the Current Standard

The arguments in favor of the current titling standard, and against any stricter standard, are clearly set forth in the DOD IG report. The DOD IG found that titling was “no more than a step in maintaining indices of investigations.”⁷⁵ The value of maintaining and indexing the investigative information “is to show that an allegation was raised, pursued, proved, disproved, or in some instances, to establish a *modus operandi*.”⁷⁶ Titling should not connote guilt or innocence, nor should it “carry with it any stigma upon which responsible individuals would initiate any *inappropriate* administrative action.”⁷⁷

The purpose of a criminal investigation is to prove or [to] disapprove an allegation of criminality and not to establish the guilt or innocence of an individual. Due process requires that guilt or innocence be established in a court of law. The report of investigation is merely the repository for all those facts tending to prove or [to] disprove the allegations, gathered . . . during the course of a thorough investigation.⁷⁸

Indexing in the DCII when an investigation is initiated based on credible information serves the administrative function of titling, as well as the law enforcement purposes described in the DOD IG report. Conversely, adoption of the probable cause standard recommended by the House Armed Services Committee would hinder the administrative function. Simply stated, if probable cause were established as the uniform standard for titling, a large amount of raw intelligence data that is used by law enforcement agencies would be lost.

The following illustrates the DOD IG’s concern. Typically, a DCII check is one of the first steps in the investigative process to determine whether a suspect is or has been the subject of a prior investigation. If an agent finds information on the DCII, he can go to the investigative agency that maintains the information and get a copy of the report and the disposition of the case. Prior to 1992, the CID’s procedure of removing information from the DCII unless it met the probable cause standard negated the entire purpose of the DCII. Unless the agent who

was searching the DCII knew that the CID maintained a separate internal index of information in the CRC, whether a person had been a subject of an investigation would be overlooked.

For example,⁷⁹ if a person is the subject of a CID investigation but probable cause was not established, information is either deleted from the DCII or is not reported in the first place. If that person later attends a function hosted by the President of the United States and the Secret Service runs a DCII check on the person, nothing appears. The Secret Service is not aware of the CID’s second indexing system (the CRC), which contains an investigation about the individual’s prior threats against the President that were found to lack probable cause. The person shoots the President.

In addition, the command was predisposed to believing that a titled individual was guilty because the CID required a probable cause determination prior to listing an individual as a subject in an ROI. A probable cause determination is a legal conclusion that should be made by someone who is acting in an unbiased judicial capacity and should not be part of the investigative process. The determination of probable cause in investigative actions was not neutral and detached, as would be required for other investigative activities, such as obtaining search warrants. The lack of neutrality inherent in the probable cause determination denigrated the quasi-judicial nature of the titling decision and added to the perception that the titled individual was guilty. Furthermore, “anyone reviewing the DCII [is predisposed] to conclude guilt based on the CID system.”⁸⁰ Injecting a legal determination into an investigation “is universally recognized as an inappropriate use of the investigative process and could also lead to a variety of abuses in administrative due process. The report should remain an objective repository of the facts and evidence bearing on the allegations.”⁸¹

Arguments Against the Current Titling Standard

The Army’s Comments to the DOD IG Concerning the Credible Information Standard

After publication of the DOD IG report in May 1991, the DOD IG began drafting *DOD Instruction 5505.7*. The DOD IG asked all of the investigative agencies in the services to submit comments concerning the proposed instruction. The Army’s

75. *Review of Titling and Indexing Procedures*, *supra* note 17, executive summary.

76. *Id.* at 3.

77. *Id.* (emphasis added). It is contemplated that appropriate administrative actions may be taken on the basis of titling alone.

78. *Id.*

79. *DOD IG Historical File—Titling*, *supra* note 24.

80. *Id.*

81. *Review of Titling and Indexing Procedures*, *supra* note 17, at 13.

comments were the most comprehensive and critical of the proposed instruction and provided some of the most cogent arguments against the current titling standard.

Major General John L. Fugh, The Judge Advocate General for the Army at the time the DOD IG requested the comments, insisted on having personal involvement in the Army response, and he provided a personally signed memorandum⁸² as an introduction to the Army's cover memorandum⁸³ and nonconcurrency⁸⁴ with comments. Major General Fugh succinctly stated the Army's position and main criticism of the credible information titling standard:

The military is a unique society for which there is no civilian counterpart. I'm therefore concerned about the "Big Brother" aspects of the DCII. Many of us have access to that system, and the information is used for personnel decisions including security clearances, promotions, assignments, schooling, and even off-duty employment.⁸⁵

The thrust of the Army memorandum, a cover paper to the Army nonconcurrency attached to Major General Fugh's memorandum, focused on three "key issues:"⁸⁶

- a. Evidentiary standards for titling and for entering a person's name in the DCII.
- b. Degree of access to the DCII and underlying investigative files . . . [and]
- c. Use of the fact of indexing on the DCII without an adequate system in place for the adjudication with legal review of the under-

lying raw investigative information for administrative purposes.⁸⁷

The Army opined that the proposed DOD instruction directing the change to the credible information standard only addressed the first key issue. "In the absence of adequate inquiry into and proposals concerning the other two issues, adoption of the DOD IG proposal is premature and unwise, and carries a high risk of unfair and abusive agency action."⁸⁸

The Army attacked the DOD IG's premise that titling and indexing are administrative functions, "a [mere] indication[] of the historical fact that, at some point, a person became the focus of a criminal investigation."⁸⁹

That concept is acceptable only if the fact of titling is not to be used for any other purpose than as a record of investigative activity and there is no negative connotation associated with being titled. Army experience is that being titled and indexed does carry a very negative connotation.⁹⁰

In addition, the Army criticized the DOD IG's focus of its review, commenting:

[The analysis was based] almost exclusively on *inputs* to the DCII and the indices of investigative activity used by Federal agencies, such as the FBI, which have a purely law enforcement or security function. The report does not discuss access to or use of DCII entries within DOD, i.e. *outputs* from the DCII, for other than investigative or law enforcement purposes.⁹¹

82. Memorandum from MG John L. Fugh, The Judge Advocate General, U.S. Army, to Derek Vander Schaff, the DOD IG, subject: Comments to Proposed DOD Instruction 5505.7 (23 Mar. 1992) (found in *DOD IG Historical File—Titling, supra* note 24) [hereinafter Fugh Memo].

83. Draft Memorandum from MG John C. Heldstab, Director of Operations, Readiness, and Mobilization, DAMO-ODL, to Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: DOD Instruction 5505XA, Titling and Indexing of Subjects of Criminal Investigations in the Department of Defense, ACTION MEMORANDUM (undated) [hereinafter Army Memo].

84. Draft Memorandum to Department of Defense Inspector General, subject: DOD Instruction 5505.XA, Titling and Indexing in the Department of Defense—INFORMATION MEMORANDUM (undated) [hereinafter Army Nonconcurrency]. The DOD historical files do not contain final versions of either the Army memorandum or the Army nonconcurrency. See generally *DOD IG Historical File—Titling, supra* note 24. Both were attached to the original memorandum from Major General Fugh. See Fugh Memo, *supra* note 82.

85. Fugh Memo, *supra* note 82. Major General Fugh also noted that the "current Army [titling] system has been upheld in the courts because we do have safeguards I doubt that we would have prevailed in a 'no safeguard' system." Fugh Memo, *supra* note 82 (citing *Aquino v. Stone*, 768 F. Supp. 529 (E.D. Va. 1991), *aff'd*, 957 F.2d 139 (4th Cir. 1992)). *Aquino* referred to the probable cause standard to title, as well as the possibility of amending the ROI based on new, relevant, and material facts. *Aquino*, 957 F.2d at 143. In addition, the court cited the old standard to remove someone from the title block, such as when probable cause to title the individual did not exist. *Id.*

86. Army Memo, *supra* note 83, para. 1.

87. *Id.*

88. *Id.*

89. *Id.* para i.

90. *Id.*

The Army also commented that the DOD was, in effect, comparing apples to oranges by relying on comparison of DOD titling procedures to non-DOD titling procedures of organizations like the FBI. Non-DOD organizations like the FBI have extremely strict restrictions on access to its system and output of its data. The system and its output are restricted to law enforcement and security investigations only, solely to determine whether raw investigative data exists, and, if so, to access it.⁹² If that were the case in the DOD, the Army conceded that the IG's comparison would be valid.

However, where the outputs from the system are widely accessible to agencies or officials *other than* criminal or security agencies or personnel . . . and where that output is used directly to support agency actions or determinations other than subsequent criminal or security investigations, then the standard recommended by the DOD IG is grossly unfair. With such a widely accessible and multi-purpose system, a probable cause standard with legal review is necessary to ensure fairness.⁹³

In the Army nonconcurrency, the Army “strongly urge[d] the DOD IG to examine thoroughly the issues of access to and use of DCII information prior to removing the safeguard of a probable cause determination from the input to the DCII.”⁹⁴

Criticism of the Advisory Board on the Investigative Capability of the Department of Defense

In 1993, “Congress recommended that the Secretary of Defense conduct a ‘vigorous review of the conduct and review of DOD investigations’ and convene an advisory board to ‘assess the current state of affairs within the Department’ with respect to its investigative capability.”⁹⁵ The Advisory Board on the Investigative Capability of the Department of Defense

was formed in late 1993; the Advisory Board published its *Report of the Advisory Board on the Investigative Capability of the Department of Defense* in late 1994.⁹⁶ As part of its review, the Advisory Board examined and severely criticized the credible information standard for titling, for much the same reasons the Army provided nearly two years previously.

The Advisory Board accepted the necessity of a retrieval method for prior investigations about an individual for law enforcement and security purposes and found the DCII's centralized index of investigative records a “necessary tool for effective law enforcement in DOD.”⁹⁷ The Advisory Board found, however, that the DCII was different from the indices that non-DOD agencies used because of its expansive access. “We find the current number of organizations, and thus individuals, with access to the DCII troubling, especially in light of the credible information standard for titling and the sheer number . . . of individuals whose identities appear in the system.”⁹⁸

The Advisory Board identified several potential dangers of the broad access to DCII information. First, the Advisory Board found it an “unacceptable risk” for non-DCIO personnel to have access to information concerning ongoing criminal investigations.⁹⁹ Because the information on subjects is entered into the DCII at the initiation of an investigation, it is possible that the subject may become aware of the investigation and may contact or harm potential witnesses.¹⁰⁰

Second, the Advisory Board found that access to “closed criminal investigations” in the DCII by non-criminal investigative agencies creates an “unacceptable risk for individuals listed as subjects in the system.”¹⁰¹ *Department of Defense Instruction 5505.7* cautions that titling alone does not provide a basis for adverse action, judicial or administrative.¹⁰² Despite this cautionary provision, however, organizations or commands can potentially abuse and misuse DCII information. The concern is that organizations may make personnel or other deci-

91. *Id.* para. 2c (emphasis in original).

92. Army Memo, *supra* note 83, para. j.

93. *Id.* (emphasis in original).

94. Army Nonconcurrency, *supra* note 84, para. g.

95. 1 ADVISORY BOARD REPORT, *supra* note 20, at v.

96. *Id.* The Advisory Board published its findings and recommendations in a two-volume report. The first volume of the report contains the actual findings, recommendations, and analysis leading to the findings and recommendations. The second volume contains all of the background information that the Advisory Board relied upon to reach its conclusions. *Id.*

97. *Id.* at 44.

98. *Id.* at 45.

99. *Id.*

100. *Id.*

101. *Id.*

sions based solely on whether a DCII search reveals a “hit” of an individual. Due to time constraints, limited access (read only capability), or laziness, the agency does not go beyond recognizing that an individual was titled.¹⁰³

Third, the Advisory Board noted that investigators who are “interpreting a very broad and subjective standard with no second party review of the determination” make the determination to title based on the credible information standard.¹⁰⁴ While this may be acceptable if only law enforcement and security organizations have access to the information, it is unacceptable when the information is used for administrative determinations such as promotions.¹⁰⁵ The Advisory Board believed that non-criminal/non-security organizations should have access to such information only when a preponderance of the evidence supports the allegations.¹⁰⁶

Fourth, the Advisory Board labeled as “unfair” the “absence of a mechanism for subjects to request removal of their name[s] from the DCII.”¹⁰⁷

There are circumstances in which a titling decision could be viewed as arbitrary, capricious, or an abuse of discretion. It is not

enough to allow a change to the system only in the event of mistaken identity. Criminal investigative organizations, and subjects, should have the ability to correct and address mistakes.¹⁰⁸

Additional Criticisms of the Credible Information Standard and Its Application

Subjects are Titled Prematurely in Initial ROIs

The CID recognizes that individuals are in danger of being titled prematurely¹⁰⁹ because CID agents are required to prepare an initial ROI within three working days of when they initiate an investigation.¹¹⁰ An investigation is initiated based on credible information that an offense within the CID jurisdiction has been committed.¹¹¹ A separate credible information determination is necessary to title an individual as a subject. “Credible information that a crime has or may have occurred may or may not meet the credible information standard to believe that a particular individual may have committed that crime.”¹¹² Even if prematurely titled, a subject may not be removed from the title

102. DOD INSTR. 5505.7, *supra* note 4, para. F-2.

103. 1 ADVISORY BOARD REPORT, *supra* note 20, at 45. The Advisory Board provided a hypothetical to illustrate this concern:

A DCIO receives what is perceived at first to be credible information that an individual has committed an offense and thus titles and indexes the subject in the DCII. This information later is deemed not credible, but the individual remains titled and in the DCII. Thus, five years later when an agency with access to the DCII conducts a search of the system on two candidates for the same critical position, the one individual is identified as the subject of a criminal investigation and the other not. Now, at this point, the agency should request the case file from the relevant DCIO and read that no credible information ultimately was developed. As a practical matter, however, the agency is pressed for time and makes a decision to employ the individual without the DCII criminal investigation record.

Id.

104. *Id.* at 46.

105. *Id.*

106. *Id.* A legitimate question arises as to whether such “non-criminal/non-security organizations” should have access to information even when supported by a preponderance of the evidence. If the reason to input data into the DCII in the first place is to allow retrieval of the information in the future for law enforcement and security purposes, why do non-law enforcement/non-security organizations have access at all? Arguably, promotion boards and the like would continue to have access, due to security concerns.

107. *Id.*

108. *Id.* at 46. This concern is glaringly illustrated by the following example. A subject is titled by a vindictive CID agent in the face of a total absence of credible information that the subject was involved in any criminal activity. While the subject should be able to become “untitled” via appeal to the CRC, current CID policy is that *DOD Instruction 5505.7* does not allow relief for the subject, because there is no “mistaken identity.” Kelly Interview, *supra* note 40. This interpretation of the regulation appears to fly in the face of common sense. It stands to reason that if the agency does not follow its own regulatory standards and catches itself, it should be able to correct the error.

109. Memorandum, Deputy Chief of Staff for Operations, U.S. Army Criminal Investigation Command, CIOP-PP, subject: Operational Memorandum 013-96, Credible Information Standard for Titling an Individual or Entity in a Report of Investigation, para. 3 (27 Dec. 96) [hereinafter Op. Memo]. The problem of premature titling came to the CID’s attention during IG inspections and action requests. *Id.* para. 1.

110. *See supra* note 13 and accompanying text.

111. *Id.*

112. Op. Memo, *supra* note 109, para. 3.

block in the absence of mistaken identity. This result is blatantly unfair to the individual.¹¹³

Lack of Clarity of Credible Information Standard

“Credible information” is an evidentiary determination peculiar to the titling area. Unlike probable cause, with a long history of judicial interpretation, “credible information” means nothing to attorneys, who are tasked to assist investigators in the determination of whether it exists in a particular case. Trial counsel might find it a standard that is impossible to measure. Moreover, there are at least two definitions of “credible information” in *AR 195-1* and *CID Regulation 195-1*.¹¹⁴ This leads to needless confusion in the application of the standard.

Confusing Regulatory Guidance

Application of the credible information standard to an individual applies only to the decision to list that individual as a subject in the ROI.¹¹⁵ A probable cause standard is applied to determine whether the offense is substantiated as to the individual.¹¹⁶ To deduce the different standards applicable to different findings, one must cull them from *CID Regulation 195-1*, a regulation that is two and one-half inches thick and that is generally not available outside of the CID channels; trial counsel are not routinely granted access to the regulation.¹¹⁷ *Army Regulation 195-2* does not distinguish among the decision to title an individual, the decision to found an offense, and the decision to substantiate the offense. Moreover, *AR 195-2* does not refer the

reader to *CID Regulation 195-1* for additional information. The obscure CID Message that clarifies the standard is not referenced anywhere in *CID Regulation 195-1* or *AR 195-2*. Compounding confusion, *AR 195-2* was not amended to comport with the 1992 change to the credible information standard until September 1993. Attorneys and investigators should not be expected to apply standards that are so needlessly difficult to decipher.

Widespread Misunderstanding of the Credible Information Standard and Its Application

Due to the confusing regulatory guidance described above, coupled with the needless limited distribution of *CID Regulation 195-1*, many investigators and the trial counsel who assist them do not understand the difference between titling an individual, founding an offense, and substantiating an offense.¹¹⁸ If there is such confusion among those who regularly deal with the system, what can be expected of commanders, promotion boards, and other entities that have access to titling information? The risk of misunderstanding, and hence, misuse, is almost certain.

Assumption of Guilt Inherent in DOD IG Rationale

Titling based on credible information and subsequent indexing in the DCII is necessary so that information can be retrieved in the future for law enforcement and security purposes.¹¹⁹ That the CID investigated an individual is cited as valuable investi-

113. The CID recognized as much:

It must be remembered that, once titled, with very limited exceptions, the subject's name will remain in the Criminal Records Center [CRC] and the Defense Clearance and Investigations Index [DCII] for 40 years. Questionable titling decisions do a great disservice to the individual and the Army community. Equally undesirable, they cast doubt on the credibility of our investigative processes.

Id. para. 5. To avoid this result, CID agents are advised that the “better practice” is to “submit the initial ROI listing unknown subjects and identify potential subjects in the narrative of the report.” *Id.* para. 3. The best practice is not to identify a subject until the requirement of credible information is met.

114. In addition to the definition of “credible information” provided in *AR 195-2* and *CID Regulation 195-1*, there is a separate definition of “credible information” as applied only to adult private consensual sexual misconduct. See *AR 195-2*, *supra* note 1, glossary; *CID REG. 195-1*, *supra* note 7, glossary. For those purposes, credible information is defined as “information, considered in light of its source and all surrounding circumstances, that supports a reasonable belief that a service member has engaged in sexual misconduct. Credible information consists of articulable facts, not just a belief or suspicion.” *CID REG. 195-1*, *supra* note 7, para. 5-24a(4). See U.S. DEP'T OF DEFENSE, INSTR. 5505.8, INVESTIGATIONS OF SEXUAL MISCONDUCT BY THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS AND OTHER DOD LAW ENFORCEMENT ORGANIZATIONS (28 Feb. 1994).

115. See Changes to CID Reg. 195-1 Message, *supra* note 10, para. R.

116. *Id.* (containing the only definition or explanation of the fundamental distinction between credible information and probable cause found in any publication or regulation).

117. In researching this paper, the author made an informal request to the CRC Director for *CID Regulation 195-1*; the request was denied. The CRC Director stated that a FOIA request for the regulation would be denied as well. The regulation used in researching this paper is located at The Judge Advocate General's School, Charlottesville, Virginia, in the Criminal Law Department. Conversations with the member of that department who obtained the regulation reveal that he had to go to extraordinary lengths in order to secure a copy. The rationale given by CID officials for such limited access to the regulation is that its distribution is limited. While true, the distribution restriction is not nearly as narrow as officials routinely contend. The “distribution restriction” page of the regulation states: “This publication contains technical and operational information that is for official government use only. *Distribution is limited to U.S. Government agencies . . .*” *CID REG. 195-1*, *supra* note 7, Restriction -1 (emphasis added). Staff judge advocates, trial counsel, and defense counsel must be given greater access to the regulation to perform their jobs competently.

gative information in itself, as it may be used to “allow the [g]overnment to identify a pattern and practice of misconduct” by an individual,¹²⁰ among other things. This rationale is illogical unless there is an underlying assumption that the allegations against an individual who is merely titled in an ROI are true. To identify a “pattern of misconduct,” one must assume the beginning or continuation of the “pattern” by reference to ROIs that include mere titling. Otherwise, those ROIs are meaningless.

Moreover, there is no logical connection between the stated necessity of information (to assist in subsequent law enforcement and security investigations) and a finding in the ROI that either the offense did not occur or the subject did not commit it. How does information that is indicative of nothing assist anything? Again, the answer assumes the truth of the allegations against the individual, despite the conclusions of the ROI.

Primer for Advocates: Challenging a Post-1992 Titling Decision

The Procedure of Army Regulation 195-2

There are two separate ways to attack an ROI. The first is to become “untitled” by removing an individual’s name from the subject block of an ROI. The second is to seek amendment of

other portions of the ROI, for example, changing a determination that the offense was founded to a determination that the offense was unfounded. An additional example of the second type of amendment is to seek to change from a determination that probable cause existed to substantiate the offense, to a determination that probable cause was lacking. Requests to amend an ROI, either seeking removal from the title block or other amendment, are made to the Director, CRC.¹²¹ Requests are made pursuant to AR 195-2; the access and amend provisions of the Privacy Act are unavailable, as the CID has exempted itself from those provisions.¹²²

Since 1992, becoming “untitled” is nearly impossible. In order to have an individual’s name deleted from the title block, the individual must “conclusively establish that the wrong person’s name has been entered as a result of mistaken identity.”¹²³ The standard for amending other portions of the report, however, remained the same after 1992. Requests to amend other portions of the ROI would be granted, as before 1992, “only if the individual submits new, relevant, and material facts that are determined to warrant revising the report.”¹²⁴ Unless an individual succeeds in removing his name from the title block, however, successfully amending other portions of the ROI do “not affect the indexing of the name in the DCII.”¹²⁵

Although the standard for granting a request for removal of one’s name from the subject block changed drastically in 1992,

118. A survey of the Army members of the 46th Graduate Course, The Judge Advocate General’s School, Charlottesville, Virginia, revealed that only 10 students out of 34 who responded understood that there was a difference between the decision to title an individual and the decision to found an offense. Many of those who understood that there was a difference could not define the difference. Numerous students were unaware of the 1992 change in the titling standard from probable cause to credible information, even though the same students acted as trial counsel after the change. In addition, numerous students could not define “titling” and frequently confused it with the decision to substantiate an offense.

Similarly, according to the Chief, Operations and Investigations Division of the Military Police School at Fort McClellan, Alabama, there is also widespread misunderstanding of the differing standards among CID agents. Telephone interview with Jerrold Unruh, Chief, Operations and Investigations Division, Military Police School, Fort McClellan, Ala. (Feb. 27, 1998). Mr. Unruh is in charge of all investigative training at Fort McClellan, including the CID Basic Course, Warrant Officer Basic Course, and all agent follow-on training held at the school. Although new agents are taught the credible information standard and how it is applied (to determine whether to list someone as a subject), Mr. Unruh saw significant confusion among more senior agents who did not receive additional training on the standard after 1992.

119. See *supra* note 17 and accompanying text.

120. *Review of Titling and Indexing Procedures*, *supra* note 17, at 11.

121. AR 195-2, *supra* note 1, para. 4-4c. The correct address to send requests to amend is: Commander, USACIDC, ATTN: CICR-FP (P97-0324), 6010 6th Street, Building 1465, Fort Belvoir, Virginia 22060-5585. The address in AR 195-2, para. 4-4c is incorrect.

122. *Id.* para. 4-4b. See 5 U.S.C.A. § 552a (West 1996). The exemption for criminal investigative files is found at § 552a(j)(2) of the statute, which provides that any agency may promulgate rules to exempt any system of records within the agency from specified Privacy Act provisions if the agency provides its rationale for so doing. *Aquino v. Stone*, 957 F.2d 139, 141 (4th Cir. 1992). The CID’s rationale for the exemption is:

Access might compromise on-going investigations, reveal classified information, investigatory techniques[,] or the identity of confidential informants, or invade the privacy of persons who provide information in connection with a particular investigation. The exemption from access necessarily includes exemption from amendment, certain agency requirements relating to access and amendment of records, and civil liability predicated upon agency compliance with those specific provisions of the Privacy Act. The exemption from access necessarily includes exemption from other requirements.

Id. at 530 (citation omitted).

123. AR 195-2, *supra* note 1, para. 4-4(b).

124. *Id.*

the procedure to request removal remained the same.¹²⁶ First, the soldier must obtain the ROI, usually from his commander.¹²⁷ When providing the ROI to the soldier, the commander is required to inform the soldier of the amendment procedure contained in AR 195-2.¹²⁸ If the soldier has not received a copy of the ROI from his commander, he must submit a request under the Privacy Act of 1974¹²⁹ to the Director, CRC, to obtain a copy from the CRC files. Next, the soldier, with the help of a legal assistance or trial defense attorney, prepares a memorandum with supporting documentation setting forth the reasons why removal from the title block (mistaken identity only) or other amendment to the ROI should be granted. The soldier must submit “new, relevant, and material facts that are determined to warrant revision of the report” to amend the ROI.¹³⁰ The new, relevant, and material facts can be submitted via additional statements or other evidence that is not found in the ROI. If no new evidence is submitted, the CRC will notify the soldier and allow an additional thirty days to provide further information.

After the thirty-day period has passed, the CRC forwards copies of the amendment request to the CID SJA and the CID Investigative Operations Section. All three entities determine individually whether the request for amendment should be granted. If all three are in agreement, the Director of the CRC approves the decision and notifies the soldier. If all three are not in agreement, each provides a memorandum in support of its position to the CID Deputy Commander, who makes the final decision on behalf of the CID Commander. The CID also

notifies any agencies that received the original ROI. The CID Deputy Commander’s decision is not reviewable and “constitutes action on behalf of the Secretary of the Army with respect to requests for amendments” under AR 195-2.¹³¹

If the soldier succeeds in removing his name from the title block because of mistaken identity, the name should also be removed from the DCII, and information concerning that particular investigation should no longer be retrievable using the soldier’s personal identifying data.¹³²

Requests to amend the ROI, either to remove a name from the subject block or to amend some other portion of the report, are rare.¹³³ Soldiers should request to amend their ROIs if they have evidence that incorrect information is contained in the ROIs or that the offenses for which they are titled are unfounded or not substantiated.

The Army Board for Correction of Military Records

If the soldier’s attempt to amend the ROI through the CID procedures is unsuccessful, the next step is the Army Board for Correction of Military Records (ABCMR).¹³⁴ “The function of the [ABCMR] is to consider all applications properly before it for the purpose of determining the existence of an error or an injustice.”¹³⁵ An error is a violation of a law or regulation. An injustice is determined as a matter of equity, a much more subjective standard than that applied to an error analysis.¹³⁶

125. *Id.*

126. McGuire Interview, *supra* note 40. Mr. McGuire confirmed that the procedure did not change after the CID adopted the credible information standard. See Captain Paul M. Peterson, *CID ROI: Your Client and the Title Block*, ARMY LAW., Oct. 1987, at 50 (describing the procedure for requesting amendment to the ROI under the pre-1992 probable cause standard).

127. AR 195-2, *supra* note 1, para. 1-4f(1)(b).

128. *Id.*

129. 5 U.S.C.A. § 522a (West 1998).

130. AR 195-2, *supra* note 1, para. 4-4b.

131. *Id.*

132. *Review of Titling and Indexing Procedures*, *supra* note 17, at 6.

133. The CID officials declined to provide any statistical information concerning the number of investigations conducted per year, the number of individuals titled per year, the number of founded offenses per year, the number of requests for amendment of ROIs per year, and the number of requests for amendment granted per year. According to the Director, CRC, a request under the provisions of the Freedom of Information Act (FOIA) is required for the information. See 5 U.S.C.A. § 552 (West Supp. 1998). The average amount of time to respond to a “routine” FOIA request is eleven months or greater. McGuire Interview, *supra* note 40. Discussions with the CID judge advocates revealed that, from 1995-97, the CID received only 20-30 requests per year for removal from the title block or other amendment. The CID rarely granted any kind of relief.

134. See 10 U.S.C. § 1552 (West Supp. 1998) (establishing the ABCMR). The statute provides that “the Secretary of a military department may correct any military record . . . when the Secretary considers it necessary to correct an error or remove an injustice . . . such corrections shall be made by the Secretary acting through boards of civilians of the executive part of the military department.” *Id.* § 1552(a)(1). See generally U.S. DEP’T OF DEFENSE, INSTR. 1336.6, CORRECTION OF MILITARY RECORDS (28 Dec. 1994); U.S. DEP’T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (18 May 1977) (C1, 1 May 1982) [hereinafter AR 15-185] (implementing the statute in the Army).

135. AR 15-185, *supra* note 134, para. 4.

The ABCMR is currently the soldier's best hope for successfully amending an ROI or removing his name from the subject block. Although very few of the ABCMR's approximately 14,000-15,000 cases annually challenge a titling decision,¹³⁷ the board has demonstrated a willingness to recommend that the Secretary of the military department expunge CID ROIs and any other record reflecting titling decisions.¹³⁸ The 1992 change to the titling standard did not change the way the ABCMR examines titling challenges. Both before and after the change, the ABCMR has recommended that the Secretary of a military department expunge a CID ROI whenever it finds error or injustice.

Procedurally, a soldier who challenges a titling decision must exhaust all other administrative remedies prior to filing an application with the ABCMR. The application is filed on Department of Defense Form 149. The soldier has three years "after discovery of the alleged error or injustice" to seek correction of his records through the ABCMR.¹³⁹ Both exhaustion of remedies and the statute of limitations can be waived.¹⁴⁰ Although *AR 15-185* does not discuss waiver or exhaustion or other administrative remedies, the first sentence of the ABCMR's format for responding to petitions states: "The applicant has exhausted or the Board has waived the requirement for exhaustion of all administrative remedies afforded by existing law or regulation."¹⁴¹

In addition to the application for correction of his military records, the soldier should include the challenged ROI and any statements or additional evidence not found in the ROI. The soldier should also obtain and submit memoranda of support from the chain of command. Such memoranda are significant in applications on which the ABCMR has acted favorably. The

soldier should also submit a memorandum in support of his application that clearly sets forth the reasons why the ABCMR should grant relief. A legal assistance attorney or trial defense attorney may help the soldier prepare the packet for submission to the ABCMR.

The soldier is responsible, by regulation, only for obtaining records outside the Department of the Army; the applicant is assured access to all relevant official records that are necessary to prepare and to present his case before the ABCMR.¹⁴² The ABCMR has the authority to request the transmittal of an applicant's military records and may call on any other Army agency for assistance.¹⁴³ For example, the ABCMR may request that the CID forward all documents pertaining to the challenged case from the CRC.

The ABCMR may convene a hearing to evaluate the soldier's application, or it may make its decision based on written submissions alone.¹⁴⁴ If the ABCMR, through hearing or otherwise, denies an application due to insufficient evidence of error or injustice, the soldier may submit new relevant evidence for consideration.¹⁴⁵ An application for correction to military records and all related documents are filed in the soldier's OMPF. If the ABCMR grants relief, however, the documents are returned to the ABCMR for permanent filing.¹⁴⁶

An examination of the two successful titling challenges since the summer of 1996 yields the following information common to both cases. First, both individuals were titled based on the post-1992 credible information standard. Second, the offenses were both founded and substantiated. The allegations in both cases were substantiated based on probable cause, as required even after the initiation of the credible information

136. Telephone Interview with Karl F. Schneider, Deputy Assistant Secretary of the Army, Army Review Boards (Feb. 4, 1998). Mr. Schneider is the director of the ABCMR, the Army Discharge Review Board, and the Army Clemency and Parole Board.

137. *Id.* Since the summer of 1996, there have been approximately five titling challenges. Relief was granted in two cases due to injustice. This 20% rate of relief is much higher than the ABCMR's average in other cases, about 6-7%. There are three more titling challenges currently awaiting action by the ABCMR, out of a total of approximately 19,000 cases of all kinds awaiting action. Interview with Captain Bronte Montgomery, Army Board for Correction of Military Records, in Alexandria, Va. (Mar. 2, 1998) [hereinafter Montgomery Interview]. The ABCMR is the only service correction board that has ordered deletion of a name from the title block and the removal of the file from the DCII. *Review of Titling and Indexing Procedures*, *supra* note 17, at 6.

138. The ABCMR's recommendation is forwarded for final action/approval to the Secretary of the Army. *AR 15-185*, *supra* note 134, para. 20. The Secretary of the Army has delegated his authority the Deputy Assistant Secretary of the Army—Army Review Boards. If the deputy approves the ABCMR's recommendations, he directs the appropriate agencies to correct the soldier's record.

139. *Id.* para. 7.

140. *Id.* para. 8.

141. ABCMR Proceedings, Docket No. AC 97-07016, [redacted name] (18 June 1977).

142. *AR 15-185*, *supra* note 134, paras. 15, 19(2).

143. *Id.* para. 27.

144. *Id.* para. 10a.

145. *Id.* para. 10b.

146. *Id.* para. 21e.

standard to title. Third, the soldiers successfully argued that the allegations lacked corroboration. Fourth, the chain of command determined that no adverse action against the soldier was appropriate due to the uncorroborated nature of the accusations. Fifth, the chain of command involved in the determination to take no action against the soldier included a major general or higher. Finally, the ABCMR concluded in both cases that the soldiers' names should be removed from the ROIs based on injustice and inequity, rather than error.

In the first case, the CID titled the applicant, an E-7 in the United States Army Reserve, for conspiracy to obtain false military identification cards and other offenses.¹⁴⁷ The allegations against the soldier were substantiated in the ROI with a finding of probable cause to believe that the soldier committed the crimes.¹⁴⁸ The evidence against the soldier consisted of the uncorroborated statements of a "bad check/scam artist who had been masquerading as a military undercover investigator."¹⁴⁹ The soldier's chain of command, up to the Adjutant General of the West Virginia National Guard (a major general) took no action against the soldier based upon insufficient evidence in the ROI. The soldier submitted numerous memoranda to the ABCMR from his chain of command and co-workers to dispute the uncorroborated allegations of the scam artist.

The ABCMR did not dispute or address the finding of probable cause. Nonetheless, the ABCMR concluded that, "[i]n the absence of any corroborating evidence that the applicant was involved in this incident and especially in light of the major general's conclusion that no further action is appropriate, the current situation is unjust."¹⁵⁰ Based on its conclusion, the ABCMR recommended that any reference to the soldier be deleted from the records and expunged from the soldier's military records.¹⁵¹

In the second case, a female active duty major was titled in January 1994 for adultery, false swearing, and sodomy based on the uncorroborated allegations of her supposed lover.¹⁵² The ROI concluded that probable cause supported the offenses and were thus substantiated.¹⁵³ After the CID completed the investigation, the CID forwarded the ROI through the major's chain of command for a determination of whether to take adverse action. Her commander, a lieutenant general, declined to take any disciplinary action because his "review of the evidence . . . resulted in the conclusion that testimony is contradictory in many critical aspects without sufficient corroboration."¹⁵⁴

The ABCMR specifically concluded that the CID agent properly substantiated the offense based on probable cause.¹⁵⁵ Nonetheless, the ABCMR concluded that "injustice and inequity exists in this case. While there may be probable cause, crime or guilt has not been shown, but the investigation will nevertheless serve to the applicant's severe detriment."¹⁵⁶ The ABCMR also noted that:

[W]hile the ROI was returned without action, it remains accessible [in the DCII] and will or may be reviewed and used in the applicant's future, e.g., for various selection boards such as a command selection board. It is a distinct unfair disadvantage for anyone under these circumstances when in competition with their peers. The Board concludes this is an injustice and an inequity in this instance.¹⁵⁷

Based on its conclusions, the ABCMR recommended correction of the officer's military records by deleting her name from the title block of the ROI, distributing copies of the amended ROI to all organizations that had received the original, and "removing her name and reference from the DCII."¹⁵⁸ The Deputy Assistant Secretary of the Army approved the

147. See ABCMR Proceedings, Docket No. AC95-07077, [redacted name] (9 Apr. 1997).

148. *Id.* at 2.

149. *Id.*

150. *Id.* at 3.

151. *Id.* The Deputy Assistant Secretary of the Army approved the ABCMR's recommendations and directed the CID to comply with them.

152. ABCMR Proceedings, Docket No. AC 97-07016, [redacted name], 18 June 1997.

153. *Id.* at 2. The officer had received top-block ratings throughout her career as both an enlisted soldier and an officer, with the exception of one center of mass appraisal. *Id.* at 3.

154. *Id.* at 4.

155. *Id.* at 5.

156. *Id.*

157. *Id.*

158. *Id.*

ABCMR's recommendations within thirty days after the ABCMR made the recommendations and directed the CID to comply. Although CID officials refused to comment on the case, the director of the CRC stated that he had complied fully with the direction of the ABCMR.¹⁵⁹

These two recent cases demonstrate the willingness of the ABCMR to act where appropriate.¹⁶⁰ Following the cases, the SJA for the Department of the Army Review Boards Agency (DARBA) began work on a systematic methodology for review of titling challenges.¹⁶¹

The need for this guidance was prompted by a concern by the General Counsel's Office and CID that the ABCMR might overturn titling decisions indiscriminately. The guidance is designed to focus the ABCMR and its analysts on the relevant issues to examine in reaching a decision, to ensure the decisions in this sensitive area are consistent, and to provide a basis for explanation of those decisions if they are challenged by the applicant or Army leadership.¹⁶²

Although not yet complete, the methodology will most likely focus the ABCMR's analysis on two areas. First, was there credible information to initiate an investigation into the alleged offenses for which the applicant is titled? If not, the individual's name should be removed from the subject block. This prong focuses on the question of whether there was a violation of law or regulation in initiating the investigation against the applicant. The focus addresses the CID's policy of refusing to amend reports even where a mistaken determination of credible information forms the basis for the titling decision. Sec-

159. McGuire Interview, *supra* note 40.

160. There is a question as to whether it is ever appropriate for the ABCMR to direct removal of a soldier's name from the title block based on any reason other than mistaken identity, as set forth in *DOD Instruction 5505.7* and *AR 195-2*. The ABCMR is granted the authority, by statute, to correct "any military record" when "necessary to correct an error or remove an injustice." 10 U.S.C.A. § 1552 (West 1998). The ABCMR's position is that its statutory mandate supercedes DOD instructions and Army regulations. Electronic Interview with Colonel Jan Serene, Staff Judge Advocate, Department of the Army Review Boards Agency (Apr. 2, 1998) [hereinafter Serene Interview].

161. Montgomery Interview, *supra* note 137. The Deputy Assistant Secretary of the Army—Army Review Boards asked the DARBA SJA to develop an analytical approach to titling cases. The approach is not so much a new one as it is "intended to be guidance to the ABCMR and its analysts to assist in their systematic and consistent review of requests to correct titling decisions." Serene Interview, *supra* note 160.

The Deputy did not disguise his distaste for the credible information standard to title a soldier. He expressed the opinion that the standard to title is extremely low, while the standard to have one's name removed from the title block is extremely high. The inequity in that equation is compounded by the vast access to the information granted by the DCII.

162. Serene Interview, *supra* note 160.

163. See *supra* notes 82-94 and accompanying text (discussing the Army memorandum and Army nonconcurrence to *DOD Instruction 5505.7*).

164. Administrative Procedures Act, 5 U.S.C.A. §§ 702-706 (West 1998) (providing a means for soldiers to appeal to the federal courts). An appeal to the federal courts would only be successful if the soldier could prove that the agency action challenged was arbitrary, capricious, or otherwise an abuse of discretion. *Id.* § 706(2)(A). See, e.g., *Aquino v. Stone*, 957 F.2d 139 (4th Cir. 1992). There are very few challenges to titling decisions filed in the federal courts. In the last three years, at least, no challenges to titling decisions have been filed against the Army. Telephone Interview with Major Douglas Mickel, Senior Litigation Attorney, Office of the Judge Advocate General, Litigation Division (Feb. 23, 1998).

165. *Review of Titling and Indexing Procedures*, *supra* note 17, at 1.

ond, even if credible information existed to initiate the investigation, the offense was properly founded, and the individual's involvement in the offense was properly substantiated, is there nonetheless injustice and inequity caused by the use of the information? The comments of the Army in its memorandum and nonconcurrence to the 1992 change in the titling standard provide great equity arguments for soldiers who are petitioning the ABCMR, as well as for counsel who are assisting them.¹⁶³

Soldiers and their attorneys who desire to challenge a titling decision at the ABCMR are encouraged to adopt the DARBA's methodology in their applications for relief. In particular, where the offense is unfounded or the individual's participation in the offense is not substantiated by probable cause, the soldier should attack the uses of the titling decision (for example, promotion boards, security clearances, or employment decisions). Although the sampling is small, the results are clear—the ABCMR is listening and is willing to act.¹⁶⁴

Recommendations and Conclusion

The titling of an individual and subsequent indexing in the DCII should serve its primary function—ensuring that information contained in the report can be retrieved at some future point in time for law enforcement and security purposes.¹⁶⁵ To ensure the viability of that primary purpose, several changes to the titling process are necessary.

First, to ensure that only accurate information is used, the amendment procedure should be modified to allow greater successful challenges to the titling decision. The current standard of removal from the titling block only in cases of mistaken

identity allows the use of proven inaccurate accusations against individuals. Allowing a soldier to remain titled cannot be justified under the following circumstances: when there is a demonstrable absence of credible information; when an offense did not occur (for example, the offense is unfounded); or when the soldier, according to the ROI itself, did not commit the offense.

Second, the two primary regulations that address titling in the Army, *AR 195-2* and *CID Regulation 195-1*, must be updated and coordinated. The regulations must clearly distinguish between the decision to title an individual, the decision to found an offense, and the decision to substantiate an offense.

Third, CID agents and trial counsel must be instructed more systematically in the titling process. This should include instruction on the ramifications of the titling decision. Currently, trial counsel receive no systematic instruction on titling.

Fourth, if changes to the system are not made to ensure the accuracy of the titling information that is put into the DCII, access to such information should be vastly restricted from its current status. Any use of potentially inaccurate information based on such a low evidentiary standard for such a large array

of administrative decisions negatively affects the Army in the end. For example, the most qualified person for the assignment, promotion, or security clearance may not be considered due to misunderstanding or misuse of a titling decision.

Finally, the Army must overcome the connotation of guilt associated with a titling decision. There is a definite stigma associated with titling in the Army.¹⁶⁶ Agents and attorneys must work to dispel that stigma. Actions as simple as providing the definition of titling in every ROI and cautioning readers about the improper use of mere titling would be a start. Similarly, a definition in the ROI of what it means to “found” and to “substantiate” an offense would be helpful to all readers of the ROI.

It will take time for the culture of the stigma associated with titling to dissipate. In the meantime, attorneys and agents must diligently apply the standards and requirements necessary to title an individual. Soldiers’ careers depend on a fair application of the titling standards. Moreover, soldiers’ careers depend on an understanding by those with access to a titling decision of what it means to be titled and, even more importantly, what it does not mean.

166. The DOD IG (see notes 80-81 and accompanying text) and the Army (see notes 88-89 and accompanying text) have recognized the existence of the stigma in the Army associated with titling.

Military Construction Funding: Variation in Cost Rules

Major M. Warner Meadows, United States Air Force

Are you proud of yourself? You should be! You have mastered the construction funding process. By determining the scope of your project¹ and the funded² construction³ costs, you were able to take the final funded construction costs and compare them with the three military construction thresholds. You then determined which of the three fiscal thresholds applied to your project.⁴ Next, you acquired the requisite approvals⁵ and sent out the invitation for bids. After a well-deserved break, the bid-opening day arrives, and to no one's surprise but yours, all the bids are higher than the approved amount. What do you do now? You award the contract, right? Wrong!

If you have not encountered this situation, you probably have encountered the following situation. You award the contract, then sit back and enjoy watching the project progress. While staring out of your window and watching the base's new training facility begin to block your view, you get a phone call from the contracting officer. She informs you that the contractor has claimed additional costs due to a differing site condition, a variation in estimated quantity, a constructive suspension of work, a contract interpretation problem, or whatever else the contractor could claim. After you and the contracting officer review the contractor's claimed costs, you determine that the costs have merit and recommend that the contracting officer pay them. The contracting officer informs you that she would

be happy to pay the additional costs, but asks whether this would put the project over one of the fiscal thresholds that apply to construction work. After wondering if the new project is high enough to jump off of, what do you do next?

Introduction

These scenarios involve cost variations. This is not an uncommon situation in construction contracts. Cost increases occur in both the contract formation and administration phases. During contract formation, the government puts together its estimate of project costs, gets the requisite approvals, and then sends out its solicitations. Sometimes, the offers come in much higher than the government estimate. In contract administration, there are normally contract changes that increase the cost of the approved project. Because this is the norm in construction contracting, the buying command generally tailors the scope of the work to allow for such contingencies. In some situations, the approved funding can be increased. When the funding cannot be increased without tripping a fiscal threshold, the scope of the project may have to be decreased.⁶

It is important that all of the work necessary for a "complete and usable facility" is included in the project to avoid project

1. The scope of the project is the amount of work that is needed to produce a complete and usable facility or an improvement to an existing facility. See Honorable Michael B. Donley, B-234326, 1991 WL 314260 (Comp. Gen. Dec. 24, 1991). It is important that all of the work necessary for a complete and usable facility is included in the project to avoid project splitting. Project splitting is a violation of the Antideficiency Act. See 31 U.S.C.A. §§ 1341, 1342, 1344 (West 1998).

2. Project limits apply only to funded costs. Unfunded costs are those costs that are charged against appropriations other than those directly paying for the construction project. They include military personnel costs, planning and design costs, and depreciation of government equipment used in the project. All other costs are funded. Funded costs include materials and supplies, non-military personnel labor, cost for temporary duty (TDY) of military personnel, maintenance and operation costs of government equipment, and the value of real property.

See U.S. DEP'T OF ARMY, REG. 420-10, MANAGEMENT OF INSTALLATION DIRECTORATES OF ENGINEERING AND HOUSING, glossary, sec. II (2 July 1987) [hereinafter AR 420-10]; 1 U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 65-601, BUDGET GUIDANCE PROCEDURES, para. 9.13.3 (21 Oct. 1994) [hereinafter AFI 65-601]; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 11010.20F, FACILITIES PROJECT MANUAL, para. 2.1.1 (7 June 1996) [hereinafter SECNAV INSTR. 11010.20F].

3. Military construction includes any construction, development, conversion, or extension of any kind that is carried out on a military installation. 10 U.S.C.A. § 2801(a) (West 1998). The term military installation means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the secretary of a military department, or in the case of an activity in a foreign country, under the operational control of the secretary of a military department or the Secretary of Defense. *Id.* § 2801(c)(2). It includes all work that is necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Construction includes the acquisition, erection, installation, or assembly of a new facility. It also includes work on an existing facility. Examples include: an expansion or extension of the facility to add to its overall dimensions; alteration of the interior or exterior arrangements of a facility to improve its current purpose; conversion of the interior or exterior arrangements so that the facility can be used for a new purpose; and replacement of a real property facility. U.S. DEP'T OF ARMY, REG. 415-15, ARMY MILITARY CONSTRUCTION PROGRAM DEVELOPMENT AND EXECUTION, glossary, sec. II (30 Aug. 1994) [hereinafter AR 415-15]; 1 AFI 65-601, *supra* note 2, ch. 9; SECNAV INSTR. 11010.20F, *supra* note 2, para. 6.1.1. Maintenance and repair are not construction; therefore, they are not subject to the \$500,000 Operation and Maintenance funds limitation on construction.

4. Operation and maintenance funds are used for projects that cost \$500,000 or less. 10 U.S.C.A. § 2805(c). For projects that cost more than \$500,000 but less than \$1.5 million, unspecified minor military construction funds are used. *Id.* § 2805(a). For projects that cost more than \$1.5 million, specified military construction funds are used. *Id.* § 2802.

5. Commanders of major commands may approve projects up to \$500,000. They may also delegate the approval authority. This authority is usually delegated to installation commanders. The service secretary approves construction projects greater than \$500,000 but less than \$1.5 million. Congress approves all projects greater than \$1.5 million. AR 415-15, *supra* note 3, para. B-1; 1 AFI 65-601, *supra* note 2, tbl. 9-1; SECNAV INSTR. 11010.20F, *supra* note 2, app. B, tbl. 1.

splitting. Project splitting is a violation of the Antideficiency Act.⁷ If the scope of the project is reduced and necessary aspects of the project are deleted, the project will not result in a complete and usable facility or improvement to the facility. It would, therefore, be necessary to award another contract to complete the facility or improvement to the facility. This is a classic example of project splitting.

In passing the Military Construction Codification Act,⁸ Congress recognized that the complexities of the construction marketplace make it impossible to estimate a project's cost precisely. Therefore, Congress allows the services some flexibility to approve certain cost increases.⁹ Although Congress allows some flexibility, the flexibility to increase the cost of a project is generally contingent on the availability of savings from other projects. This is an important consideration, especially for projects that are funded using specified military construction funds. In other words, since construction funds are limited, the ability to take advantage of the cost variations is contingent on whether funds are available.

It is vital for contract attorneys to understand the cost variation rules for construction work to avoid violating the Antideficiency Act.¹⁰ Surpassing a construction funding threshold violates the purpose statute.¹¹ In fact, exceeding the limits of operation and maintenance (O&M) funds for minor construction projects is the number one Antideficiency Act violation within the Department of Defense (DOD).¹² This means the command is using the wrong funds. Since the funding threshold has been exceeded, a different type of construction funds must be used.¹³ Additionally, this violates 41 U.S.C. § 12, which states that "no contract shall be entered into for the erec-

tion, repair, or furnishing of any public building, or for any public improvement which shall bind the government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."¹⁴ The statute further states that "the purpose of this section is to prevent executive officers from involving the government in expenditures or liabilities beyond those contemplated and authorized by the law making power."¹⁵ A clear understanding of the construction cost variation rules will significantly help ensure that your command does not run afoul of the Antideficiency Act or any other applicable construction funding statute.

It is also important to distinguish between the type of funds being used and whether the contract funding change is made before or after the contract award. The cost variation rules differ for O&M funds, for unspecified minor military construction funds, and for specified military construction funds. Additionally, the rules differ for cost variations that occur in the contract formation and contract administration phases. This article discusses the statutes and regulations concerning cost variations that occur after the installation receives approved funding for construction contracts. The article surveys the statutory guidance applicable to all of the services and highlights any variations found in the regulations applicable to the military departments for each construction funding threshold.

Specified Military Construction Projects

In the specified military construction program,¹⁶ Congress provides annual approval and funding for the DOD military construction requests.¹⁷ Congress appropriates funds for spe-

6. The scope of the project is the amount of work needed to produce a complete and usable facility or an improvement to an existing facility. See *Donley*, 1991 WL 314260.

7. 31 U.S.C.A. §§ 1341, 1342, 1344.

8. 10 U.S.C.A. § 2801.

9. See Major Earle D. Munns, *An Analysis of the Military Construction Codification Act*, ARMY LAW., Nov. 1987 at 26.

10. 31 U.S.C.A. §§ 1341, 1342, 1344.

11. *Id.* § 1502.

12. U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REG. 7000-14-R, ADMINISTRATIVE CONTROL OF FUNDS AND ANTIDEFIENCY ACT VIOLATIONS [hereinafter DOD 7000-14-R].

13. If the proper funds were available at the time the contract was entered into and at the time the threshold was exceeded, the violation may be correctable. See *id.* ch. 10; DEFENSE FINANCE AND ACCOUNTING SERVICE-INDIANAPOLIS REG. 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION, para. 7.5b (Sept. 1998); The Honorable Bill Alexander, House of Representatives, B-213137, 63 Comp. Gen. 422 (June 22, 1984).

14. 41 U.S.C.A. § 12 (West 1998).

15. *Id.*

16. See Department of Defense, Military Construction Appropriation Act of 1998, Pub. L. No. 105-45, 111 Stat. 1142 (1997).

17. *Id.* For fiscal year 1998, the following amounts were authorized and appropriated: for the Army, \$598,750,000 for Continental United States (CONUS) and \$156,100,000 for overseas; for the Navy, \$521,297,000 for CONUS and \$66,120,000 for overseas; for the Air Force, \$559,085,000 for CONUS and \$89,345,000 for overseas; and for the DOD, \$407,890,000 for CONUS and \$16,000,000 for overseas.

cific construction projects in the annual military construction appropriation (MCA) act in a lump sum amount.¹⁸ The conference reports associated with the various MCA acts typically provide a by-project breakdown for this lump sum amount.¹⁹ The specified military construction program normally consists of construction projects that are expected to exceed \$1.5 million.²⁰ Based on the budget request that is provided by the requesting agency and routed through the DOD, Congress determines the size (scope) of the project and the amount of funding. Increases in the authorized and appropriated amounts are within the purview of the congressional subcommittees that are responsible for overseeing all military construction work.²¹

This means that Congress is the approval authority for all projects with expected costs that exceed \$1.5 million. The installation where the project is to be built determines the planned scope and funded construction costs of the project. If the installation determines during the planning phase that the estimated funded construction costs will exceed \$1.5 million, the project must be forwarded through the chain of command to the service secretary's office. The service secretary then forwards the project request and its justification to the Secretary of Defense who, upon approval, forwards it to Congress. Congress then determines the scope of the project and provides the funding in the annual military construction authorization and appropriation acts.²²

Suppose Congress provides an installation with the scope and funding for a construction project. What, if anything, can the buying command do if the cost of the project increases either before or after contract award? There are two options. The command may increase the funding or decrease the project

scope. Decreasing the project scope enables the buying command to remain within the congressionally approved funding amount. While this is an option, the project must still result in a complete and usable facility or a complete and usable improvement to the facility.²³

Often, everything that is included in the project justification that is provided to Congress is necessary for the complete and usable facility; thus, the project scope cannot be decreased. The only remaining option is to somehow increase the amount of funds for the project. If not, the amount of congressionally approved funding could be exceeded, resulting in an Antideficiency Act violation.

The starting point for researching the cost variation rules and the approach to take can be found in 10 U.S.C. § 2853.²⁴ This statute provides that the cost authorized for a military construction project or for the construction, improvement, and acquisition of a military family housing project may be increased by no more than twenty-five percent of the amount appropriated for the project or 200 percent of the unspecified minor construction project ceiling,²⁵ whichever is less.²⁶ The service secretary responsible for the construction project must determine that the increase in cost is required for the sole purpose of meeting unusual variations in cost and that the cost variations could not have been reasonably anticipated at the time Congress originally approved the project.²⁷ This cost variation statute limits the reduction in the scope of work for military construction projects and the construction, improvement, and acquisition of military family housing projects.²⁸ The project scope cannot be reduced by more than 25 percent from the amount approved by Congress.

18. 41 U.S.C.A. § 12.

19. See generally H.R. REP. NO. 105-132 (1996).

20. 41 U.S.C.A. § 12.

21. The congressional subcommittees that are responsible for overseeing military construction work are the Armed Services and Appropriations Military Construction (MILCON) subcommittees.

22. Although urgent requirements are approved in a much faster fashion, it has been the author's experience that the average specified project takes five-seven years for congressional approval.

23. There appears to be no clear definition of a complete and usable facility or a complete and usable improvement to a facility. Rather, the definition is highly fact specific. For instance, suppose that the military has decided to move an NCO academy to a certain installation. The installation decides to build an administrative facility, a dormitory/barracks facility, and a mess hall/dining facility. For a complete and usable NCO Academy, the installation must determine whether it is necessary to have all three buildings. If so, the project must include all three. But what if the Academy is being built close to the other dormitory/barracks or mess hall/dining facility on the installation? It is then possible for the academy to use these already existing facilities, and therefore, the complete and usable facility is only the administrative building itself. The equation changes if the academy is to be built on a remote part of the installation. One way to look at the equation is to decide what is necessary to have a facility that meets the agency's purposes.

24. See 10 U.S.C.A. § 2853 (West 1998).

25. Currently, the unspecified minor construction project ceiling is \$1.5 million. This threshold is increased to \$3 million for projects intended that are solely to correct deficiencies that threaten life, health, or safety. *Id.* § 2805(a)(1).

26. Currently, the minor military construction authority is capped at \$1.5 million. Therefore, 200 percent of the unspecified minor construction project is \$3 million. 10 U.S.C.A. § 2805(a)(1).

27. *Id.* § 2853(a).

The limitations in cost or scope do not apply, if the service secretary approves the variation and notifies Congress²⁹ of the change in writing. Once notice is provided, the service secretary must wait a period of twenty-one days before taking final action on the proposed change in cost or scope. If Congress does not act within that twenty-one days, the service secretary may assume that Congress has approved the action.³⁰ Importantly, the limitation on cost increases does not apply to the settlement of a contractor claim under a contract if the increase in cost is approved by the secretary and the secretary promptly submits written notification of the facts relating to the proposed cost increase to the appropriate congressional committees.³¹ Also, cost variations cannot be used to increase the scope of a project; however, limited scope adjustments are permissible if they are required for technical reasons.³²

As with many statutes, the military services often promulgate their own additional guidance. Each military service has implemented further guidance on how to handle cost or scope increases or decreases. For example, *Air Force Instruction 65-601*³³ discusses how to handle changes in scope and cost. It states that the Air Force Office of Civil Engineering (AF/CE) and the Secretary of the Air Force, Office of Military Installations (SAF/MI), jointly determine if the Air Force will require advance approval for major changes to approved projects. If so, the AF/CE notifies Congress when a project's scope decreases more than twenty-five percent or when its cost increases more than \$1.5 million or by twenty percent, whichever is less.

Regarding changes to the project's scope, the project justification documents³⁴ that were submitted to Congress show the scope of a facility in units of measure such as square feet of building space or square yards of pavement. When Congress approves a project, it establishes the project's scope. Therefore,

not more than ten percent of the approved scope should be added without prior approval of the AF/CE.³⁵ Likewise, decreasing the approved scope of the construction work by more than twenty-five percent requires prior AF/CE approval.³⁶ It is necessary to stay within the total amounts provided in each annual appropriation act. The Air Force instruction further states that "within the aforementioned guidelines, the requiring activity may adjust financing to complete projects approved and started, to cover projects expected to start during the current fiscal year, and to meet other project costs that represent valid unfinanced requirements for the budget year."³⁷

Army³⁸ and Navy³⁹ regulations also discuss changes in scope and cost. Both of these regulations begin by reviewing the statutory language behind construction cost variations.⁴⁰ They state that the services may approve cost increases that could not have been reasonably anticipated at the time of congressional approval and that are necessary to meet unusual variations in cost. The cost increase, however, must not be the result of an increase in the authorized scope. The service secretary may approve a cost variation up to twenty-five percent of the appropriated amount or 200 percent of the unspecified minor military construction threshold, whichever is less.

Although congressional notification and approval are required, it is easy to envision cases where cost increases must be funded promptly to avoid interest or additional increases in cost. The services have unlimited authority to approve payment of changes that are within the project's scope and meritorious claims if there has been prompt notification to Congress. Also, Congress can approve pre-award increases in the specified authorized amount for initial awards that are greater than twenty-five percent over the appropriated amount, or \$3 million, whichever is less. The award, however, cannot occur until

28. *Id.*

29. Notification is made to the House National Security Committee, the Senate Armed Services Committees, and the House and Senate Appropriation Committees.

30. During this twenty-one day time period, Congress can notify the secretary that the action is approved or decide to hold hearings on the matter.

31. 10 U.S.C.A. § 2853(b).

32. 10 U.S.C.A. § 2853.

33. 1 AFI 65-601, *supra* note 2, para. 9.4.3.

34. See U.S. Dep't of Defense, DD Form 1391, Military Construction Project Data (Dec. 1976).

35. 1 AFI 65-601, *supra* note 2, para. 9.4.3.1.

36. *Id.*

37. *Id.*

38. See AR 415-15, *supra* note 3.

39. SECNAV INSTR. 11010.20E, *supra* note 2.

40. 10 U.S.C.A. § 2853.

at least twenty-one calendar days after Congress is notified, provided that Congress has no objections.⁴¹

Congress is very involved in the military construction process. The reasons for that are numerous. In 1989, the House Armed Services Committee⁴² criticized the DOD's use of O&M funds for military construction projects.⁴³ The committee cited three of the numerous examples it had uncovered where installation commanders ignored construction funding limitations. Although the cited problems focused on the overuse of O&M funds for projects incorrectly classified as repair,⁴⁴ the report made it clear that Congress will closely monitor the spending of appropriated military construction funds.

The following synopsis is helpful for analyzing cost variations in a specified military construction project. After Congress approves the project in concept, it determines the size of the project and how much it will cost. This establishes the funding level and the type of appropriation. Only Congress can initially approve specified construction projects and changes in scope or cost after the project is initially approved. If the cost increases more than twenty-five percent, congressional notification and approval are required before the cost increase can be approved by the affected military service. For example, if Congress specified a project at \$10 million and the cost increase is greater than \$2.5 million, additional congressional approval would be required. Also, if the project cost increases by more than 200 percent of the minor military construction project ceiling,⁴⁵ congressional notification and approval are required before the cost increase can be approved. Currently, the minor military construction project ceiling is \$1.5 million; 200 percent of that amount equals \$3 million. Therefore, if the project cost increases by more than \$3 million, congressional notification and approval are required.

When requesting approval to increase the project cost, the justification to Congress must include certain considerations. The increase in cost must be solely to meet unusual variations in cost that could not have been reasonably anticipated.⁴⁶ Also, the cost variation cannot be requested to increase the scope of

the project. Suppose, however, that the agency failed to program into its project something that is necessary for a complete and usable facility. To have a complete and usable facility, the command must add some item of construction work. In order to do so, however, the project must be increased above the amount specified by Congress. What does the command do in this situation? The statute is clear that the cost variation cannot be requested to increase the scope of the project; however, the statutory provision does not cover this situation. The purpose of the statute is to prevent agencies from asking for more money simply because they decided that a larger building or a higher quality component would be nice. Under the above circumstances, the agency has no choice but to add the necessary work to have a complete and usable facility. Therefore, the work and the cost increase should be submitted to Congress for approval. The command, however, must ensure that the justification documents are well above par in order to convince congress to approve the requested cost and scope increase.

Should a command decide not to pursue the congressional notification and approval process, the only option is to decrease the scope of the project. Two things must be considered before the scope of the project is reduced. First, the project must result in a complete and usable facility or improvement to a facility.⁴⁷ The scope cannot be reduced to the point that a complete and usable facility or improvement to the facility would not exist. This is especially true if, after reducing the project's scope, the command awards a separate contract for the deducted work. This is considered to be project splitting and is a violation of the Antideficiency Act.⁴⁸ Second, if the project's scope must be reduced by twenty-five percent or more, Congress must be notified beforehand.⁴⁹ As to Air Force projects there are lower notification thresholds and different approval levels.

Unspecified Minor Military Construction Projects

In the unspecified minor military construction program, Congress provides annual funding and approval to each military department for minor construction projects that are not

41. AR 415-15, *supra* note 3, para. 5-13.

42. This is now called the House National Security Committee.

43. See H.R. REP. NO. 101-21 (1989).

44. The reported cases included the Air Force building a new officers club using \$10 million in O&M funds, the Army using \$26 million in O&M funds to gut a building and to upgrade the interior completely, and the Navy using \$13 million in O&M funds to restore the exterior of a building.

45. 10 U.S.C.A. § 2805.

46. Examples of this include: unanticipated constructive changes, such as differing site conditions or suspension; environmental considerations; or increases in labor or supply costs.

47. Honorable Michael B. Donley, B-234326, 1991 WL 314260 (Comp. Gen. Dec. 24, 1991); 10 U.S.C.A. § 2801 (West 1998).

48. *Donley*, 1991 U.S. Comp. Gen. WL 314260.

49. AR 415-15, *supra* para. 5-13.

specified in the conference report that accompanies the military construction appropriation act.⁵⁰ Service secretaries may use these funds for minor projects that are not specifically approved by Congress.⁵¹ Generally, unspecified minor military construction consists of projects that cost more than the O&M threshold (\$500,000 or less) but less than the specified construction threshold (greater than \$1.5 million). Additionally, service secretaries, have the authority to use up to \$3 million for projects that are intended solely to correct deficiencies that threaten life, health, or safety.⁵²

As with the cost variation rules for specified construction, Congress provides the DOD and the military services with a greater degree of flexibility for unspecified minor military construction work. This means that Congress gives the DOD and the military services a lump sum amount and the authority to prioritize and fund their individual projects within the appropriated amount. Although the unspecified minor military construction threshold is capped at \$1.5 million, the DOD and the military services have flexibility to exceed this amount. The statute allows the service secretary to increase an unspecified minor military construction project up to 125 percent of the "amount authorized by law."⁵³ The "amount authorized by law" is up to \$1.5 million, which is the threshold for unspecified minor military construction. For projects that are intended solely to correct deficiencies that threaten life, health or safety, the threshold doubles to \$3 million. Therefore, it appears that, under the current thresholds, a service secretary could approve total project cost increases up to \$1,875,000 for normal projects, or up to \$3,750,000 for projects that are intended solely to correct deficiencies which threaten life, health, or safety.

As with specified military construction, there are notification and approval requirements associated with these cost increases. Once the command decides to increase a project above either the \$1.5 or \$3 million threshold, the service secretary must notify the appropriate committees in writing. The project cannot begin, or the cost cannot be increased, until twenty-one days after the congressional committees receive notification. These requirements are meant to discourage the DOD and the military services from exceeding the unspecified minor military construction threshold. When the command wishes to exceed the statutory threshold, the congressional

intent must be taken into consideration, prior to notifying Congress.

Another basic consideration is financial. Congressional notification is required to increase the project above the unspecified minor military construction threshold, but the congressional notification does not provide either the agency or the command with additional money. The increase must be funded within the overall unspecified minor military construction appropriation provided to the agency at the beginning of the fiscal year. Plain economics may defeat the command's ability to increase the project above the unspecified minor military construction threshold.

If the command is reticent about notifying Congress, or does not have the funds to approve the change after congressional notification, there are two available options. If the project costs are expected to exceed the basic \$1.5 million unspecified minor military construction threshold, either the scope must be decreased or the project must be funded as a specified project.⁵⁴ When the project scope is decreased, the project must still result in a complete and usable facility.

Due to the problems with increasing the project scope above the \$1.5 million unspecified minor military construction threshold, it appears that the Air Force has reacted by not allowing itself to take advantage of funding unspecified minor military construction projects above the normal funding levels. Air Force guidance strictly prohibits exceeding the statutory limit of \$1.5 million for a minor construction project.⁵⁵ Consequently, if a major command cannot award a contract so that the total current working estimate is under \$1.5 million, it must reduce the scope or cancel the project. It appears that this strict guidance is meant to prevent additional Antideficiency Act violations in this area. This is a harsh rule, because it does not seem to allow any exceptions. There are certainly circumstances beyond the control of the command where the project should be increased above the normal funding threshold for unspecified minor military construction.⁵⁶

In an effort to alleviate Antideficiency Act violations for unspecified minor military construction projects, the Air Force may be subjecting itself to additional Antideficiency Act violations. Since the Air Force instruction does not allow the Air

50. Department of Defense, Military Construction Appropriation Act, Pub. L. No. 105-45, 111 Stat. 1142 (1997). For Fiscal Year 1998, Congress authorized and appropriated the following unspecified minor military construction funds: for the Army \$7,400,000; for the Air Force, \$8,545,000; for the Navy, \$11,460,000; and for the DOD, \$26,075,000.

51. 10 U.S.C.A. § 2805(a).

52. *Id.* § 2805(a)(1) as amended by the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2811, 110 Stat. 186 (1996).

53. 10 U.S.C.A. § 2805(a)(1).

54. This is a difficult task if the project has begun because it generally takes Congress five-seven years to approve these projects.

55. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 32-1021, FACILITY CONSTRUCTION PROJECTS, para. 4.6.5 (12 May 1994). This instruction has been amended to allow the Air Force to fund projects that are intended solely to correct deficiencies that affect life, health or safety up to \$3 million.

Force to go above the normal unspecified minor military construction threshold, what happens if the cost for a project that is necessary to correct conditions affecting life, health, or safety exceeds \$1.5 or \$3 million? If the command is prohibited from notifying Congress that it wishes to increase the project up to twenty-five percent, it now faces a potential purpose violation. It has used unspecified minor military construction funds when it should have used specified military construction funds. To avoid the violation, the command must have had the proper funds at the time the original obligation was made and at the time necessary to fix the violation. This is a virtual impossibility; unless the project was specified in the first place or the agency has savings from other specified projects, the money will not be available to correct the violation. For these reasons, the Army and the Navy take advantage of these statutory provisions.⁵⁷

Cost variations for an unspecified minor military construction project can be approved under certain conditions. The service secretary can approve project increases up to the unspecified minor military construction threshold, either prior to the contract award or after the award.⁵⁸ After notification to Congress, the service secretary can increase the total project cost up to 125 percent of the threshold.⁵⁹ If the total project costs exceed these thresholds, or if Congress does not approve the project increases, the military service must cancel the project and institute the project as a specified military construction project. For the Air Force, either pre- or post-contract award, the secretary can approve the project up to the unspecified minor military construction threshold.⁶⁰

Projects Funded with Operation and Maintenance Funds

Most installations fund their routine operations with O&M funds. To allow commanders the authority to perform small construction work, Congress has authorized the DOD to use these funds of up to \$500,000 for unspecified minor military

construction projects.⁶¹ For projects that are intended solely to correct deficiencies that threaten life, health, or safety,⁶² the DOD may also use O&M funds up to \$1 million. Unlike specified and unspecified military construction, there are no provisions to increase construction projects that are funded with O&M above these thresholds. Prior to the contract award, if it is determined that the funded construction costs will exceed \$500,000 or \$1 million, the project's scope must be legitimately decreased or funded with unspecified minor military construction funds. With a scope decrease, the project must still result in a complete and usable facility or a complete and usable improvement to a facility. If, after contract award, the funded construction costs exceed \$500,000 or \$1 million, the project's scope must be legitimately decreased or there is a potential Antideficiency Act violation. The key to avoiding this situation is to anticipate legitimate contract changes and to avoid funding the project near the \$500,000 or \$1 million threshold.

Conclusion

At first glance, the cost variation rules appear complicated, but they are crucial in getting projects funded or completed. The key is to understand how the rules apply to specific projects. The rules for variations in costs differ according to the types of funds used for projects—specified military construction funds, unspecified minor military construction funds, or O&M funds. These cost variation rules also differ depending on whether the construction contract is in the contract formation or contract administration stage. Everyone who is involved in the process needs to be aware of these rules from the beginning of acquisition planning. They need to be ready for the possibility that the command cannot fund the project as expected and to be prepared to move to a higher funding threshold. A firm understanding of the cost variation rules is essential to avoiding unwanted audits and potential Antideficiency Act violations.

56. The author envisions constructive changes, such as suspension of work and differing site conditions, as valid reasons to take advantage of this option. Undiscovered environmental concerns that result in additional costs and work stoppages justify paying additional costs; likewise, this situation is also unforeseeable. Although planning for such contingencies is always preferable, it is not always possible.

57. See SECNAV INSTR. 11010.20F, *supra* note 2; AR 415-15, *supra* note 3.

58. This amount is either \$1.5 million or \$3 million.

59. This amount is either \$1,875,000 or \$3,750,000.

60. 1 AFI 65-601, *supra* note 1, vol. 1, para. 9.4.3.1.

61. 10 U.S.C.A. § 2805 (West 1998).

62. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2811, 110 Stat. 186 (1996).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781.

Family Law Note

Colorado Reinforces the "Time Rule" Formula for Division of Military Pensions

The Uniformed Services Former Spouses' Protection Act¹ (USFSPA) allows state courts to divide disposable military retirement pay as marital property.² The USFSPA does not, however, establish any formula or method for state courts to use in determining each party's share. Colorado recognizes the following three methods to divide military retirement pay: net present value,³ deferred distribution,⁴ and reserve jurisdiction.⁵ The deferred distribution method is commonly used and

involves establishing the spouse's share through applying the "time rule" formula. The "time rule" formula requires that the monthly benefit be multiplied by the coverture fraction.⁶ The result is then divided in half, and the resulting quotient represents the spouse's share. Determining the figures for the coverture fraction can make a huge difference in the spouse's share. Colorado establishes the numerator of the coverture fraction as the date of the divorce decree or the date of the hearing on disposition of property, if such hearing precedes the date of the decree.⁷

In the case *In re Marriage of Lockwood*,⁸ the Colorado Court of Appeals reinforced the "time rule." The Lockwoods married in 1961 in Germany while he was a military member.⁹ They separated several years later. Mr. Lockwood relocated to the United States without his wife's knowledge and obtained a divorce in Wyoming in 1978.¹⁰ In 1992, Mrs. Lockwood discovered that her husband was living in Colorado. Mrs. Lockwood filed an action in Colorado to divide marital property and challenged the Wyoming divorce decree based on insufficient service.¹¹ The Colorado trial court determined that the Wyoming divorce was void.¹² After a series of appeals, the Colorado courts agreed that Mr. Lockwood obtained the 1978 Wyoming divorce through "outright fraud upon the Wyoming

1. 10 U.S.C.A. § 1408 (West 1998).

2. *Id.* § 1408(c)(1).

3. Net present value is where the court awards a present value to the yet to be determined full pension. The net present value is distributed immediately and offset against other property in the marital estate. *In re Marriage of Kelm*, 912 P.2d 545, 547 (Colo. 1996). This method is not often used in military pension division because it is difficult to assign a present value in most cases, especially where the service member is not yet close to twenty years. Because military retirement benefits are determined by the rank and time-in-service at the time of retirement, it makes present value a difficult determination when the divorce occurs before retirement. In addition, net present value is an offset or "buy out" of the spouse's interest and is paid immediately. This is not generally possible for many military families.

4. In the deferred distribution division of a military pension, the court determines the share of the military retirement pay that is due to the spouse, but the right to collect that share is deferred until a later date, usually the actual retirement of the service member.

5. Reserve jurisdiction also defers collection of the spouse's share of the benefit. Under reserve jurisdiction, the court does not determine any share or attempt to divide the military retirement pension. Instead, the court simply reserves jurisdiction over the pension. After the service member retires, the court can divide the asset.

6. The coverture fraction consists of a numerator that is defined by the number of years or months that the active duty service and the marriage overlap and a denominator that is defined by the number of years or months of total service toward the pension. In a military divorce, the denominator is always at least 20, unless the service member retires under an early retirement program.

7. COLO. REV. STAT. § 14-10-133(5) (1997). This statute establishes when marital property in Colorado is valued. States define this differently, and it is not always defined by statute. Whether the figure is determined at the date of divorce, the date of separation, or the date of filing can make a significant difference. There is no uniformity among the states.

8. No. 97CA0233, 1998 WL 213215 (Colo. Ct. App. Apr. 30, 1998).

9. *Id.* at *1.

10. *Id.* Mr. Lockwood filed for divorce in Wyoming and attempted service by publication on Mrs. Lockwood, who was still residing in Germany. The supporting affidavit listed her last known address as Berlin, Germany. Three months later, he asked for default based on Mrs. Lockwood's failure to respond. At the time of default, the accompanying affidavit stated that there was no known address for the wife in spite of search and reasonable diligence. The default was granted on 7 December 1978. Mr. Lockwood remarried in 1979. *In re Marriage of Lockwood*, 857 P.2d 557, 558-59 (Colo. Ct. App. 1993).

court” and refused to recognize the divorce.¹³ The Colorado court issued a divorce decree in 1996 and held a separate hearing on division of the marital property.¹⁴ Mr. Lockwood’s military retirement was one of the marital assets for division.

The court determined that it would use the deferred distribution formula and apply the “time rule” formula to divide the military retirement pay.¹⁵ Apparently, in an attempt to fashion an equitable distribution, however, the court used the 1992 date when Mrs. Lockwood filed for divorce in Colorado rather than the 1996 date of divorce to determine the numerator of the coverture fraction.¹⁶ On appeal, the Colorado Court of Appeals held that equitable concerns are relevant only in deciding which of the three methods to use in dividing the retirement pay. The “time rule” formula cannot be altered.¹⁷ Therefore, the court remanded the case for the trial court to establish Mrs. Lockwood’s portion of the military retirement using the 1996 decree of divorce date.¹⁸

This case points out the importance of understanding the coverture fraction and how the state court where the divorce occurs uses that fraction. Although the USFSPA does not establish any formula, most courts use the coverture fraction in some manner to divide the military retirement pay. In addition, this case is a lesson in general family law issues of divorce.

Although Mr. Lockwood had a facially valid divorce decree, the fraud he perpetrated in the service on Mrs. Lockwood resulted in a void decree under Wyoming law.¹⁹ It also cost him dearly monetarily.²⁰

Lockwood provides good lessons for the service member’s counsel and the spouse’s counsel. The service member’s counsel should carefully consider the possible outcome before taking short cuts to achieve the client’s end. The spouse’s counsel should not give up without checking out some basic facts. Major Fenton.

Consumer Law Note

The Truth in Lending Act Means What It Says—You Only Have Three Years to Rescind

The Truth in Lending Act²¹ (TILA) provides a three-day “cooling off period” during which a consumer may rescind a non-purchase money credit transaction that is secured by his principal residence.²² The TILA also extends this right to rescind for up to three years if the creditor fails to provide certain material disclosures.²³ This provision helps to protect an individual’s home in many contexts.²⁴ Many consumer advo-

11. *Lockwood*, 1998 WL 213215, at *1. The Wyoming court file contained a letter from Mrs. Lockwood that indicated that she had received no notification and could not be present at a 5 December 1978 hearing. The Wyoming decree made no mention of the letter. In addition, Mrs. Lockwood made inquiries in 1979 on how to set aside the decree, but she took no action until she found Mr. Lockwood’s whereabouts in Colorado in 1990. *Lockwood*, 857 P.2d at 559.

12. *Lockwood*, 1998 WL 213215, at *1. In her attempt to show insufficient service, Mrs. Lockwood produced uncontroverted evidence that her address had remained the same since 1968 and that Mr. Lockwood knew the address. Included in this evidence was the Wyoming divorce decree that had been mailed from Mr. Lockwood’s attorney’s office to her street address in Berlin four days after the decree was entered. *Lockwood*, 857 P.2d, at 559.

13. *Lockwood*, 1998 WL 213215, at *1.

14. *Id.*

15. *Id.* Neither party objected to this method of distribution. *Id.*

16. *Id.* at *2. The court determined that, in light of Mrs. Lockwood’s delay in pursuing the claim, equities weighed in favor of using the filing date for the Colorado divorce in 1992. *Id.*

17. *Id.* at *3.

18. *Id.* at *4.

19. Colorado looked to Wyoming law to determine whether the divorce was void or voidable under the circumstances of improper service. Once the court determined that the divorce was void under Wyoming law, there was no full faith and credit due the decree. Mr. Lockwood asserted several equitable defenses that the court also considered and dismissed.

20. Ironically, if Mr. Lockwood had served Mrs. Lockwood properly in 1978, the military retirement would not have been divisible. The USFSPA was passed in 1982 and effective 1 February 1983. Mrs. Lockwood waited until 1992 to file for divorce in Colorado and to assert her rights to the pension. Had she been properly served and waited until 1992 to try to divide the pension, she could not have reopened the matter because the USFSPA was amended in 1990 to prevent retroactive application to cases that were decided prior to July 1981.

21. 15 U.S.C.A. §§ 1601-1667e (West 1998).

22. *Id.* § 1635(a).

23. *Id.* See 12 C.F.R. § 226.23(a)(3) (1997).

24. See Consumer L. Note, *The Truth-in-Lending Act Can Help With Home Improvement Contracts*, ARMY LAW., May 1997, at 65.

cates use this provision on behalf of homeowners “to defend against enforcement of high rate, ‘predatory’ home equity loans.”²⁵ This defensive use is referred to as “rescission by recoupment.”²⁶ A unanimous United States Supreme Court recently took the defensive use of this tool away from consumers and their advocates in *Beach v. Ocwen Federal Bank*.²⁷

“[R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff’s action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.”²⁸ Essentially, states, by statute or common law, allow a civil defendant to attack a plaintiff’s claim by using defects in the transaction that form the basis of the claim, without regard to the statute of limitations.²⁹ The rationale for this is “that the purposes of statutes of limitation are not served by allowing one party to enforce claims while denying the other’s related defenses.”³⁰ Many courts have considered TILA rescission rights to fall within the concept of “recoupment.”³¹

David and Linda Beach faced a foreclosure action in 1992 for failing to pay their mortgage.³² In 1986, they built a house in Florida using a secured loan and later refinanced the home through a different lender.³³ After defaulting in 1991, the Beaches raised rescission under the TILA as an affirmative defense to the bank’s foreclosure.³⁴ Using recoupment, the

Beaches claimed that the bank had failed to give proper TILA notices at the time of the loan. Based on their argument, the bank’s failures entitled them to rescind the transaction despite the running of the three-year period allowed for rescission.³⁵

The Florida circuit court allowed the Beaches to offset their actual damages from the bank’s claim, but denied their attempt to rescind the mortgage.³⁶ The court gave two reasons for this decision. First, the transaction was a “residential mortgage transaction” and, second, the three-year time period to rescind had expired in 1989.³⁷ The Beaches appealed to the Florida Supreme Court, which decided only the issue of rescission rights, and found that Congress intended to limit the rescission period to three years.³⁸ The court distinguished the Beaches’ case from other recoupment cases by finding that the rescission provision of the TILA was not a statute of limitation but, rather, a statute that extinguished the right.³⁹ The U.S. Supreme Court granted certiorari because the Florida decision conflicted with the decisions of several other courts.⁴⁰

Justice Souter, writing for a unanimous U.S. Supreme Court, conceded the general rule that statutes of limitations do not extinguish recoupment claims.⁴¹ The Court, however, agreed with the Florida Supreme Court that the three-year limit on rescission rights was not a statute of limitations.⁴² It found that the language of 15 U.S.C. § 1635(f), which states that the right

25. *Supreme Court Bars Most Rescission By Recoupment*, 16 NCLC REPORTS, BANKRUPTCY AND FORECLOSURES EDITION (Nat’l Consumer L. Ctr.), Mar./Apr. 1998, at 17 [hereinafter NCLC REPORT].

26. *Id.*

27. 118 S. Ct. 1408 (1998).

28. *Bull v. United States*, 295 U.S. 247, 262 (1935), *quoted in* *United States v. Dahm*, 494 U.S. 596, 599 (1990). *See* NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING § 6.6.3.3.1 (1995 & Supp. 1997) [hereinafter TRUTH IN LENDING].

29. *See Using Bankruptcy to Recoup Consumer Damage Claims After the Statute of Limitations Has Run*, 13 NCLC REPORTS, BANKRUPTCY AND FORECLOSURES EDITION (Nat’l Consumer L. Ctr.), Mar./Apr. 1995, at 19.

30. TRUTH IN LENDING, *supra* note 28.

31. *Id.*

32. *Beach*, 118 S. Ct. at 1410.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1410-11.

37. *Id.* at 1411.

38. *Id.* (citing *Beach v. Great W. Bank*, 692 So. 2d 146 (1997)).

39. *Id.* at 1411.

40. *Id.* (citing *In re Barsky*, 210 B.R. 683 (E.D. Pa. 1997); *In re Botelho*, 195 B.R. 558 (D. Mass. 1996); *In re Shaw*, 178 B.R. 380 (D. N.J. 1994); *Federal Deposit Ins. Corp. v. Ablin*, 532 N.E.2d 379 (1988); *Community Nat’l Bank & Trust Co. of N.Y. v. McClammy*, 525 N.Y.S.2d 629 (1988); *Dawe v. Merchants Mortgage and Trust Corp.*, 683 P.2d 796 (Colo. 1984) (en banc)).

“shall expire,” provides a limitation on the life of the underlying right.⁴³ The Court contrasted this provision with a statute of limitations that merely limits the enforcement mechanism of the right.⁴⁴ Moreover, in 15 U.S.C. § 1640, Congress specifically addressed recoupment when establishing a one-year statute of limitations for commencing TILA damage actions. This “unmistakably different treatment” of the rescission right and the general TILA statute of limitations caused the Court to apply “the normal rule of construction” that these different treatments “reflect a deliberate intent on the part of Congress.”⁴⁵ Thus, the Court found that TILA rescission could not be raised after the three-year period had run, virtually eliminating this claim as a recoupment defense.⁴⁶

Beach could have a far-reaching impact on consumers. With the proliferation of the home-equity market, TILA rescission rights have become an important weapon in the arsenal of consumer advocates.⁴⁷ Often, lenders charge exorbitant interest rates for home equity loans, and the stake is the consumer’s home. “Unfortunately, consumers who are the victims of abusive high rate loan schemes rarely come forward for legal help until they have trouble paying their mortgage and foreclosure is looming.”⁴⁸ Since this will very often occur more than three years from the loan date, the loss of rescission as a recoupment defense is a major defeat for consumers.⁴⁹

Legal assistance practitioners should reemphasize to soldiers the dangers of high rate loans, particularly in the home equity context where failure to pay can affect the roof over the heads of the soldier’s family. While consumer protections have

come a long way in the last twenty-five years, the buyer is still well advised to be cautious before entering any financial transaction. *Beach* reminds practitioners that consumer protection statutes and case law will not always provide relief. Even when there is protection, it is always better to avoid problems rather than trying to fix them after the fact. Major Lescault.

USERRA Note

How Do You Get Your Job Back?

In a case of first impression, *McGuire v. United Parcel Service, Inc.*,⁵⁰ the U.S. District Court for the Northern District of Illinois spelled out how a military reservist can be reinstated to his preservice job. According to *McGuire*, the returning service member has the burden of establishing whether he has satisfied the requirements of the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁵¹ for reinstatement.⁵²

The requirements for being reinstated under the USERRA are: (1) the service member must give the employer advance written or oral notice of the service-related absence;⁵³ (2) the cumulative length of absence must be less than five years;⁵⁴ (3) the service member must receive an honorable discharge from the active military duty;⁵⁵ and (4) if the period of active military service is less than 180 days, the service member must apply for reemployment within fourteen days after completion of service.⁵⁶

41. *Beach*, 118 S. Ct. at 1411.

42. *Id.* at 1412.

43. *Id.*

44. *Id.*

45. *Id.* at 1412-13.

46. While the Court eliminated the federal basis for a recoupment action based on TILA rescission, it stated in a footnote that “[s]ince there is no claim before us that Florida law purports to provide any right to rescind defensively on the grounds relevant under [the TILA], we have no occasion to explore how state recoupment law might work when raised in a foreclosure proceeding outside the three-year period.” *Id.* at 1413 n.6.

47. See generally NCLC REPORT, *supra* note 25; TRUTH IN LENDING, *supra* note 28, §§ 6.2.1, 6.6.2, 6.6.3, 10.6.2.

48. NCLC REPORT, *supra* note 25, at 17.

49. *Id.*

50. No. 97-C-0232, 1997 WL 543059 (N.D. Ill. Aug. 28, 1997).

51. Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C.A. §§ 4301-4333 (West 1998).

52. *Id.* § 4312.

53. *Id.* § 4312(a)(1). The service member must have been employed prior to activation. *Id.*

54. *Id.* § 4312(a)(2).

55. *Id.* § 4304.

McGuire had been an air sales representative for United Parcel Service's (UPS's) Chicago office for over two years when he orally notified his supervisors in November 1995 that he might be activated for an extended period of active military duty. During his entire period of employment with the company, he was a member of the Army Reserve.⁵⁷ He provided UPS with a written notice of military duty on 22 December 1995 and faxed a copy of his military orders to UPS on 2 January 1996. United Parcel Service did not replace McGuire during his absence but had other employees cover his duties. On 27 April 1996, McGuire sent his supervisor, Mr. John Segovia, a letter requesting information on reemployment upon his discharge from active duty. Apparently, Segovia did not receive the letter, but when McGuire called to follow up on 8 June 1996, another supervisor assured him that Segovia had the letter and would contact him.

McGuire was honorably discharged from active duty on 30 June 1996. On 11 July 1996, McGuire wrote Segovia another letter requesting "the procedures to get my job back."⁵⁸ McGuire also asked, "If you cannot answer this please pass it on to someone who can."⁵⁹ Mr. Segovia asked Mr. Ed LeBel of the UPS Human Resources Department for guidance. LeBel told Segovia that all McGuire had to do to be rehired was submit an employee update form.

On [16 July] 1996, Segovia sent the following letter to McGuire:

Dave--
The law specifies that there are no requirements for reemployment. Please touch base w/ Ed LeBel (HR) upon your return. Look to see you--
John Segovia
Resp. Ex. K.⁶⁰

McGuire received Segovia's letter the next day, but he never contacted the UPS Human Resources Department as directed. Mistakenly, McGuire believed that Segovia's letter was a letter of termination. McGuire attempted to contact Segovia by phone over the next few days, but never requested his job back or indicated that he believed he had been fired.

On 18 July, Segovia received a letter from an attorney who was assisting McGuire. The lawyer informed Segovia that McGuire believed that UPS was refusing to rehire him. Segovia called the lawyer and told him that McGuire was not fired and that all McGuire had to do was to report to the UPS Human Resources Office and he would be reinstated. The lawyer passed on Segovia's message to McGuire. Incredibly, McGuire never contacted the UPS Human Resources Office or visited the UPS facility to inquire about reinstatement.

On 13 January 1997, McGuire filed a court petition for reinstatement by UPS and alleged violations of the USERRA. United Parcel Service moved for summary judgment on the grounds that McGuire failed to apply for reinstatement under USERRA.⁶¹

The court framed the dispositive issue as whether McGuire had submitted an application for reemployment as required by the USERRA reinstatement provisions.⁶² The court determined that what constituted a proper application for reinstatement under the USERRA was a question of first impression.⁶³ Since there were no cases interpreting this provision of USERRA,⁶⁴ the court looked back to reinstatement application requirements under the Veterans' Reemployment Rights Act (VRRRA).⁶⁵ The court noted that Congress directed that, where the statute sections of the VRRRA and USERRA are similar, case law interpreting the predecessor statute should be "given full force and effect in interpreting these provisions."⁶⁶ The court determined that, while application for reemployment involves "more than a mere inquiry, a written application is not required in every sit-

56. *Id.* § 4312 (e)(1) (C).

57. McGuire had less than five years of reserve active duty time while employed with UPS.

58. *McGuire v. United Parcel Service, Inc.*, No. 97-C-0232, 1997 WL 543059, at *2 (N.D. Ill. Aug. 28, 1997).

59. *Id.*

60. *Id.*

61. *Id.* at *3.

62. 38 U.S.C.A. § 4312(e)(1)(C).

63. *McGuire*, 1997 WL 543059, at *3.

64. *Id.* at *3 n.5.

65. Pub. L. No. 93-508, 88 Stat. 1594 (1974). The reemployment application requirement section of the VRRRA was last codified at 38 U.S.C. § 2021. Neither statute specified any specific application procedure or application requirement for reinstatement. *See Thomas v. City & Borough of Juneau*, 638 F. Supp. 303 (D. Alaska 1986) (noting that where the employer was aware that a veteran was reapplying for reemployment, the employer had a legal obligation to rehire him).

66. *McGuire*, 1997 WL 543059, at *3 n.5. *See H.R. Rep. No. 103-65*, at 21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2451-52.

uation.”⁶⁷ The court determined that a case-by-case examination of the facts, “based upon the intent and reasonable expectations [of the parties], in light of all the circumstances,” was the appropriate standard of review.⁶⁸

The court reviewed several cases under the VRRRA where service members were found to have improperly requested reinstatement upon return from active duty⁶⁹ and conceded that McGuire had made more than a “mere inquiry” about reemployment.⁷⁰ McGuire sent several letters back to his supervisor and followed up with several telephone calls. Still, the court found that McGuire failed to submit an application.⁷¹ The court looked at the exchange of letters between Segovia and McGuire. The court determined that McGuire failed to use due diligence to obtain reemployment once he was put on notice that Segovia did not have authority to hire him back and that he needed to contact the UPS Human Resources Office.⁷²

Finally, the court noted that McGuire’s misunderstanding regarding his reemployment status did not equal employer refusal to rehire. United Parcel Service never denied or discouraged McGuire’s right to be rehired. When McGuire’s attorney notified UPS of his client’s concern that he was being denied reemployment, Segovia contacted the lawyer and reassured him that all his client needed to do was report to the Human Resources Office. As the court observed, “At a certain point the responsibility to see that one’s reemployment rights are observed falls on the employee.”⁷³ The court concluded that summary judgment was appropriate, as McGuire failed to fol-

low-up on UPS’s letter directing him where and to whom he needed to reapply for his civilian job.

While this case has limited precedential value, it is instructive as to what the courts expect of returning veterans and reservists who invoke their reemployment rights. Service members should contact their employers in writing, by certified mail, and demand reinstatement to their civilian employment within the statutory report back period. The letter should be sent to their companies’ directors of human resources or the appropriate personnel within the company who have clear authority to rehire service members, with copies to their immediate supervisors. If necessary, service members should follow up their letters with personal visits to their employers’ human resources offices upon discharge and should request USERRA reinstatement to their preservice employment. While there is no specific reemployment application form, the letter should leave no doubt to the employer that the service member wants reinstatement to his civilian job, in accordance with USERRA.⁷⁴

If there is any misunderstanding about reemployment, the service member should immediately contact the National Committee for Employer Support of the Guard and Reserve (NCESGR) National Ombudsman, or the Department of Labor Veterans and Employment Training Service, to resolve the misunderstanding.⁷⁵ If the service member waits beyond the statutory period to seek reemployment, the employer does not have an obligation to rehire him.⁷⁶ Lieutenant Colonel Conrad.

67. *McGuire*, 1997 WL 543059, at *3. See *Baron v. United States Steel Corp.*, 649 F. Supp. 537, 540 (N.D. Ind. 1986).

68. *McGuire*, 1997 WL 543059, at *3. See *Shadle v. Superwood Corp.*, 858 F.2d 437, 438 (8th Cir. 1988).

69. *McGuire*, 1997 WL 543059, at *3. See *Shadle*, 858 F.2d at 440 (holding that a service member’s mere visit to the employer guard shack to request employment application and two calls to supervisor are an insufficient request for reinstatement); *Baron*, 649 F. Supp. at 540 (N.D. Ind. 1986) (holding that a service member’s advisement to his employer that he would seek reemployment if he did not get into college was an insufficient request for reinstatement); *Lacek v. Peoples Laundry Co.*, 94 F. Supp. 399, 401 (M.D. Pa. 1950) (holding that a service member’s casual visit to his workplace and a general discussion about working conditions are an insufficient request for reinstatement). See also U.S. DEPARTMENT OF LABOR, VETERANS’ REEMPLOYMENT RIGHTS HANDBOOK, ch. 7 (1986).

70. *McGuire*, 1997 WL 543059, at *3.

71. *Id.*

72. *Id.* See *Hayse v. Tennessee Dep’t of Conservation*, 750 F. Supp. 298, 304 (E.D. Tenn. 1989) (noting that an employer “has a right to expect that notice be received by someone who is in a decision-making position, for example, someone who is able to hire the returning veteran.”). See also H.R. REP. 103-65, at 29 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2462 (explaining that an application must be made verbally or in writing to the employer or an employer’s representative “who has either the authority to act on the application or who is in a position to forward the request to someone who has the authority”). Arguably, Mr. Segovia, as McGuire’s supervisor, was in a position to forward his reemployment request, which should have met the requirements of the statute.

73. *McGuire*, 1997 WL 543059, at *3. “Common sense dictates that an employer cannot be expected to give every inquiry, regardless of how slight, full consideration and attention.” *Baron*, 649 F. Supp. at 541.

74. Model letters to employers are available on the Legal Automation Army Wide System bulletin board service in the Reserve and National Guard file section for downloading, and via the Army JAGCNET internet site at <http://www.jagcnet.army.mil>. Additional sources for information on reemployment rights are the Department of Defense National Committee for Employer Support of the Guard and Reserve (NCESGR) website at <http://www.ncesgr.osd.mil>, and the Department of Labor website at <http://www.dol.gov/dol/vets>. Army judge advocates and civilian legal assistance attorneys are precluded from contacting employers directly on USERRA matters involving individual service members. See U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6e(2) (10 Sept. 1995).

75. The NCESGR National Ombudsman may be contacted by calling (800) 336-4590 for assistance in mediating reemployment rights with employers. Department of Labor assistance may be received by calling (202) 219-9110.

Contract Law Note

Decision to Terminate a Travel Contract for Convenience Results in a Breach of Contract

In *Travel Centre v. General Services Administration*,⁷⁷ the General Services Board of Contract Appeals (GSBCA) found that the General Services Administration's (GSA) decision to terminate a travel services contract for convenience was done in bad faith, resulting in breach of the contract. After losing at the GSBCA, the GSA sought reconsideration, but the GSBCA rejected the GSA's motion for reconsideration. The GSBCA held, in part, that when a government official has information in his possession that is material to a pending procurement and fails to provide that information to offerors, the government official has not shown the good faith that people who do business with the government expect.⁷⁸

The subject procurement required the successful offeror to establish and to operate a travel management center for federal agencies located in New England. The solicitation specified that the successful offeror would serve as the preferred source for federal agencies that needed airline tickets, lodging, rental vehicles, and other travel services. The winning contractor would receive commissions from the services it provided.⁷⁹

The solicitation required an indefinite delivery, indefinite quantity (IDIQ) type of contract with a minimum guaranteed revenue of one hundred dollars. During the pre-award process, the incumbent contractor notified GSA that its largest government customer, Department of Defense (DOD)-related agencies,⁸⁰ awarded its own travel services contract to another contractor. Therefore, the DOD-related agencies would not be using the GSA contract. According to the GSBCA:

[The] GSA never informed offerors of this important information—information which directly contradicted the estimates of expected business contained in the solicitation upon which offerors had based their proposals. [The] GSA simply awarded a contract to Travel Centre for the states of Maine and New Hampshire. When expected business failed to materialize, Travel Centre was forced to close its business. [The] GSA then terminated the contract for default, changing the termination to one for the convenience of the Government in April 1997.⁸¹

In the underlying decision, the GSBCA noted that courts and boards have struggled mightily with the question of where to draw the line between a government breach of a contract and the legitimate use of the government's right to terminate a contract for convenience.⁸² Before *Torncello v. United States*,⁸³ courts had regularly held that terminations for convenience would only be considered a breach of contract when government officials acted in bad faith or abused their discretion.⁸⁴ In a plurality opinion in *Torncello*, the court further limited the government's power to terminate a contract for convenience by adopting a "change in circumstances" test. That is, when the circumstances of a contract have not changed after award of the contract, the government cannot rely on the termination for convenience clause to avoid a breach.⁸⁵ Subsequent case law has eroded the limitation established in *Torncello*, culminating with *Krygoski Construction Co. v. United States*,⁸⁶ which basically returned the law to its pre-1982 status. According to the GSBCA, "[g]iven the current state of the law . . . we must determine whether [the] GSA's termination for convenience of Travel Centre's contract as a result of a severely deficient estimate was in bad faith or constituted an abuse of discretion."⁸⁷

76. 38 U.S.C.A. § 4312(e)(3) (West 1998). Such employees do not automatically forfeit all their rights under the USERRA, but they are subject to any employer policies or practices regarding workers who are absent from the workplace without permission. *Id.*

77. GSBCA No. 14057, 98-1 BCA ¶ 29,541.

78. *Id.*

79. *Id.*

80. *Id.* The DOD business accounted for more than half of the business from the State of Maine.

81. *Id.*

82. *Id.*

83. 681 F.2d 756 (Ct. Cl. 1982). *Torncello* stands for the proposition that when the government enters into a contract knowing full well that it will not honor the contract, it cannot avoid a breach claim by using the termination for convenience clause. In *Torncello*, the government entered into an exclusive requirements contract knowing that it could get the same services much cheaper from another contractor. When the contractor complained that the government was breaching the contract by satisfying its requirement from the cheaper source and ordering nothing from it, the government claimed its actions amounted to a constructive termination for convenience. The court held that the government could not avoid the consequences of breach by hiding behind the termination for convenience clause. *Id.* at 772.

84. *See, e.g., Kalvar Corp. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977).

85. *Torncello*, 681 F.2d at 772.

The GSBCA analogized the instant case to *Atlantic Garages, Inc.*⁸⁸ In *Atlantic Garages*, a faulty estimate of the number of vehicles that would need to be repaired during the year suffered from the same basic defect as the faulty estimate here—the Government’s actions were sufficiently irrational as to support a finding that it knew or should have known that the estimate was not based on all relevant information. Also, as here, the irrationally-arrived-at estimate (and the resulting lack of income) caused the contractor to lose money and fail to meet its financial obligations.⁸⁹

The GSBCA held that the government’s actions in arriving at such an irrational estimate constituted a breach of the contract. Specifically, it stated that “[w]hatever risks a contractor takes should not include the risk that the contract will be based on an irrationally contrived estimate.”⁹⁰

In the instant case, the GSBCA concluded that the GSA irrationally-arrived-at estimate was not a run-of-the-mill mistake. According to the GSBCA, the GSA awarded the contract to Travel Centre knowing that its estimate was vastly overstated and knowing that Travel Centre had based its offer on the erroneous information.

By not telling offerors that half of the estimated sales for Maine would not be attainable, [the] GSA withheld crucial information material to an offerors’s decision whether to submit a proposal at all and, if so, how to structure it. Under such circumstances, whether [the] GSA actually knew about important additional relevant information, or recklessly disregarded it (an explanation which we do not find credible but, in any event, amounts to the same thing), potential injury to Travel Centre was present from the outset. We reject [the] GSA’s argument that

such behavior lacks the bad faith element necessary to finding breach.⁹¹

The GSA took the position that there was no breach for the following reasons: (1) it was an IDIQ type of contract; (2) it had a guaranteed minimum of one hundred dollars of revenue; (3) it did not guarantee that any specific agencies would use the contract; and (4) the contractor actually received more than one hundred dollars of revenue.⁹² The GSBCA disagreed with the GSA’s position. Initially, the GSBCA noted that it had serious doubts that Travel Centre actually accepted the risk that the GSA had misled it as to the amount of business it might expect to receive under the contract. More specifically, Administrative Judge Robert W. Parker stated in his opinion that “where the Government knows or has reason to know that the contractor has no chance of achieving the estimated quantity of sales, and fails to disclose that fact prior to entering into the contract, the term ‘risk’ is a misnomer.”⁹³

Judge Parker distinguished the instant contract from an ordinary IDIQ contract. In an ordinary IDIQ contract, the government promises nothing more than to purchase the minimum quantity. In the instant solicitation, the GSA advised that the successful offeror would be the preferred source for federal agencies in the region and mandated that offerors base their offers on the estimates provided in the solicitation. According to Judge Parker, even though the GSA never guaranteed more than one hundred dollars worth of revenue, Travel Centre was extremely vulnerable to a defective government estimate. That is, “[b]y inducing Travel Centre to base its proposal on quantities that [the] GSA knew or should have known were overstated, [the] GSA breached its duty to deal with Travel Centre fairly and in good faith.”⁹⁴ In other words, the GSA entered into the contract with no intention of fulfilling its promise.⁹⁵

The GSBCA was divided both in its underlying decision and on the motion for reconsideration. Administrative Judge

86. 94 F.3d 1537 (Fed. Cir. 1996). In *Krygoski*, the Air Force awarded the plaintiff a contract to demolish an abandoned Air Force missile site in Michigan. During a predemolition survey, the plaintiff identified additional areas that were not included in the original government estimate that required asbestos removal. Due to the substantial cost increase related to additional asbestos removal, the contracting officer decided to terminate the contract for convenience and to reprocure the requirement. The plaintiff sued in the Court of Federal Claims, alleging a breach of the contract. Relying on *Torncello*, the trial court found that the government improperly terminated Krygoski’s contract. The court also found that the government abused its discretion in terminating the contract under the standard found in *Kalvar*. The Court of Appeals for the Federal Circuit reversed and remanded, holding that the Court of Federal Claims incorrectly relied upon dicta in the plurality opinion in *Torncello*. *Id.* at 1538. Specifically, the court concluded that the trial court improperly found the change of circumstances insufficient to justify termination for convenience. *Id.* at 1545. Although the government’s circumstances arguably had changed to meet even the *Torncello* plurality standard, the court declined to reach that issue, because *Torncello* only applies when the government enters into a contract with no intentions of fulfilling its promises. *Id.*

87. *Travel Centre*, 98-1 BCA ¶ 29,422.

88. GSBCA No. 5891, 82-1 BCA ¶ 15,479.

89. *Id.*

90. *Id.* ¶ 76,710.

91. *Travel Centre*, 98-1 BCA ¶ 29,422.

92. *Id.*

93. *Id.*

Joseph Vergilio offered a spirited dissent to both opinions. Judge Vergilio took exception with the underlying facts of the case as well as the case law relied upon in the majority opinion. He initially noted that Travel Centre obtained work in excess of the guaranteed minimum.⁹⁶ The contract was terminated for default (and later converted to a termination for convenience) because the contractor closed its business during the contract period after the government had satisfied the minimum quantity. Finally, Judge Vergilio took issue with the majority's opinion that the GSA's procurement officials acted in bad faith. He noted that "[t]he findings and record fall short of meeting the standard of 'well-nigh irrefragable proof' required to overcome the presumption of good faith dealing by the agency."⁹⁷ Judge Vergilio stated that the record does not identify any government official who may have possessed the information and been connected with the procurement.⁹⁸ Even if a government official learned that DOD-related agencies had entered into a separate travel service contract, the record does not show that the knowledge included the type or duration of the DOD contract. Major Wallace.

International and Operational Law Notes

The following note is the third in a series of practice notes⁹⁹ that discuss concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense Law of War Program.¹⁰⁰

Principle 2: Distinction

In its recent advisory opinion on the legality of the use of nuclear weapons, the International Court of Justice articulated what it categorized as the two "cardinal principles" of the law of war.¹⁰¹ One of these two principles was "distinction."¹⁰² This conclusion is not surprising. According to the official commentary to Geneva Protocol I,¹⁰³ the concept of distinguishing between lawful and unlawful targets is at the very foundation of virtually every provision of the contemporary law of war.¹⁰⁴ Indeed, simple reflection on the variety of prohibitions and mandates familiar to most judge advocate bears out this fact.

The common theme among the prohibitions and mandates is to ensure that the application of destructive military force is limited to the greatest extent possible to only those people, places, or things categorized as legitimate targets as the result of the existence of a state of hostilities. What the judge advocate often does not appreciate is the "quid pro quo" nature of this equation. It is international law that "legalizes" the application of destructive force to such "targets." As a result, international law creates an "immunity" for lawful combatants who commit such destructive acts directed at lawful targets. It is that same body of law, however, that mandates distinction between "lawful" and "unlawful" targets for preservation of the immunity that accompanies destroying lawful targets.¹⁰⁵

This principle was a central element in the first modern comprehensive code of regulations for land forces engaged in combat operations, The Lieber Code.¹⁰⁶ According to Lieber, the

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., JUNE 1998, at 17.

100. See U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). See also CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

101. Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, *reprinted in* 35 I.L.M. 809, 827 (1996) [hereinafter Nuclear Weapons Opinion].

102. *Id.*

103. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 40 (1987) [hereinafter COMMENTARY].

104. See generally U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 9 (July 1956). See also RICHARD I. MILLER, THE LAW OF WAR 17-27 (1975). "Although it was never officially contained in an international treaty, the principle of *protection* and of *distinction* forms the basis of the entire regulation of war . . ." COMMENTARY, *supra* note 103, at 586 (emphasis in original).

105. The concept of "combatant immunity" will be addressed in more detail in a subsequent note.

106. U.S. War Dep't., Adjutant Gen. Office, Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field (24 Apr. 1863), *reprinted in* THE LAWS OF ARMED CONFLICT 3 (Dietrich Shindler & Jiri Toman eds., 3d. 1988).

distinction between private individuals of a hostile country and the armed forces of that country required that the “unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”¹⁰⁷ Ironically, explicit articulation of this principle in a multilateral law of war treaty did not occur until over one hundred years after publication of Lieber’s Code. The law of war practitioner will not find the term “distinction” in the articles of either the Hague Convention of 1907 or the four Geneva Conventions of 1949.¹⁰⁸ In spite of its apparent centrality in the development of the law of war, it remained “implied” within the meaning of many other provisions until 1977.

The first explicit articulation of the principle of distinction in a multi-lateral law of war treaty appeared as Article 48 of Additional Protocol I of 1977:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.¹⁰⁹

As is apparent from Article 48, the principle of distinction is intrinsically linked to the concept of “objective”—that is, in order to implement the obligation to distinguish between lawful and unlawful targets, military operations must be directed only at lawful military objectives.

In his chapter in the most recent volume of the International War Studies from the United States Naval War College, Horace

B. Robertson, Jr. traces the evolution of the explicit enunciation of the principle of military objective as a mechanism to implement the requirement of distinction.¹¹⁰ Robertson traces the Additional Protocol I mandate to direct military operations against only valid military objectives back to the Hague Rules of Air Warfare of 1923.¹¹¹ He demonstrates how articulation of the principle evolved between 1923 and 1977, when it was codified in both Articles 48 and 52 of Additional Protocol I. The language of Article 48 is established as the “basic rule.”¹¹² Article 52 is a further expression of the limitation imposed on combatants specifically within the context of protection of civilian persons and objects during international armed conflict. Accordingly, Article 52 establishes that:

Attacks shall be limited to strictly military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹¹³

Robertson proceeds to analyze whether this principle of military objective is part of the customary law of war.¹¹⁴ This is perhaps even more significant for the United States practitioner than his analysis of the history of this principle, because as he points out, the United States has never ratified, and therefore is not bound as a matter of treaty obligation to, Additional Protocol I.¹¹⁵ Robertson cites various statements of United States officials and provisions of United States law of war manuals to conclude that the United States is indeed bound to the general meaning of Articles 48 and 52, although he does identify one

107. THE LAWS OF ARMED CONFLICT, *supra* note 106, at 7.

108. See Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Art. 22, 36 Stat. 2277, *reprinted in* U.S. DEPARTMENT OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) (reprinting Article 22 of The Lieber Code) [hereinafter DA PAM 27-1]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2-3, T.I.A.S. No. 3362 [hereinafter GWS], *reprinted in* DA PAM 27-1, *supra*; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3363 [hereinafter GWS Sea], *reprinted in* DA PAM 27-1, *supra*; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3364 [hereinafter GPW], *reprinted in* DA PAM 27-1, *supra*; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3365 [hereinafter GC], *reprinted in* DA PAM 27-1, *supra*; 1977 Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter GP I]; 1977 Protocol II Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter GP II].

109. GP I, *supra* note 108, art. 48.

110. Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, in THE LAW OF MILITARY OPERATIONS 197 (Michael N. Schmitt ed., 1998).

111. HAGUE RULES OF AIR WARFARE, drafted by a Commission of Jurists at The Hague, Dec. 1922-Feb. 1923, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 106, at 207.

112. GP I, *supra* note 108, art. 48.

113. GP I, *supra* note 108, art. 52.

114. Robertson, Jr., *supra* note 110, at 203.

115. *Id.* at 203-04.

definitional nuance on which the United States may have staked out a different position.¹¹⁶

Among the authorities cited by Robertson to support the conclusion that the United States is bound to these provisions as a matter of customary international law are statements by Michael Matheson, Deputy Legal Advisor to the Department of State, and Abraham D. Sofaer, Legal Advisor to the Department of State, at a conference co-sponsored by the Red Cross and devoted to analyzing the status of the additional protocols. Mr. Matheson articulated which provisions of Additional Protocol I the United States felt did not reflect customary international law.¹¹⁷ By implication, those which he did not identify were not objectionable to the United States. Mr. Sofaer focused specifically on provisions of Additional Protocol I that the United States considers to be beyond the scope of binding customary international law.¹¹⁸ The only provision of Additional Protocol I related to distinction that he identified as objectionable at that time was the prohibition against making civilians the object of reprisal.¹¹⁹

The conclusion justified by the sources cited above is that the principle of distinction, as implemented by the principle of military objective, do indeed form part of the customary law of war related to international armed conflict (and arguably internal armed conflict as well).¹²⁰ Among the many “principles” of the law of war, distinction lies at the very core. It is a principle that focuses on limiting the destruction caused by conflict between warring armed forces. This should not, however, result in the conclusion that it is inapplicable to military operations other than war (MOOTW) that do not rise to the level of armed conflict. The true essence of the principle of distinction, as implemented by the “military objective” rule, is that combatants in any situation must constantly endeavor to ensure that warlike acts are not directed against anyone or anything that does not qualify as a legitimate target.

Implementing this imperative would seem facilitated by a clearly identified hostile force, enabling the combatant to make

the necessary distinction between lawful and unlawful targets more readily. This fact is explicitly acknowledged in the language of Article 44 of Additional Protocol I: “In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”¹²¹ Additional Protocol I then indicates that this obligation only requires, at a minimum, that a combatant distinguish himself as such “during each military attack”¹²² or “during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”¹²³ This “minimalist” standard for determining who qualifies as a lawful combatant by distinguishing themselves as such was rejected by the United States as an unjustified modification of the customary law standard for establishing combatant status.¹²⁴ This rejection may be viewed as evidence of how seriously the United States considers the need to be able to make the critical distinction between combatants and non-combatants. The obligation to make such distinctions should not be considered as having been eliminated when making such distinctions becomes more difficult as the result of facing a “non-traditional” hostile force that does not adequately distinguish itself from civilians. Instead, it would be central to the question of whether such an adversary, upon capture, was entitled to treatment consistent with prisoner of war status.

A classic example of the need to carry this principle over to the MOOTW environment was Somalia. Faced with a hostile force that was virtually indistinguishable from the local civilian population, United States forces continued to attempt to make distinctions between lawful and unlawful targets based on the distinguishing factors available, which often amounted to little more than identifying a hostile act directed towards United States forces. Based on the United States rejection of the Additional Protocol I standard for combatant status, even if the conflict had amounted to an international armed conflict triggering the full body of the law of war, these adversaries would never have technically qualified for prisoner of war status upon cap-

116. *Id.* at 204 (citing Michael Matheson (Deputy Legal Advisor, U.S. Department of State), *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, in *The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law*, 2 AM. U. J. INT’L L. & POL’Y 419, 426 (1987)).

117. *See* Matheson, *supra* note 116, at 419.

118. *Id.* at 460.

119. *Id.* at 469.

120. *See* Prosecutor v. Dusko Tadic a/k/a/ “Dule,” *Opinion and Judgment*, INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, Case No. IT-94-1-T (7 May 1997) (analyzing the applicability of customary international law of war principles to conflicts not of an international nature).

121. GPI, *supra* note 108, art. 44(3).

122. *Id.* art. 44(3)(a).

123. *Id.* art. 44(3)(b).

124. *See* Matheson, *supra* note 116, at 419.

ture as a matter of law. The United States forces, however, did not use this fact to reject the imperative of attempting to make the critical distinction between “combatant” and “non-combatant.” This is the essence of the principle of distinction, a principle that must always form the foundation of the war-fighter’s decision-making process. Major Corn.

1998 Operational Law Handbook Now Available

The 1998 edition of the *Operational Law Handbook* is now available for distribution. Students who attend the Operational Law Seminar will receive copies, and the school has a limited number of hard copies available for distribution on an as-needed basis. The *Operational Law Handbook* is a “how to” guide for judge advocates who practice operational law. It provides references and describes tactics and techniques for the practice of operational law. The *Operational Law Handbook* is not a substitute for official references. Like operational law itself, the *Handbook* is a focused collection of diverse legal and practical information. The *Handbook* is not intended to provide “the school solution” to a particular problem, but is designed to help judge advocates recognize, analyze, and resolve the problems they encounter in the operational context.

The *Handbook* was designed and written for judge advocates who practice operational law. The size and contents of the *Handbook* are controlled by this focus. Simply put, the *Handbook*, is a “cargo pocket sized” reference made for all service members of the judge advocate general’s corps, who serve alongside their clients in the operational context. Accordingly, the *Operational Law Handbook* is compatible with current joint and combined doctrine.

The proponent for this publication is the International and Operational Law Department, The Judge Advocate General’s School (TJAGSA). Anyone who has comments, suggestions, and work product from the field should send them to TJAGSA, International and Operational Law Department, Attention: Major Mike Newton, Charlottesville, Virginia 22903-1781. To gain more detailed information or to discuss an issue with the author of a particular chapter, practitioners should call Major Newton at DSN 934-7115, ext. 373 or commercial (804) 972-6373 or e-mail at: newtoma@hqda.army.mil.

The 1998 *Operational Law Handbook* is on the Lotus Notes Database in two locations. The “Int’l and Opn’l Law1” database on the TJAGSAN1 server contains a digital file for each chapter of the *Handbook*. To access, open the database and view documents by title. The 1998 edition is also linked to the CLAMO General database under the keyword “Operational

Law Handbook–1998 edition.” The digital copies are particularly valuable research tools because they contain many hypertext links to references in the text, such as treaties; statutes; DOD directives, instructions, and manuals; Chairman, Joint Chiefs of Staff instructions; joint publications; Army regulations; and field manuals. For a blue link, the user should click on it and Lotus Notes will retrieve the cited document from the Internet. The hypertext linking is an ongoing project and will only get better with time. Some internet links require that your computer have specific types of software. Major Newton.

Criminal Law Note

Explanation of the 1998 Amendments to the *Manual for Courts-Martial*

Introduction

The July 1998 edition of *The Army Lawyer* contained a complete copy of the 1998 amendments to the *Manual for Courts-Martial (MCM)*. This note highlights the numerous amendments made to the *MCM* and the impact the amendments may have for military criminal law practitioners.¹²⁵

Pretrial Restraint

Amended Rule for Courts-Martial (R.C.M.) 305(g) through (k) reflects the constitutional requirement for a neutral and detached officer to review an accused’s pretrial confinement within forty-eight hours of imposition.¹²⁶ Amended R.C.M. 305(h)(2)(A) notes that the existing seventy-two-hour commander’s review may satisfy this requirement if it is conducted within forty-eight hours and if the commander is truly neutral and detached. This same provision also notes that nothing prohibits the neutral and detached officer from conducting either the seventy-two-hour review or the forty-eight-hour review immediately after an accused is ordered into pretrial confinement.

To clarify the *Manual’s* distinct neutral and detached review requirements, R.C.M. 305(i) was broken into two subparts: (1) the forty-eight-hour review conducted by a neutral and detached officer and (2) the seven-day review conducted by a neutral and detached officer appointed in accordance with applicable service regulations (for example, the military magistrate provisions in *Army Regulation 27-10*¹²⁷). Although listed as two separate reviews, if the seven-day reviewing officer (that is, the military magistrate) conducts his review within forty-eight-hours, it may satisfy both review requirements.

125. Executive Order Number 13,086 contains the recent amendments to the *MCM*. See Exec. Order No. 13,086, *reprinted in* ARMY LAWYER, July 1998, at 1.

126. See *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), *cert denied*, 114 S. Ct. 1296 (1994). In *Rexroat*, the court held that the 48-hour review required by *County of Riverside v. McLaughlin* applies to the military. *Id.* See *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

127. U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (24 June 1996).

The provisions of R.C.M. 305(k) were also amended to expand the remedial powers of the military judge. In addition to the existing authority to order credit for noncompliance with subsections (f), (h), (i), and (j) of this rule, military judges may now order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances.

Pre-Trial Investigations

Based on the National Defense Authorization Act for Fiscal Year 1996,¹²⁸ R.C.M. 405(e) was amended to reflect the additional authority of pretrial investigating officers to investigate an uncharged offense and to make recommendations as to its disposition, even when formal charges for the offense have not been preferred. The discussion to amended R.C.M. 405(e) states that Article 32b investigations into uncharged offenses may occur only when the accused has been put on notice of the general nature of the uncharged offense and afforded the same opportunity to be represented, to cross-examine witnesses, and to present evidence afforded soldiers during investigations of charged offenses. The analysis to amended R.C.M. 405(e) acknowledges the benefit to the government and to the accused as a result of the improved judicial economy resulting from the amended rule.

Speedy Trial

Based on new rules regarding hospitalization of an incompetent accused, subsection (E) was added to R.C.M. 707(b)(3) to specify that the period of time when an accused is committed pursuant to R.C.M. 909(f) shall be excluded for purposes of the 120-day speedy trial clock. If the accused is later returned to the custody of the general court-martial convening authority (GCMCA), a new 120-day clock will begin on the date the accused is returned to custody. Rule for Courts-Martial 707(c) was also amended to accommodate this change by adding the additional provision that all periods of time during which an accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded.

Government Appeals

The 1998 amendment to R.C.M. 908(a) expands the grounds for which the United States may appeal a military judge's order or ruling. Previously, the United States could only appeal an order or ruling that terminated the proceedings with respect to a charge or specification, or that excluded evidence that was substantial proof of a material fact. The amendment now permits the United States to appeal a military judge's order or ruling that affects the disclosure or nondisclosure of classified information. This change conforms to the 1996 change to Arti-

cle 62, UCMJ. The term "classified information" is defined in the 1998 amendment to R.C.M. 103, discussion, subsection (14).

Automatic Forfeitures

The amendments to R.C.M. 1101 set forth the requirements for deferment and waiver of automatic forfeitures. Automatic forfeitures arise under Article 58b, UCMJ, when a court-martial sentence includes more than six months confinement or a punitive discharge along with any confinement.

Amended R.C.M. 1101(c)(2) provides that, "upon written application of the accused," the convening authority may defer forfeitures. Amended R.C.M. 1101(c)(3) sets forth the factors for the convening authority to consider when deciding whether to defer an accused's forfeitures. Amended R.C.M. 1101(c)(4) requires that the deferment be reported in the convening authority's action.

Amended R.C.M. 1101 contains a new subparagraph (d), which addresses waiver of automatic forfeitures "to provide for dependent support." Amended R.C.M. 1101(d)(1) highlights a key—and often-overlooked—distinction between deferment and waiver. Waiver applies to "forfeiture of pay and allowances resulting only by operation of law." Thus, if a court-martial sentence does not include one of the triggers in Article 58b, waiver does not apply.

The waiver provisions in R.C.M. 1101(d)(1) further provide that the convening authority may waive such forfeitures when they become effective by operation of Article 57(a), which occurs fourteen days after sentence is adjudged. Subparagraphs (2) and (3) set forth factors that a convening authority may consider in granting waiver and establish eligible dependents to whom the convening authority may direct such waived benefits be paid.

Competency to Stand Trial/Mental Responsibility

Amended R.C.M. 909 details the new procedures to commit an incompetent accused to the custody of the U. S. attorney general under Article 76b, UCMJ. Commitment of an incompetent accused is not discretionary. According to R.C.M. 909(d) and R.C.M. 909(c), the convening authority must commit the accused to the attorney general if the military judge determines that the accused is incompetent (post-referral) or if the GCMCA concurs with a sanity board's findings (pre-referral) that the accused is incompetent. Rule for Courts-Martial 909(e) details the incompetency hearing. Pursuant to the requirements of R.C.M. 909(f), military accuseds shall be hospitalized using the same procedures applied to federal defendants who are found incompetent to stand trial.

128. Pub. L. No. 104-106, § 1131, 110 Stat. 186, 464 (1996).

Amended R.C.M. 909 also addresses speedy trial issues that affect R.C.M. 707(b)(3)'s 120-day speedy trial clock. Amended R.C.M. 909(g) now specifies that the period of time during which an accused is committed to the custody of the attorney general under Article 76b and R.C.M. 909(f) is excludable for speedy trial purposes. If the accused is later found competent and returned to the custody of the GCMCA, then a new 120-day time period begins on the date of the return to custody.

The 1998 amendments also include a completely new section, R.C.M. 1102A, which provides guidance for the post-trial handling of accuseds who are found not guilty only by reason of lack of mental responsibility. Under R.C.M. 916(k), an accused who is found not guilty by reason of lack of mental responsibility will be committed to the custody of the attorney general, unless the accused can prove that commitment is not necessary. Rule for Courts-Martial 1102A(c) sets forth the procedures for the post-trial hearings before the military judge. The post-trial hearing is held within forty days of the court-martial findings. At the hearing, the burden is on the accused to show that his release would not create a substantial risk of bodily injury to another person or serious damage to the property of another person due to a present mental disease or defect. The accused's burden varies, depending on the offense(s) he committed.¹²⁹

Amended R.C.M. 1107(b)(4) explains that when a court-martial finds an accused not guilty only by reason of lack of mental responsibility, the convening authority shall commit the accused to a suitable facility pending his post-trial R.C.M. 1102A hearing. This new provision ensures that the accused will be available for his post-trial hearing.

Military Rules of Evidence

Military Rule of Evidence (M.R.E.) 1102 was changed to make amendments in the Federal Rules of Evidence (F.R.E.) automatically applicable to the Military Rules of Evidence eighteen months after the effective date of the federal amendments, unless the President takes action to the contrary. Under the former rule, changes were automatically incorporated into the M.R.E. six months after the effective date of a new federal rule.

Federal Rules of Evidence 407, 801, 803, 804, and 807 were amended on 1 December 1997. These amendments were scheduled to take effect in the military on 1 June 1998. Since M.R.E. 1102 was amended on 27 May 1998, however, these F.R.E. amendments will not be included in the 1998 edition of the *MCM*.

In addition to this significant change to M.R.E. 1102, several minor amendments were made to M.R.E. 412 regarding an alleged victim's behavior or sexual predisposition. All references to civil proceedings were deleted. Amended M.R.E. 412(c)(1)(A) requires parties who seek to offer evidence of an alleged victim's sexual behavior or sexual predisposition to file a written motion at least five days prior to the entry of pleas. The former rule required notice fourteen days before trial. Pursuant to Article 39(a), UCMJ, M.R.E. 412(c)(B)(2) was amended to replace the term "hearing in camera" with "closed hearing" to reflect that an in camera hearing in federal district court closely resembles a closed hearing under Article 39(a). Military Rule of Evidence 412 sections (d) and (e) were added to define the terms "sexual behavior" and "nonconsensual sexual offense."

Several changes were also made to M.R.E. 413 and M.R.E. 414 to tailor the rules to military practice. Military justice terminology was substituted, and all references to F.R.E. 415 were deleted because it applies only to civil proceedings. Sections (b) of M.R.E. 413 and M.R.E. 414 were amended to require the government to disclose evidence of similar crimes at least five days before the scheduled date of trial. The federal rule requires a fifteen-day notice. Amended M.R.E. 413(d) adds the phrase "without consent" to specifically exclude the introduction of evidence concerning adultery or consensual sodomy. Sections (e), (f), (g), and (h) were added to M.R.E. 413 and M.R.E. 414 specifically to define the terms "sexual act," "sexual contact," "sexually explicit conduct," and "state."

Crimes and Defenses

The 1998 amendments to part IV of the *MCM* reflect significant changes to punitive articles that expand criminal liability in several specific areas, create a new special defense to carnal knowledge, and enumerate parole violations as an offense under Article 134. These changes incorporate recent statutory amendments to the UCMJ and reflect the use of presidential authority to promulgate the R.C.M. under Article 36 and to establish maximum punishments under Article 56.

Paragraph 19 of part IV incorporates a 1996 amendment to Article 95, UCMJ. Although the 1951, 1969, and 1984 *MCMs* maintained that mere flight was a violation of Article 95, the Court of Appeals for the Armed Forces (CAAF) had rejected that interpretation. In *United States v. Harris*¹³⁰ and *United States v. Burgess*,¹³¹ the CAAF held that flight alone did not constitute resisting apprehension under Article 95. The 1996 amendment supersedes *Harris* and *Burgess* and creates a separate offense of fleeing apprehension. The maximum punish-

129. If the offense(s) involved an injury or risk of injury to another person or serious damage (or risk of serious damage) to another's property, the accused's burden of proof is clear and convincing evidence. With respect to all other offenses, the accused's burden of proof is a preponderance of the evidence.

130. 29 M.J. 169 (C.M.A. 1989).

131. 32 M.J. 446 (C.M.A. 1991).

ment for fleeing apprehension is a bad-conduct discharge, total forfeitures, and confinement for one year—the same as for resisting apprehension.

Paragraph 45 of part IV incorporates the 1996 statutory amendments to the offense of carnal knowledge under Article 120. Article 120(b) was amended to make carnal knowledge a gender-neutral crime. This change expands liability to include female perpetrators, though the accused and victim must still be of opposite genders.¹³² The amendments also added Article 120(d), which allows mistake of fact as to the age of the victim as a defense in cases of carnal knowledge.¹³³ Under the amended statute, the defense is available only if the victim had attained the age of twelve at the time of the offense and the accused had an honest and reasonable belief that the victim was sixteen or older at the time of the offense. Contrary to the normal allocation of burdens, the accused has the burden of proving the defense by a preponderance of the evidence. The government is not required to prove that the accused knew the victim's age as part of the case-in-chief, but must be prepared to rebut the defense evidence that tends to support an honest and reasonable mistake defense. The 1998 amendments to R.C.M. 916(j) (defining the mistake of fact defense) and R.C.M. 920(e)(5)(D) (allocating burdens of proof) complete the implementation of these statutory changes.

Paragraph 45 of part IV was amended to increase the maximum punishment for simple assaults committed with an unloaded or inoperative firearm. The President added this sentence escalator in recognition of the increased psychological harm suffered by victims who are assaulted with apparently functional firearms. The *MCM* has maintained since 1951 that an unloaded or nonfunctional firearm is not a “dangerous weapon” under Article 128(b). The CAAF agreed with this position in *United States v. Davis*,¹³⁴ holding that an offer-type assault with an unloaded pistol was not an aggravated assault under Article 128.¹³⁵ The 1998 change ameliorates the impact of the *Davis* decision by permitting enhanced punishments for this special category of simple assaults.

The 1998 amendments also create paragraph 97a, which defines parole violations as an offense under Article 134. Violation of parole has been noted in the table of maximum punishments in every edition of the *MCM* since the enactment of the UCMJ, but it has never been included as an enumerated offense in part IV of the *MCM*. The 1998 change provides practitioners with a delineation of elements, an explanation of the offense, and a model specification to apply Article 134 to parole violations.

Rule for Courts-Martial 1105(b) addresses the matters that an accused may submit to the convening authority. Amended R.C.M. 1105(b) is rephrased to ensure that all parties understand that an accused is permitted to submit any matters, including non-written matters, as part of a clemency submission. Although the amended rule clarifies the accused's right to submit non-written matters, it does not create an obligation upon the convening authority to consider these these non-written matters. Pursuant to R.C.M. 1105(b)(1), the convening authority is only required to consider written submissions.

Formerly, R.C.M. 1105(b) provided that an accused could submit “any written matters” that might affect the convening authority's decision. The provision unduly restricted the accused's right to submit matters to the convening authority. Amended R.C.M. 1105(b) is more appropriate in the highly discretionary realm of post-trial action and clemency. It permits an accused to submit any matters that might help obtain clemency, while it leaves the decision whether to consider such non-written matters to the individual discretion of the convening authority on a case-by-case basis.

Rule 1203(c)(1) was amended to reflect the creation of Article 57a of the UCMJ. The new rule authorizes a service secretary to defer confinement when a sentence has been set aside by a service court of criminal appeals and a judge advocate general certifies the case to the Court of Appeals for the Armed Forces for further review under Article 67(a)(2). The analysis accompanying the rule recognizes that an accused should be released from confinement unless it can be shown that the accused is a flight risk or a threat to the community.

A significant amendment was also made to R.C.M. 1210(a) regarding an accused's right to petition for a new trial. A new provision was added that prohibits an accused from petitioning for a new trial “when the petitioner was found guilty of the relevant offense pursuant to a guilty plea.” This addition was intended to conform to the interpretations of Federal Rule of Criminal Procedure 33.

Vacation Proceedings

Amended R.C.M. 1109 clarifies the powers of the special court-martial convening authority to vacate any portion of a suspended special court-martial sentence other than an approved bad-conduct discharge. The amended rule catego-

132. Carnal knowledge, like rape, only applies to only heterosexual intercourse. Homosexual acts must be charged under Article 125.

133. The mistake of fact defense, generally defined in R.C.M. 916(j), could not be judicially applied to carnal knowledge because knowledge of the victim's age is not an element of the offense under Article 120(b). A statutory amendment was therefore required to make this defense available.

134. 47 M.J. 484 (1998).

135. *Id.*

rizes the vacation of certain suspended punishments into four categories: sub-paragraph (d) vacation of suspended general court-martial sentence; sub-paragraph (e) vacation of a suspended special court-martial sentence wherein a bad-conduct discharge was not adjudged; sub-paragraph (f) vacation of a suspended special court-martial sentence that includes a bad-conduct discharge; and sub-paragraph (g) vacation of a suspended summary court-martial sentence. The former rule had two categories of cases and provided confusing guidance regarding the types of punishments a special court-martial convening authority could vacate.

Under the old provision, only the GCMCA could vacate any portion of a suspended sentence that included a bad-conduct discharge, even if the portion of the sentence he desired to vacate was nothing more than additional confinement, forfeitures, or reduction in rank. The amended rule now permits a

special court-martial convening authority to vacate these other types of punishments even in those cases when the adjudged sentence includes a bad-conduct discharge.

Contempt

Amended R.C.M. 809 modernizes military contempt procedures. The rule now vests contempt powers in the military judge alone and removes the members' involvement in the process. The military judge will conduct the proceedings in all cases, outside the presence of the members. The amendment also provides that the court-martial proceedings need not be suspended while the contempt proceedings are conducted. Criminal Law Faculty.

Note from the Field

Flying Evaluation Boards: A Primer for Judge Advocates

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Introduction

Army regulations provide that “[e]ach officer authorized to pilot a military aircraft or to perform crew member duties must maintain the highest professional standards. When an officer’s performance is doubtful, justification for continued aviation service or authorization to pilot Army aircraft is subject to complete review.”¹ The forum for this review is a flying evaluation board (FEB).

Judge advocates who support aviation units will, at some point during their tenure, likely participate in an FEB. At first glance, such a proceeding may seem the province of pilots, rather than attorneys. After all, the purpose of the board is to evaluate a pilot’s potential for continued aviation service. What could a non-aviator judge advocate have to offer?

The answer to this question can be summed up in one word: counsel. Like all formal boards in the military, the FEB includes a government representative or “recorder,” and, because the aviator is designated as the “respondent,” he is entitled to counsel.² Accordingly, judge advocates should be aware that they may be called on to play a part in an FEB, at any given time.

Judge advocates who are unfamiliar with Army aviation should not be alarmed at the prospect of participating in an FEB. With a little bit of homework and a careful review of the relevant regulations, most attorneys will find that an FEB is no more difficult than any other administrative board. The key is to consult with subject matter experts early in the process to

gain a basic understanding of the aviation specific issues that the board will consider.

Reasons to Convene a FEB

An FEB may be convened for a variety of reasons. In most cases, it will be directed when an aviation officer fails to maintain professional or medical qualifications or an officer demonstrates behavior that could be construed as substandard or unsafe.³ Examples of unsafe behavior include: flagrant violations of flying regulations, failure to comply with urinalysis testing, positive urinalysis results, insufficient motivation, or unsatisfactory duty performance.⁴

In some cases, an FEB will be convened in the wake of an aircraft accident. If a collateral investigation was conducted to investigate the accident, records and information that were collected during the collateral investigation may be made available to the FEB.⁵ Reports and information compiled by the Army Safety Center or a formal accident investigation board are not releasable to the FEB.⁶

As with other adverse actions, the government has the burden of proof. Specifically, the government must prove that the aviator’s qualifications have lapsed or that his behavior is substandard or unsafe. Unless otherwise directed by the appointing authority, the standard of proof for an FEB is the “greater weight of evidence” standard, as outlined in *Army Regulation (AR) 15-6*.⁷ Under normal circumstances, an FEB should not disqualify an individual from aviation service “based on an iso-

1. U.S. DEP’T OF ARMY, REG. 600-105, AVIATION SERVICE OF RATED ARMY OFFICERS, para. 6-1 (15 Dec. 1994) [hereinafter AR 600-105].
2. See U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, ch. 5 (11 May 1988) [hereinafter AR 15-6] (discussing rules governing entitlements to counsel during formal boards of officers).
3. AR 600-105, *supra* note 1, para. 6-1c.
4. *Id.* para. 6-1.
5. See U.S. DEP’T OF ARMY, REG. 385-40, ACCIDENT REPORTING AND RECORDS (1 Nov. 1994).
6. *Id.* para. 1-10 (containing detailed information on aircraft investigations).
7. AR 15-6, *supra* note 2, para. 3-9b (stating that findings of investigations and boards governed by this regulation must be supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more probable than any other conclusion).

lated incident or action.”⁸ Rather, the government must show a pattern of dangerous or unacceptable performance.

The Applicable Regulations

In preparing for an FEB, a judge advocate must carefully review *AR 600-15*, chapter 6. This portion of the regulation discusses the FEB in detail, including the review and approval process for the board’s findings and recommendations.

Since an FEB is a formal board of officers, *AR 15-6*, should be used as a procedural guide. Judge advocates should read *AR 15-6*, chapter 4 along with *AR 600-105*, paragraph 6-3 for detailed information on procedures for formal boards. The script and the sample appointment and notification memoranda found in *AR 15-6* are appropriate for use before and during the FEB.⁹ In rare instances when there is a conflict between *AR 600-105* and *AR 15-6*, “the guidance found in *AR 600-105* will prevail.”¹⁰

FEB Procedures

An FEB may be appointed by any officer with the authority to suspend an aviator from flight status for up to 180 days.¹¹ For active duty forces, this includes commanders of “posts, camps, stations, divisions, regiments, brigades, or detached battalions.”¹² Under most circumstances, the FEB appointing authority is a brigade level commander. The appointing authority typically appoints board members and the respondent by a signed memorandum. Upon completion of the board, the memorandum will be attached as an enclosure to the FEB report.

An FEB will be composed of an uneven number of voting members (no fewer than three) who are aviation rated commissioned and warrant officers. If the respondent is a warrant officer, at least one non-voting member will be a warrant officer who is senior in grade to the respondent.¹³ If a medical issue is involved, the board may include a flight surgeon as a non-voting member. In all other respects, board membership will comport with *AR 15-6*, to include the appointment of a non-voting legal advisor.

Procedures for conducting the board are contained in both *AR 15-6* and *AR 600-105*.¹⁴ In general, the board receives exhibits and hears testimony from the government and the respondent. Witnesses for both sides are subject to direct and cross-examination and, as with other military forums, the board members may question the witnesses if they so desire. Formal rules of evidence do not apply, and the president of the FEB rules on all objections. The respondent has a right to be represented by military counsel free of charge or by civilian counsel at no expense to the government.

Findings and Recommendations

After deliberation, the FEB will issue its findings and recommendations. There is no restriction regarding the content of the board’s findings; however, *AR 600-105* states that the *recommendations* of an FEB are generally limited to:

- (1) Officers with proper training and skills be awarded an aeronautical rating.
- (2) Orders suspending the respondent from flying be rescinded and the respondent be restored to aviation service.
- (3) Orders disqualifying the respondent be rescinded and the respondent be requalified for aviation service.
- (4) The respondent be disqualified from aviation service.
- (5) The respondent be permanently disqualified from aviation service.
- (6) The respondent be permanently disqualified from aviation service and no longer authorized to wear the Army Aviation Badge.¹⁵

In cases where aviation operations or the flying ability of the respondent can be improved, other recommendations can be made.¹⁶ Judges advocates should carefully review the options available to the FEB regarding possible recommendations and craft the theory and theme of their cases accordingly.

8. *AR 600-105*, *supra* note 1, para. 6-3d(1).

9. *AR 15-6*, *supra* note 2, figs. 2-1, 2-2, 3-1.

10. *AR 600-105*, *supra* note 1, para. 6-1d.

11. *Id.* para. 6-1b.

12. *Id.* ch. 5, tbl. 5-1.

13. *Id.* para. 6-2.

14. *See generally* *AR 15-6*, *supra* note 2, ch. 3; *AR 600-105*, *supra* note 1, para. 6-3.

15. *AR 600-105*, *supra* note 1, para. 6-3c.

Review, Appeal, and Requalification

The appointing authority (or a higher reviewing authority) may take final action on the board's recommendations when such action restores the aviator to aviation service, provided that the aviator has not previously been disqualified.¹⁷ If the board results are adverse to the aviator, they must be forwarded through command channels to the next higher reviewing authority. In all cases, the commander in the aviator's chain of command who exercises general court-martial convening authority will approve the FEB report.¹⁸

Adverse FEB results may be appealed based on additional evidence or new, unexpected circumstances. Aviators grounded by a previous FEB, who were not permanently disqualified from aviation service, may seek requalification "when the original reason(s) for the disqualification and current circumstances warrant reconsideration."¹⁹ In cases where an aviator requests requalification, the FEB is not bound by the decisions of the first board. Approval authority for requalification parallels aviation service termination authority. For Aviation Branch, Medical Service Corps, and warrant officers the approval authority is the Commander of Personnel Command. For Medical Corps officers (flight surgeons), the approval authority is the Surgeon General, U.S. Army.

Practice Notes

By its very nature, the FEB involves a variety of issues that are unique to Army aviation. It is imperative, therefore, that non-aviator judge advocates (recorder, defense counsel, and legal advisor) consult with a subject matter expert, preferably a rated Army aviator, well in advance of the board. An aviation officer will be able to walk judge advocates through the respondent's flight records (normally an important exhibit for the board to consider) and to clarify other matters involving flying

proficiency, aeronautical ratings, currency requirements, and medical fitness to fly.

If the respondent is facing disqualification for medical reasons, judge advocates should prepare for the board by interviewing a qualified and current flight surgeon. Depending on the situation, the recorder or defense counsel may want to call a flight surgeon as a witness. Likewise, if the aviator's mental state is at issue, a military psychologist, particularly one who has attended the Aeromedical Aviation Psychology Course, may be a critical witness.

One final practice note involves the use of acronyms during the board. Like every branch of the Army, Aviation has its own unique terminology and acronyms. Since there will likely be no verbatim record taken during the FEB, the reporter will have to prepare a summary of the proceedings from an audiotape. Judge advocates should be alert to the use of acronyms by witnesses and board members and ensure that the acronyms are clarified on the spot. This will greatly assist the reporter in preparing a timely summary of the proceedings.

Conclusion

"The objective of the FEB is to ensure that all information relevant to an aviator's qualifications is presented, and that the proceedings are objectively evaluated."²⁰ To help the board meet this objective, judge advocates must consult early and often with subject matter experts. They must gain a basic understanding of aviation terminology and aviation specific issues. As with any military proceeding, a judge advocate's credibility during an FEB will be based, in large part, on his knowledge of the subject matter and his ability to "speak the language" of the board members.

16. *Id.*

17. *Id.* para. 6-3f.

18. *Id.*

19. *Id.* para. 6-6a.

20. *Id.* para. 6-3.

The Art of Trial Advocacy

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Preparation of Effective Rebuttal Arguments

Introduction

Most people agree with Thomas Edison's dictum that "genius is one percent inspiration and ninety-nine percent perspiration." Yet, many trial counsel pretend that Edison's observation does not apply to the practice of making rebuttal arguments. Counsel routinely neglect pretrial analysis and preparation of the rebuttal argument and rely instead on the tenuous hope for divine inspiration at the moment of engagement. Often, rebuttal arguments are impromptu reactions to defense arguments that are made in the heat of the courtroom struggle. Lacking an integrated plan of attack, the rebuttal often becomes a series of insipid postscripts instead of a cohesive and forceful *coup de grace*.

The rebuttal argument gives the government an opportunity to regain the momentum, to reestablish focus on the key issues in the case, and to refute the defense's arguments on key issues. A purely reactive point-by-point response to defense arguments cannot accomplish this mission. The rebuttal must refute the defense arguments on key issues and forcefully reassert the government's theory of guilt. The leading causes of weak and ineffective rebuttal arguments are inadequate preparation and ineffective organization of the argument. This note proposes a method for constructing rebuttal arguments that are consistently on target.

Prepare the Rebuttal as an Integral Part of Your Closing Argument

It is often said that the preparation of a case should begin with an outline of the closing argument. If that is so, preparation must also begin with an outline of the rebuttal argument. The government gets to argue first and last.¹ The benefits of primacy and recency should be fully exploited by careful planning. The first closing and the rebuttal must work together to maximize the persuasive presentation of the government's case.

The mission of the first closing is to marshal the evidence that supports the government's theory of guilt. The government

must carry the burden of proof on every element of the offenses charged and must disprove any defenses that are raised by the evidence. It is essential that the first closing meet these goals. Trial counsel should not rely on rebuttal to pull victory from the jaws of defeat. Rather, the primary mission of the rebuttal is to restore commitment to the theory of guilt that was clearly constructed in the first closing. It is a restoration project, not a new building. The themes and structure of the two arguments must be carefully coordinated to contribute to the same persuasive goal.

Counsel should avoid two pitfalls. One is the temptation to anticipate fully and to neutralize defense arguments in the first closing. While there is an advantage in immunizing the panel against defense arguments, too much attention to the defense argument distorts the focus of the first closing. The focus should be kept on your affirmative proof with occasional warnings against specific defense sophistries to come. This approach sets up rebuttal on those points. Save the full refutation for the rebuttal. Too much anticipation weakens the rebuttal by tipping off the defense counsel to your best rebuttal arguments and gives him the chance to respond to your rebuttal as well as your case-in-chief. A second pitfall lies in the temptation to sandbag the defense by saving everything for rebuttal. This tactic surrenders the advantage of primacy, which is the benefit of going first. It may also run afoul of the scope limitations on rebuttal argument. Rebuttal is generally limited to matters that are raised by the defense argument.² For example, if the defense counsel ignores the premeditation issue in a homicide case and exclusively argues the issue of identity, the trial counsel may be precluded from arguing the premeditation issue during the rebuttal. The defense counsel could also counter the sandbagging tactic by offering argument only on some of the charged offenses or by waiving argument entirely.³

Control the Agenda

Since the first closing established the agenda of key issues, the rebuttal can begin by reminding the panel that resolution of those issues will determine the verdict. It makes sense to organize the negative rebuttal around those issues. You must resist

1. The *Manual for Courts-Martial* states simply: "After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 919(a) (1995). Although the *Manual* clearly gives the government a right to present rebuttal argument, the length and scope of the rebuttal remain within the discretion of the military judge. See *id.* R.C.M. 919 discussion. "The military judge may exercise reasonable control over argument." *Id.* R.C.M. 801(a)(3).

2. The discussion following Rule for Courts-Martial, 919 further states: "The rebuttal argument of trial counsel is generally limited to matters argued by the defense. If trial counsel is permitted to introduce new matter in closing argument, the defense should be allowed to reply in rebuttal. However, this will not preclude trial counsel from presenting a final argument." *Id.* R.C.M. 919 discussion.

3. Defense counsel will, however, be reluctant to use these tactics because of this risk of raising an ineffective assistance of counsel claim.

the temptation to engage in a point-by-point response to the defense argument. That practice allows the defense to control the agenda and causes the rebuttal to deteriorate into an uncoordinated attack. A better method is to identify the three main issues in the case and to construct an outline for rebuttal based on each of those issues. You should anticipate and wargame the defense arguments on those main points. You will then be fully prepared to listen and to refine the rebuttal during the defense argument. If the defense fails to address one of the issues that you selected for rebuttal, you can then explain to the panel why that omission is so glaring. Having analyzed the key issues in the case, trial counsel can prepare an outline of rebuttal argument before trial.

Structure the Rebuttal for Maximum Effect

A standard format for organizing the rebuttal arguments will help counsel focus on the goals of rebuttal and help them get started. This format can be modified as required to meet the exigencies of each case.

Part I: Introduction

In the opening seconds of the rebuttal argument, the trial counsel must regain the momentum for the prosecution. This can be done by identifying the crucial shortcoming in the defense argument or by turning the defense theme against them. Counsel should develop an arsenal of responses for standard defense themes and use them to fashion a one-line rebuttal introduction. The next step is to reassert the government theme. A strong first closing puts you in the best position for rebuttal. Having already made your case, you can confidently begin the rebuttal argument by recapping the most compelling evidence of guilt. If the defense has stressed the reasonable doubt standard, acknowledge the government's burden of proof and confidently embrace it. This restores the proper focus on what you perceive as the real issue or issues in the case and sets up the outline for rebuttal.

Part II: Key Point Rebuttal

Having set the stage by restoring focus on the crucial issues, you are ready to proceed with the negative aspect of the rebuttal—refuting selected arguments of the defense. The following three-step process should be used to address each key point that you that you selected for rebuttal.

The first step is to restate the defense argument. You cannot cut off a snake's head while it is moving, and you cannot effectively refute an argument without clearly restating it. Any attempt to make a strawman out of the defense argument will undermine your credibility with the panel and will draw an objection from an attentive defense counsel. If you fail to restate the defense argument accurately, the snake will still be moving in the panel's mind.

The next step is to refute the defense argument. This is the heart of negative rebuttal. Having immobilized the snake, you can safely and cleanly cut off its head. Refutation can take a variety of forms, but it all boils down to this: you can refute the fact or you can refute the inferences drawn from the facts. No matter which tactic you use you must always appeal to common sense and explain why your theory offers a better alternative. The quality of this part of the argument will dramatically increase if counsel devote time during case preparation to anticipating defense arguments and thinking through avenues of rebuttal.

Finally, you should recap your theory of the case. After each argument is identified and refuted, explain how that conclusion affects the big picture and why it makes your theory of guilt the only certain conclusion.

Part III: Final Appeal for a Verdict

The final appeal for a verdict is the final word before instructions. Use it to make your final appeal to the panel or judge. This appeal combines the plea for justice, the restatement of your theme, and a summary of the reasons that compel a verdict of guilty. This portion of the argument should be committed to memory.

Feel Their Pain

An effective rebuttal argument must be concise. Trial counsel must be clear, be brief, and be seated. At this stage of the trial, the panel is tired and restless. They want to get on with the task of deliberation. You must ease their pain. You must show them the light at the end of the tunnel while projecting confidence in the importance of your final words. Several techniques will help to enhance the persuasive force of the rebuttal. First, put a fresh face up there. If the trial counsel makes the first closing, the assistant trial counsel should make the rebuttal. There is no rule against tag teaming, and it adds a new element of interest to recapture the attention of the court. Second, unleash your passion. The first closing puts a premium on the careful construction of the affirmative case. At the rebuttal stage, trial counsel can afford to convey a sense of anger and sarcasm toward the defense efforts to divert the course of justice. Of course, this tactic works only if you have established credibility with the panel. If you have been overreacting throughout the trial, another tantrum in rebuttal will only induce yawns.

A third technique for gaining the attention of the panel during the rebuttal is to be clear about the aims of the rebuttal. Tell the members your plan for rebuttal; for example, a trial counsel might say: "It is not necessary to prolong this trial with a lengthy point-by-point rebuttal of every fallacy contained in the defense argument. I'm sure you detected many errors yourself. Instead, I have identified three issues that go to the heart of this

case.” Finally, save something fresh for the final argument. If you have a particularly devastating argument, or a persuasive analogy, story, or other rhetorical device, consider saving it for the rebuttal. Saving something good for the end will exploit the benefit of recency and deny the defense any opportunity to respond to your best stuff.

Conclusion

The rebuttal argument can be an insipid postscript that tries the patience of the court, or it can be the *coup de grace* that secures the verdict. The difference lies in the preparation and organization of the argument. Success is more likely to be achieved through old-fashioned perspiration than momentary inspiration. A well-structured rebuttal frees counsel to focus on the art of expression that transforms a good rebuttal into a truly inspired one. Major Einwechter.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin*, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 7, is reproduced in part below.

Supreme Court Rules Citizen Suits not Allowed for Past EPCRA Violations

On 4 March 1998, the U.S. Supreme Court issued an opinion in the case of *Steel Co. v. Citizens for a Better Environment*.¹ The court held that the citizen suit provision of the Emergency Planning Community Right to Know Act (EPCRA)² cannot be used to bring lawsuits for wholly past violations of the law.³ Although it deals specifically with the citizen suit provision of one statute, this case could have important implications for citizen suits that are brought under other statutes as well.

Citizens for a Better Environment (CBE) filed suit against the Chicago Steel and Pickling Company for past violations of the EPCRA's reporting requirements. The alleged violations concerned failure to file required reports. Prior to filing the lawsuit, the group provided notice of intent to sue to the company, the Environmental Protection Agency (EPA), and the appropriate state authorities, as required by the citizen suit provision of the EPCRA.⁴ After receiving notice from CBE, the company filed the overdue reports.⁵ The citizens group filed

the suit anyway, seeking: (1) a declaratory judgment that the company had violated the EPCRA; (2) authorization to periodically inspect the company's facility and records; (3) an order requiring the company to provide CBE with copies of all compliance reports submitted to the EPA; (4) an order requiring the company to pay civil penalties of \$25,000 per day for each day of violation; (5) CBE's costs in connection with investigation and prosecution of the matter, including attorney fees; and (6) any other relief deemed appropriate by the court.⁶

The Court ruled that CBE did not have standing to bring the suit for wholly past violations of the law. Standing requires injury in fact (concrete and actual, not speculative), causation (a fairly traceable connection between the plaintiffs injury and the complained-of conduct by the defendant), and redressability (the likelihood that the requested relief will redress the alleged injury).⁷

The Court ruled that the lawsuit brought by CBE lacked redressability. The Court examined the six items of requested relief and determined that none of them met the redressability requirement. The Court noted that a declaratory judgment in this case (the first type of relief requested), where there is no controversy over whether the company filed the reports, would be worthless not only to the respondent, but "worthless to all the world."⁸ The Court stated that items two and three of the requested relief are in the nature of an injunction and; therefore, cannot be a remedy for a past wrong but is instead a deterrent from future violations.⁹ The Court held that item four of the requested relief, relating to civil penalties, are paid to the federal treasury rather than the citizens.¹⁰ The Court reasoned that although the citizens may gain some "psychic satisfaction" from seeing wrongdoers punished or making sure the federal treasury is not cheated, this satisfaction does not meet the redressability requirement for standing.¹¹ The Court then noted

1. 118 S. Ct. 1003 (1998).

2. 42 U.S.C.A. §§ 11001-11050 (West 1998). The citizen suit provision is located at 42 U.S.C.A. § 11046.

3. *Steel Co.*, 118 S. Ct. at 1018.

4. *Id.* at 1003. See 42 U.S.C.A. § 11046(d).

5. *Steel Co.*, 118 S. Ct. at 1009. Apparently, the company had not filed a single report since enactment of the EPCRA in 1988.

6. *Id.* at 1008.

7. *Id.* at 1007 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

8. *Id.* at 1018.

9. *Id.* at 1019.

10. *Id.* at 1018.

that “investigation and prosecution” costs are insufficient to create standing where no standing is established on the underlying claim.¹²

This case is significant for federal agencies for at least two reasons.¹³ First, it presents an additional defense to cases brought under the citizen suit provisions of other environmental statutes. In *Gwaltney v. Chesapeake Bay Foundation, Inc.*,¹⁴ the Supreme Court ruled that the citizen suit provisions of the Clean Water Act (CWA) cannot be used to litigate wholly past violations of that statute. To the extent that the citizen suit provisions of other environmental statutes may allow suits for purely historical violations, the constitutional standing requirements laid out in *Steel Company* provide an additional hurdle that plaintiffs must meet in order to bring such suits.

The other significant aspect of the decision is the Court’s language regarding declaratory judgments for past violations. Often, plaintiffs will seek a declaratory judgment, not because it will benefit them in the current case, but because they may be able to use that judgment against the agency in other litigation or for public relations purposes. This case lends support to the argument that, if the wholly past violation is undisputed by all parties, a declaratory judgment indicating such historical facts would be inappropriate. Major Romans and Major Mayfield.

The Administration’s Specifications for RCRA Remediation Waste Legislation

On 15 April 1998, the Clinton Administration finalized legislative specifications for remediation waste for use in negotiations with Congress on cleanup legislation.¹⁵ The administration’s principles were proposed in response to legis-

lation drafted this year by Senator Trent Lott’s staff.¹⁶ Senator Lott’s draft Resource Conservation and Recovery Act (RCRA) reform bill is based on an earlier bill that he introduced in the 104th Congress.¹⁷ Since that time, based on stakeholder input, the legislation has been rewritten to narrow the wastes addressed, to provide additional public participation, and to clarify minimum cleanup conditions.

The legislative specifications provide general principles for remediation waste legislation and address some specific areas of concern.¹⁸ In general, the administration supports tailoring minimum technology, restricting land disposal, and permitting requirements for hazardous remediation waste to encourage cleanup of contaminated sites.¹⁹ The specifications limit reforms to the minimum changes necessary to address these areas, while prohibiting any affect on RCRA requirements for non-remediation waste.²⁰

The administration proposes to grant the EPA the authority to identify certain remediation wastes that do not require treatment for the protection of human health and the environment.²¹ In addition, the administration would like the EPA to have the authority to modify, by regulation, the existing land disposal restrictions to institute alternative treatment for remediation wastes.²² In the interim, the administration supports a presumptive remediation waste treatment standard for principal threats that require treatment to ninety percent reduction in concentrations of hazardous constituents or ten times the universal treatment standard, whichever is higher.²³ This presumptive standard, however, is subject to adjustment based on what the administration calls “appropriate factors.”²⁴ The administration indicates, by use of a placeholder in the document, that the factors will be determined through the legislative process.²⁵

11. *Id.* at 1019.

12. *Id.* at 1018.

13. The specific ruling of the case, that EPCRA citizen suit actions cannot be brought for wholly past violations of the statute, should not affect federal agencies, since federal facilities are not subject to citizen suit enforcement of EPCRA requirements. *See* Exec. Order No. 12,856, 58 Fed. Reg. 41,981 (1993) (containing requirements of federal facilities under the EPCRA).

14. 484 U.S. 49 (1987).

15. Clinton Administration’s Remediation Waste Legislative Specifications (Apr. 15, 1998) (on file with author) [hereinafter Specifications].

16. Discussion Draft of Senate RCRA Bill (Jan. 15, 1998) (on file with author).

17. S. 1274, 104th Cong. (1996).

18. Specifications, *supra* note 15.

19. *Id.* at 2.

20. *Id.* at 3.

21. *Id.* at 4.

22. *Id.*

23. *Id.* at 5.

The administration specifies that the EPA should have the authority to modify existing minimum technological requirements to allow alternatives for hazardous remediation waste. The alternative technological requirements must, however, ensure that waste treatment, storage, and disposal units are designed and operated to minimize any release of waste into the environment, as well as to detect and to characterize any releases.²⁶

The specifications call for a special RCRA Subtitle C permit for hazardous remediation waste treatment, storage, and disposal facilities.²⁷ If the facility is already otherwise permitted, the permit could be modified to cover remediation waste.²⁸ By rulemaking, the EPA could modify facility standards that are implemented through the permitting process to address special characteristics of remediation waste.²⁹ At a minimum, the administration wants the permits to specify principal threats of any hazardous remediation waste and the measures to address the threats; to describe the on-site management of the waste; and to specify record keeping and reporting requirements to enforce permit conditions.³⁰ The administration supports the removal of the RCRA corrective action requirements from permits for facilities that manage only hazardous remediation waste.³¹

The administration calls for the use of existing enforcement provisions under the RCRA for alternative remediation waste requirements. The administration wants legislation to ensure that the EPA is administratively able to order cleanup of releases from hazardous remediation waste units at cleanup-only facilities. Also addressed is the need for the EPA to be able

to impose alternative remediation requirements for a facility that is undergoing cleanup.³²

Although the specifications set out the parameters for remediation waste legislation, there remains much room for debate. The administration does not address the particulars of when and how contaminated waste should be treated or contained and what factors should control cleanup decisions. Also, the specifications do not speak to state-approved cleanup plans or to the possibility of removing certain types of remediation waste to Subtitle D regulation. It is too early to know whether there is enough common ground between the sponsors of the draft bill and the administration for finalization of legislation this year. Major Anderson-Lloyd.

Update on Administrative Penalties under the Clean Air Act

Last summer, the Department of Justice (DOJ) opined³³ that the Clean Air Act (CAA)³⁴ authorized the Environmental Protection Agency (EPA) to issue punitive administrative fines to other federal agencies. In 1994, the EPA proposed a field citation rule³⁵ that allows the EPA agents to impose ticket-like fines on federal agencies for minor violations of the CAA.³⁶ The DOJ opinion came as a result of comments by the Department of Defense (DOD) to the proposed rules inclusion of federal agencies. The opinion went beyond addressing the initial dispute over the EPA's authority to issue field citations and found that the EPA has the authority to issue the full range of administrative fines under the CAA.³⁷

24. *Id.*

25. *Id.*

26. *Id.* at 5, 6.

27. *Id.* at 7.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 8.

32. *Id.* at 9.

33. See Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Judith A. Miller, General Counsel, Department of Defense, subject: Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act, at 10 (July 16, 1997) (on file with author) [hereinafter DOJ Opinion].

34. 42 U.S.C.A. §§ 7401-7671q (West 1998).

35. Field Citation Program, 59 Fed. Reg. 22,776 (1994).

36. See 42 U.S.C.A. § 7413(d)(3) (authorizing the EPA to issue civil penalties not to exceed \$5000 per day of violation for minor violations).

37. DOJ Opinion, *supra* note 33, at 1. This includes issuing larger punitive fines under 42 U.S.C.A. § 7413(d)(1) which authorizes administrative fines of up to \$25,000 per day of violation. See 42 U.S.C.A. § 7413(d)(1).

Before the EPA can begin issuing field citations, it must promulgate a final field citation rule.³⁸ During work to finalize the field citation program, the EPA has allowed the DOD to comment on the recently-added federal agency procedural due process aspects of the program.³⁹ The draft revision of the rule sets out factors for determining whether a violation of the CAA is minor.⁴⁰ It also establishes maximum daily fine amounts⁴¹ and total fine amounts⁴² for a given field citation. If the revision is promulgated as drafted, it will afford federal agencies a hearing before an EPA regional office attorney, the right to appeal the hearing officers decision to the Environmental Appeals Board (EAB), and the opportunity for a conference with the EPA administrator.⁴³ It is unlikely that this rule will be effective before September 1998.⁴⁴

The DOJ opinion also created a need for the EPA to revise its rules of practice⁴⁵ to address due process procedures for federal agencies that receive larger fines under the CAA; current rules do not allow for this. The EPA recently proposed revisions⁴⁶ to its Rules of Practice that provide generic procedures for administrative fines that are imposed under various media statutes. The proposal contains supplemental rules that apply specifically to the CAA. Under those rules, federal agencies against which the EPA assesses fines, that are not field citations, may receive hearings before an administrative law judge, appeal to the EAB, and confer with the Administrator before the action is final.⁴⁷ After reviewing the proposed rule, legal representatives from the DOD CAA Services Steering Committee determined that no comments were necessary.

The fallout from the DOJ opinion indicates that within the next year installations will be subject to punitive fines imposed by the EPA under the CAA. There has been no change in the Army's policy concerning payment of punitive fines that are imposed by state regulators under the CAA. It continues to be

the Army policy that the doctrine of sovereign immunity precludes payment of state-imposed punitive fines under the CAA. Lieutenant Colonel Jaynes.

EPA's Final Supplemental Environmental Projects (SEP) Policy Hits the Web

The Environmental Protection Agency (EPA) has issued the final Supplemental Environmental Projects (SEP) policy after almost three years of experience implementing and fine-tuning the interim revised SEP policy that was issued in 1995. Although the EPA characterizes the final policy as containing no radical changes or alterations to the basic structure and operation of the SEP policy, there are several other changes. Included in these are: increased community input in SEP development, a prohibition on the use of SEPs to mitigate stipulated penalties except in extraordinary circumstances; expanded penalty calculation methodology, and revised legal guidelines.

The most significant change appears to be a shift in the EPA policy toward federal facilities and the economic benefits of noncompliance. Under the interim policy, government agencies could pay cash settlement amounts that were less than the required ten percent of the economic benefit of noncompliance. Under the final policy, this provision has been removed and replaced with a provision that allows government agencies (as well as small businesses and nonprofit organizations) to claim an SEP mitigation percentage as high as 100% of the SEP cost, if the agency can demonstrate that the SEP is of outstanding quality. Thus, under the final policy, government agencies may not be able to argue for a different application of economic benefit principles.

38. See 42 U.S.C. § 7413(d)(3) (permitting the EPA to implement field citation program through regulations).

39. Field Citation Program, 40 C.F.R. pt. 59 (proposed Nov. 17, 1997) (unpublished draft, on file with author).

40. *Id.* § 59.3. These factors include: whether the violation is readily recognizable; the risk of environmental harm; time, effort, and expense required to correct the violation; and the frequency and duration of the violation. *Id.*

41. *Id.* The maximum is \$5500 per day, regardless of the number of violations that may have occurred each day. The maximum amount is larger than the \$5000 cited in the CAA as the result of the Federal Civil Penalties Inflation Adjustment Act of 1990. See 28 U.S.C.A. § 2461 explanatory note (West 1998), as amended by Debt Collection Improvement Act of 1996, 31 U.S.C.A. § 3701 explanatory note (West 1998); (*implemented in* Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. pt. 19 (1997)).

42. *Id.* The total that may be assessed for a single field citation is five times the maximum per-day civil penalty (which is currently \$27,500).

43. *Id.* §§ 59.5-59.6.

44. Telephone Interview with Mr. Cary Secrest, Office of Air and Radiation, Environmental Protection Agency (Apr. 30, 1998). According to Mr. Secrest, the field citation rule is still pending approval by the administrator. Once approved, it will be reviewed at Office of Management and Budget for 90 days before being published in the Federal Register. The rule will be effective 60 days after promulgation. *Id.*

45. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. pt. 22 (1997).

46. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 63 Fed. Reg. 9464 (1998) (to be codified at 40 C.F.R. pt. 22).

47. *Id.* at 9476 and 9491.

The SEP policy became effective 1 May 1998 and is available on the Internet at <http://es.epa.gov/oeca/sep/sepfinal.html>. Major Silas DeRoma.

Litigation Division Note

When a Claim Becomes a Claim: It Might Be Different Than You Think

There continues to be confusion in the field regarding the date that the two year statute of limitations begins to run on claims under the Federal Tort Claims Act (FTCA).⁴⁸ This confusion not only complicates the claims investigation unnecessarily but also can prejudice the United States when it asserts the defense in litigation. This note reviews the rules and should help practitioners to speed the claims process in appropriate cases.

Under the FTCA “a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues”⁴⁹ Because there is a two-year limit on presentment of the claim, it is important to determine when the two-year clock begins (when the claim accrued). The filing of an administrative claim is jurisdictional and cannot be waived.⁵⁰

The accrual question is controlled by federal law⁵¹ and is simple enough in most cases. For example, the claim accrues when a government vehicle hits the claimant’s car or when the claimant slips on an oil spill in the post exchange. In some cases, however, it is not so simple. For example, did the claim accrue on the day of the claimant’s injury or when claimant dis-

covered the injury? Did it accrue when the claimant discovered the cause of the injury or at some other point?

In *United States v. Kubrick*⁵² the U.S. Supreme Court held that a claim accrues when the claimant knows that he has been injured and the likely cause of the injury.⁵³ He need not know that the injury was caused by negligence.⁵⁴ In *Kubrick*, the plaintiff was negligently treated by a Veteran’s Administration hospital (VAH). Soon after this treatment, the plaintiff noticed a loss of hearing. A second doctor told him that the treatment at the VAH may well be the cause of his hearing loss. More than two years later, Kubrick was told that the treatment he received at the VAH was negligent. The plaintiff then filed his administrative claim under the FTCA.

The Supreme Court held that the claim accrued after the second doctor’s advice because Kubrick had actual knowledge of his injury and its likely cause.⁵⁵ The lower court had held that a claim does not accrue until a claimant learns that his injury is legally actionable. The Supreme Court rejected this view and held that a plaintiff who knows “he has been hurt and who has inflicted the injury” may protect himself by seeking medical or legal advice to determine whether the cause of the injury is actionable.⁵⁶ Therefore, a claimant is under a duty of diligent inquiry.⁵⁷ He may not wait until he is told that he has a legal claim.⁵⁸ In fact, he need not even be aware that his injury was negligently inflicted.⁵⁹ Instead, he must take affirmative action to investigate whether his injury was caused by negligence and is therefore a proper claim.⁶⁰

A claimant must file an administrative claim within two years of discovering both his injury and the source of his injury, even if he does not know that the person who injured him was a federal employee acting within the scope of his employment. The U.S. Court of Appeals for the Ninth Circuit has held that once a claimant knows of his injury and its cause, the claimant’s

48. 28 U.S.C.A. §§ 2401(b)-2671 (West 1998).

49. *Id.* § 2401(b).

50. *See Cook v. United States*, 978 F.2d 164, 165 (5th Cir. 1992).

51. *See Johnston v. United States*, 85 F.3d 217 (5th Cir. 1996).

52. 444 U.S. 111 (1979).

53. *Id.*

54. *Id.*

55. *Id.* at 122.

56. *Id.*

57. *See Kerstetter v. United States*, 57 F.3d 362 (4th Cir. 1995).

58. *Kubrick*, 444 U.S. at 124.

59. *Id.* at 123.

60. *Id.*

ignorance of the involvement of United States employees is irrelevant.⁶¹ “In the absence of fraudulent concealment it is the plaintiff’s burden, within the statutory period, to determine whether and whom to sue.”⁶²

To evaluate the accrual date of a claim, a practitioner must first determine what may have caused the injury. Next, he must determine when the claimant became aware of the injury. This is when the claim accrues and when the statute of limitations

begins. A claim that is not presented within two years of its accrual is barred. If the claim is not filed within two years of that date, it is barred by the statute of limitations.⁶³ Although each circuit may have a slightly different twist on the “accrual date,” this methodology provides a good base line analysis upon which to begin an inquiry as to when a claim accrues. Major Diedrichs.

61. See *United States v. Gibson*, 781 F.2d 1334, 1344 (9th Cir. 1986) (citing *Dyniewicz v. United States*, 742 F.2d 484 (9th Cir. 1984)).

62. *Gibson*, 781 F.2d at 1334 (quoting *Davis v. United States* 642 F.2d 328 (9th Cir. 1981)).

63. *Kubrick*, 444 U.S. at 111.

Claims Report

United States Army Claims Service

Personnel Claims Notes

Initials No Longer Permitted on Chronology Sheets

One of the changes contained in the new version of *Department of the Army Pamphlet 27-162*¹ is the requirement to list the name, rather than the initials, of the individuals making entries on the chronology sheet.² This was not required under the previous version of the claims pamphlet.³ Traditionally, claims personnel have used initials to identify who made entries on the chronology sheet. Under the new pamphlet, the use of initials is no longer permitted.⁴

The purpose of the new requirement is to make it easier to identify the individuals who completed the chronology sheet. The entries on the chronology sheet are often critical in determining whether the claim was properly adjudicated. When the claim is transferred to another office or to the U.S. Army Claims Service for review, it may be necessary to contact the individual who made the entries to obtain clarification. It is difficult to determine who made the chronology sheet entries if only initials are provided. At a minimum, the last name of the person making the entry should be included on the chronology sheet. Lieutenant Colonel Masterton.

Carrier Industry Requests

Recently, at a military-industry personal property and claims symposium, the carrier industry representatives made two requests that, if followed, would allow for more efficient pro-

cessing of claims. The first request focused on telephone and fax numbers on the Department of Defense Form 1840R, Notice of Loss or Damage. The form provides a space, box 4d, for the telephone number of the claims office. The carrier industry representatives request that the telephone number be provided on all the DD Forms 1840R dispatched. Further, although a specially designated space for a fax number is not provided on the form, the carrier industry representatives request that the claims office provide a fax number. Claims personnel should write the fax number near box 4d and indicate that it is a fax number.

The carrier industry representatives' second request concerns members' statements that electronic items (for example, computers, televisions, and VCRs) worked at the point of origin. The carrier industry's agents often refuse to accept these statements because they are often preprinted and are inadequate to complete the claims process. The industry representatives indicated that the agents would accept a statement if it fully explains why the claimant knew that the item worked at the point of origin. For example, a hand-written statement which explains "my television was working prior to pick up; my children were watching it when the movers arrived" is adequate. On the other hand, a preprinted form that states that "the item(s) listed below worked prior to pick-up" is *not* adequate. The carrier industry representatives believe that if the statements are full and explicit and explain all of the issues involved, the carrier industry will have fewer problems with its agents and claims. Ms. Schultz.

1. U.S. DEP'T OF ARMY, PAM. 27-167, LEGAL SERVICES, CLAIMS PROCEDURES (1 Apr. 1998) [hereinafter DA PAM 27-167].

2. *Id.* para. 11-10f.

3. See U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES, CLAIMS, para. 2-55f (15 Dec. 1989).

4. DA PAM 27-162, *supra* note 1, para. 11-10f.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

Office of The Judge Advocate General, U.S. Army

Reserve Component Quotas for Resident Graduate Course

Two student quotas in the 48th 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 16 August 1999 to 26 May 2000. Successful graduates will be awarded the degree of Master of Laws (LL.M.) in Military Law. Any Reserve Component JAGC captain or major who will have at least four years JAGC experience by 16 August 1999 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, home, and e-mail).

Military experience: Chronological list of reserve and active duty assignments; include **all** OERs and AERs.

Awards and decorations: List of all awards and decorations.

Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded. Law school transcript.

Civilian experience: Resume of legal experience.

Statement of purpose: A concise statement (one or two paragraphs) of why you want to attend the resident graduate course.

Letter of Recommendation: Include a letter of recommendation from one of the judge advocate leaders listed below:

United States Army Reserve (USAR) TPU: Legal Support Organization (LSO) Commander

Command or Staff Judge Advocate

Army National Guard (ARNG): Staff Judge Advocate.

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 GRA no later than 15 December 1998.

ARNG: Forward the packet through the state chain of command to Office of The Chief Counsel, National Guard Bureau, 2500 Army, Pentagon, Washington, DC 20310-2500.

USAR CONUS TROOP PROGRAM UNIT (TPU): Through chain of command, to Commander, AR-PERSCOM, ATTN: ARPC-OPB, 9700 Page Avenue, St. Louis, MO 63132-5200. (800) 325-4916

OTJAG, Guard and Reserve Affairs: Dr. Mark Foley, Ed.D., (804)972-6382/Fax (804)972-6386 E-Mail foleym@hqda.army.mil. Dr. Foley.

The Army Judge Advocate General's Corps Application Procedure for Guard and Reserve

Mailing address:

Office of The Judge Advocate General
Guard and Reserve Affairs
ATTN: JAGS-GRA-PA
600 Massie Road
Charlottesville, VA 22903-1781

e-mail address: Gra-pa@hqda.army.mil
(800) 552-3978 ext. 388
(804) 972-6388

Applications will be forwarded to the JAGC appointment board by the unit to which you are applying for a position. National Guard applications will be forwarded through the National Guard Bureau by the state. Individuals who are currently members of the military in other branches (Navy, Air Force, Marines) must request a conditional release from their service prior to applying for an Army JAGC position. *Army Regulation (AR) 135-100* and *National Guard Regulation (NGR) 600-100* are the controlling regulations for appointment in the reserve component Army JAGC. Applications are reviewed by a board of Army active duty and reserve component judge advocates. The board is a standing board, in place for one year. Complete applications are processed and sent to the board as they are received. The approval or disapproval process is usually sixty days. Communications with board members is not permitted. Applicants will be notified when their application arrives and when a decision is reached. Approved applications are sent to the Army's Personnel Com-

mand for completion and actual appointment as an Army officer.

Required Materials

Applications that are missing items will be delayed until they are complete. Law school students may apply in their final semester of school, however, if approved, they cannot be appointed until they have passed a state bar exam.

(1) DA Form 61 (USAR) or NG Form 62 (ARNG), application for appointment in the USAR or ARNG.

(2) Transcripts of all undergraduate and law school studies, prepared by the school where the work was completed. A student copy of the transcript is acceptable if it is complete. You should be prepared to provide an official transcript if approved for appointment.

(3) Questionnaire for National Security (SF86). All officers must obtain a security clearance. If final clearance is denied after appointment, the officer will be discharged. In lieu of SF 86, current military personnel may submit a letter from their organization security manager stating that you have a current security clearance, including level of clearance and agency granting the clearance.

(4) Chronological listing of civilian employment.

(5) Detailed description of legal experience.

(6) Statement from the clerk of highest court of a state showing admission and current standing before the bar and any disciplinary action. This certificate must be less than a year old. If disciplinary action has been taken against you, explain circumstances in a separate letter and submit it with the application.

(7) Three letters from lawyers, judges, or military officers (in the grade of captain or above) attesting to applicant's reputation and professional standing.

(8) Two recent photographs (full length military photos or head and shoulder type, 3" x 5") on separate sheet of paper.

(9) Interview report (DA Form 5000-R). You must arrange a local interview with a judge advocate (in the grade of major or above, or any official Army JAGC Field Screening Officer). Check the list of JAG units in your area. This report should not be returned to you when completed. The report may be mailed or e-mailed to this office, or included by the unit when they forward your application. You should include a statement with your application that you were interviewed on a specific date, and by whom.

(10) Assignment request. For unit assignment, include a statement from the unit holding the position for you (the specific position must be stated as shown in the sample provided).

(11) Acknowledgment of service requirement. DA Form 3574 or DA Form 3575.

(12) Copy of your birth certificate.

(13) Statement acknowledging accommodation of religious practices.

(14) Military service record for current or former military personnel. A copy of your OMPF (Official Military Personnel File) on microfiche. Former military personnel can obtain copies of their records from the National Personnel Records Center www.nara.gov/regional/mpr.html. E-mail inquiries can be made to center@stlouis.nara.gov.

(15) Physical examination. This exam must be taken at an official Armed Forces examination station. The physical examination may be taken prior to submitting the application or after approval. However, the examination must be completed and approved before appointment to the Army. Individuals currently in the military must submit a military physical examination taken within the last two years.

(16) Request for age waiver. If you cannot complete 20 years of service prior to age 60 and/or are 33 or older, with no prior commissioned military service, you must request an age waiver. The letter should contain positive statements concerning your potential value to the JAGC, for example, your legal experience and/or other military service.

(17) Conditional release from other branches of the Armed Services.

(18) DA Form 145, Army Correspondence Course Enrollment Application.

(19) Civilian or military resume (optional).

Dr. Foley.

USAR Vacancies

A listing of JAGC USAR position vacancies for judge advocates, legal administrators, and legal specialists can be found on the Internet at <http://www.army.mil/usar/vacancies.htm>. Units are encouraged to advertise their vacancies locally, through the LAAWS BBS, and on the Internet. Dr. Foley.

U.S. ARMY RESERVE COMPONENTS JUDGE ADVOCATE GENERAL'S CORPS

FACT SHEET

Judge advocates have provided professional legal service to the Army for over 200 years. Since that time the Corps has grown dramatically to meet the Army's increased need for legal expertise. Today, approximately 1500 attorneys serve on active duty while more than 2800 Judge Advocates find rewarding part-time careers as members of the U.S. Army Reserve and Army National Guard. Service as a Reserve Component Judge Advocate is available to all qualified attorneys. Those who are selected have the opportunity to practice in areas as diverse as the field of law itself. For example, JAGC officers prosecute, defend, and judge courts-martial; negotiate and review government contracts; act as counsel at administrative hearings; and provide legal advice in such specialized areas as international, regulatory, labor, patent, and tax law, while effectively maintaining their civilian careers.

APPOINTMENT ELIGIBILITY AND GRADE: In general, applicants must meet the following qualifications:

(1) Be at least 21 years old and able to complete 20 years of creditable service prior to reaching age 60. In addition, for appointment as a first lieutenant, be less than 33, and for appointment to captain, be less than 39 (waivers for those exceeding age limitations are available in exceptional cases).

(2) Be a graduate of an ABA-approved law school.

(3) Be a member in good standing of the bar of the highest court of a state or federal court.

(4) Be of good moral character and possess leadership qualities.

(5) Be physically fit.

Grade of rank at the time of appointment is determined by the number of years of constructive service credit to which an individual is entitled. As a general rule, an approved applicant receives three years credit from graduation from law school plus any prior active or reserve commissioned service. Any time period is counted only once (i.e., three years of commissioned service while attending law school entitles a person to only three years constructive service credit, not six years). Once the total credit is calculated, the entry grade is awarded as follows:

(1) 2 or more but less than 7 years	First Lieutenant
(2) 7 or more but less than 14 years	Captain
(1) 14 or more but less than 21 years	Major

An applicant who has had no previous military commissioned service, therefore, can expect to be commissioned as a first lieutenant with one years service credit towards promotion.

PAY AND BENEFITS: Basic pay varies depending on grade, length of service, and degree of participation. Reserve officers are eligible for numerous federal benefits including full-time Servicemen's Group Life Insurance; limited access to post exchanges, commissaries, theaters and available transient billets; space-available travel on military aircraft within the continental United States, if on reserve duty; authorized survivor benefits; and generous retirement benefits. When performing active duty or active duty for training, reservists may use military recreation, entertainment and other post facilities, and receive limited medical and dental care.

PARTICIPATION REQUIREMENTS: The JAGC Reserve Program is multifaceted, with the degree of participation determined largely by the individual. Officers are originally assigned to a Troop Program Unit (TPU). Follow on assignments may include service as an Individual Mobilization Augmentee (IMA). TPU officers attend monthly drills and perform two weeks of annual training a year. Upon mobilization, they deploy with their unit and provide legal services commensurate with their duty positions.

Individual mobilization augmentee officers are assigned to active duty agencies or installations where they perform two weeks of on-the-job training each year. During the remainder of the year, they do legal assistance, take correspondence courses, or do project work at their own convenience in order to earn points towards retirement. Upon mobilization, these officers go to their assigned positions and augment the legal services provided by that office. Officers may also transfer from one unit to another or between units

and IMA positions depending upon the availability of vacancies. This flexibility permits the Reserve Judge Advocate to tailor his or her participation to meet personal and professional needs. Newly appointed officers will usually serve in TPU assignments.

SCHOOLING: New officers are required to complete the Judge Advocate Officer's Basic Course within twenty-four months of commissioning as a condition of appointment. Once enrolled in the Basic Course, new officers must complete Phase I in twelve months. This course consists of two phases: Phase I is a two-week resident course in general military subjects at Fort Lee, Virginia. Phase II, military law, may be completed in residence at Charlottesville, Virginia or by correspondence. In addition to the basic course, various other legal and military courses are available to the reservist and may be taken either by correspondence or in residence at The Judge Advocate General's School in Charlottesville, Virginia.

SERVICE OBLIGATION: In general, new appointees incur a statutory service obligation of eight years. Individuals who have previous military service do not incur an additional obligation as a result of a new appointment.

RETIREMENT BENEFITS: Eligibility for retirement pay and other benefits is granted to members who have completed 20 years of qualifying federal military service. With a few exceptions, the extent of these benefits is the same for both the reservist and the service member who retires from active duty. The major difference in the two retirement programs is that the reservist does not begin receiving most of the retirement benefits, including pay, until reaching age 60. The amount of monthly retirement income depends upon the grade and total number of qualifying points earned during the course of the individual's career. Along with the pension, the retired reservist is entitled to shop in military exchanges and commissaries, use most post facilities, travel space-available on military aircraft worldwide, and utilize some medical facilities.

U.S. ARMY RESERVE COMPONENT INFORMATION: Further information, application forms, and instructions may be obtained by calling **1-800-552-3978, ext. 388**, e-mail gra-pa@hqda.army.mil or writing:

Office of The Judge Advocate General
Guard and Reserve Affairs
ATTN: JAGS-GRA
600 Massie Road
Charlottesville, VA 22903-1781.

Intenet Links

National Guard: www.ngb.dtic.mil
US Army Reserve: www.army.mil/usar/ar-perscom/atoc.htm
Reserve Pay: www.dfas.mil/money/milpay/98pay/index.htm

Dr. Foley.

GRA On-Line!

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

COL Tom Tromej,.....trometn@hqda.army.mil
Director

COL Keith Hamack,.....hamackh@hqda.army.mil
USAR Advisor

Dr. Mark Foley,.....foleyms@hqda.army.mil
Personnel Actions

MAJ Juan Rivera,.....riverjj@hqda.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkeda@hqda.army.mil
Automation Assistant

Ms. Sandra Foster,fostesl@hqda.army.mil
IMA Assistant

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

The following is the current schedule of The Judge Advocate General’s Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard

judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1998-1999 Academic Year On-Site CLE Training

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

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

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

**THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT
(ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE
1998-1999 ACADEMIC YEAR**

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*</u>	<u>ACTION OFFICER</u>	
12-13 Sep 98	Pittsburgh, PA 99th RSC Pittsburgh Airport Marriott 100 Aten Road Coraopolis, PA 15108 (412) 788-8800	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MAJ J. P. Moran MAJ David Wallace MAJ Juan J. Rivera	MAJ Isolina Esposito OSJA, 99th RSC 5 Lobaugh Street Oakdale, PA 15071-5001 (724) (693-2109/2151 (fax) (724) 693-2149
7-8 Nov	Minneapolis, MN 214th LSO Thunderbird Hotel & Convention Center 2201 East 78th Street Bloomington, MN 55452 (612) 854-3411	AC GO RC GO Int'l - Ops Law Criminal Law GRA Rep	MAJ Geoffrey Corn MAJ Greg Coe MAJ Juan J. Rivera	MAJ John Kingrey 214th LSO 505 88th Division Rd Fort Snelling, MN 55111 (612) 713-3234
21-22 Nov	New York, NY 4th LSO/77th RSC Fort Hamilton Adams Guest House Brooklyn, NY 10023 (718) 630-4052/4892	AC GO RC GO Int'l Ops Law Criminal Law GRA Rep	MAJ Michael Newton MAJ Jack Einwechter COL Keith Hamack	LTC Donald Lynde HQ, 77th RSC ATTN: AFRC-CMY-JA) Bldg. 200 Fort Totten, NY 11359-1016 (718) 352-5703/5720 (Lynde@usarc-emh2.army.mil)
9-10 Jan 99	Long Beach, CA 78th MSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MAJ Stephanie Stephens MAJ M. B. Harney COL Thomas N. Trome	MAJ Christopher Kneib 5129 Vail Creek Court San Diego, CA 92130 (work) (619) 553-6045 (unit) (714) 229-7300
30-31 Jan	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MAJ Harrold McCracken LTC Tony Helm COL Keith Hamack	LTC Frederick S. Feller 7023, 95th Avenue, SW Tacoma, WA 98498 (work) (360) 753-6824 (home) (253-582-6486 (fax) (360) 664-9444

23-25 Apr	Little Rock, AK 90th RSC/1st LSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MAJ Rick Rousseau MAJ Tom Hong Dr. Mark Foley	MAJ Tim Corrigan 90th RSC 8000 Camp Robinson Road North Little Rock, AK 72118-2208 (501) 771-7901/8935 e-mail: corrigan@usarc-emh2.army.mil
24-25 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Training Center 360 Elliott Street Newport, RI 02841	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	MAJ Mike Berrigan MAJ Geoffrey Corn COL Thomas N. Tromeu	MAJ Lisa Windsor/Jerry Hunter OSJA, 94th RSC 50 Sherman Avenue Devens, MA 01433 (978) 796-2140-2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
1-2 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Boulevard Gulf Shores, AL 36547 (334) 948-4853 (800) 544-4853	AC GO RC GO Int'l - Ops Law Contract Law GRA Rep	LCDR Brian Bill MAJ Beth Berrigan COL Keith Hamack	1LT Chris Brown OSJA, 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9303/9304 e-mail: brownncr@usarc-emh2.army.mil
13-15 May	Kansas City, MO 89th RSC Westin Crown Center 1 Pershing Road Kansas City, MO 64108 (816) 474-4400	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MAJ Janet Fenton MAJ Michael Hargis Dr. Mark Foley	LTC James Rupper 89th RSC ATTN: AFRC-CKS-SJA 2600 North Woodlawn Wichita, KS 67220 (316) 681-1759, ext. 228 or CPT Frank Casio (800) 892-7266, ext. 397

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

Please notify MAJ Rivera if any changes are required, telephone (804) 972-6383.

CLE News

1. Resident Course Quotas

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

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

When requesting a reservation, you should know the following:

TJAGSA School Code—181

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

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

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

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

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

2. TJAGSA CLE Course Schedule

1998

August 1998

3-14 August	141st Contract Attorneys Course (5F-F10).
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Note: The 10th Criminal Law Advocacy Course (5F-F34) has been rescheduled to 14-25 September 1998.

3-14 August	10th Criminal Law Advocacy Course (5F-F34).
10-14 August	16th Federal Litigation Course (5F-F29).
17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).
17 August 1998-27 May 1999	47th Graduate Course (5-27-C22).
24-28 August	4th Military Justice Managers Course (5F-F31).
24 August-4 September	30th Operational Law Seminar (5F-F47).

September 1998

9-11 September	3d Procurement Fraud Course (5F-F101).
9-11 September	1998 USAREUR Legal Assistance CLE (5F-F23E).
14-25 September	10th Criminal Law Advocacy Course (5F-F34).
14-18 September	1998 USAREUR Administrative Law CLE (5F-F24E).

October 1998

1-14 October	147th Basic Course (Phase I-Fort Lee) (5-27-C20).
5-9 October	1998 JAG Annual CLE Workshop (5F-JAG).
14 October-18 December	147th Basic Course (Phase II-Fort Lee) (5-27-C20).
19-23 October	43rd Legal Assistance Course (5F-F23).
26-30 October	52nd Fiscal Law Course (5F-F12).

November 1998		2 April	TJAGSA) (5-27-C20).
2-6 November	150th Senior Officers Legal Orientation Course (5F-F1).	25-29 January	152nd Senior Officers Legal Orientation Course (5F-F1).
16-20 November	22nd Criminal Law New Developments Course (5F-F35).	February 1999	
16-20 November	52nd Federal Labor Relations Course (5F-F22).	8-12 February	70th Law of War Workshop (5F-F42).
30 November-4 December	1998 USAREUR Operational Law CLE (5F-F47E).	8-12 February	1999 Maxwell AFB Fiscal Law Course (5F-F13A).
30 November - 4 December	151st Senior Officers Legal Orientation Course (5F-F1).	8-12 February	23rd Administrative Law for Military Installations Course (5F-F24).
December 1998		March 1999	
7-11 December	1998 Government Contract Law Symposium (5F-F11).	1-12 March	31st Operational Law Seminar (5F-F47).
7-11 December	1998 USAREUR Criminal Law Advocacy CLE (5F-F35E).	1-12 March	142nd Contract Attorneys Course (5F-F10).
14-16 December	2nd Tax Law for Attorneys Course (5F-F28).	15-19 March	44th Legal Assistance Course (5F-F23).
	1999	22-26 March	2d Advanced Contract Law Course (5F-F103).
January 1999		22 March-2 April	11th Criminal Law Advocacy Course (5F-F34).
4-15 January	1999 JAOAC (Phase II) (5F-F55).	29 March-2 April	153rd Senior Officers Legal Orientation Course (5F-F1).
5-8 January	1999 USAREUR Tax CLE (5F-F28E).	April 1999	
11-15 January	1999 PACOM Tax CLE (5F-F28P).	12-16 April	1st Basics for Ethics Counselors Workshop (5F-F202).
11-15 January	1999 USAREUR Contract and Fiscal Law CLE (5F-F15E).	14-16 April	1st Advanced Ethics Counselors Workshop (5F-F203).
11-22 January	148th Basic Course (Phase I-Fort Lee) (5-27-C20).	19-22 April	1999 Reserve Component Judge Advocate Workshop (5F-F56).
20-22 January	5th RC General Officers Legal Orientation Course (5F-F3).	26-30 April	10th Law for Legal NCOs Course (512-71D/20/30).
22 January-	148th Basic Course (Phase II-	26-30 April	53rd Fiscal Law Course (5F-F12).

May 1999

3-7 May 54th Fiscal Law Course (5F-F12).
 3-21 May 42nd Military Judge Course (5F-F33).

June 1999

7-18 June 4th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
 7 June- 16 July 6th JA Warrant Officer Basic Course (7A-550A0).
 7-11 June 2nd National Security Crime and Intelligence Law Workshop (5F-F401).
 7-11 June 154th Senior Officers Legal Orientation Course (5F-F1).
 14-18 June 3rd Chief Legal NCO Course (512-71D-CLNCO).
 14-18 June 29th Staff Judge Advocate Course (5F-F52).
 21 June-2 July 4th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
 21-25 June 10th Senior Legal NCO Management Course (512-71D/40/50).
 28-30 June Professional Recruiting Training Seminar

July 1999

5-16 July 149th Basic Course (Phase I-Fort Lee) (5-27-C20).
 6-9 July 30th Methods of Instruction Course (5F-F70).
 12-16 July 10th Legal Administrators Course (7A-550A1).
 16 July- 24 September 149th Basic Course (Phase II-TJAGSA) (5-27-C20).
 21-23 July Career Services Directors Conference

August 1999

2-6 August 71st Law of War Workshop (5F-F42).
 2-13 August 143rd Contract Attorneys Course (5F-F10).
 9-13 August 17th Federal Litigation Course (5F-F29).
 16-20 August 155th Senior Officers Legal Orientation Course (5F-F1).
 16 August 1999- 26 May 2000 48th Graduate Course (5-27-C22).
 23-27 August 5th Military Justice Mangers Course (5F-F31).
 23 August- 3 September 32nd Operational Law Seminar (5F-F47).

September 1999

8-10 September 1999 USAREUR Legal Assistance CLE (5F-F23E).
 13-17 September 1999 USAREUR Administrative Law CLE (5F-F24E).
 13-24 September 12th Criminal Law Advocacy Course (5F-F34).

October 1999

4-8 October 1999 JAG Annual CLE Workshop (5F-JAG).
 4-15 October 150th Basic Course (Phase I-Fort Lee) (5-27-C20).
 15 October 22 December 150th Basic Course (Phase II-TJAGSA) (5-27-C20).
 12-15 October 72nd Law of War Workshop (5F-F42).
 18-22 October 45th Legal Assistance Course (5F-F23).
 25-29 October 55th Fiscal Law Course (5F-F12).

November 1999		7 April	TJAGSA) (5-27-C20).
1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).	31 January-4 February	158th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).	February 2000	
15-19 November	53rd Federal Labor Relations Course (5F-F22).	7-11 February	73rd Law of War Workshop (5F-F42).
29 November 3 December	157th Senior Officers Legal Orientation Course (5F-F1).	7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
29 November 3 December	1999 USAREUR Operational Law CLE (5F-F47E).	14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
December 1999		28 February-10 March	33rd Operational Law Seminar (5F-F47).
6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).	28 February-10 March	144th Contract Attorneys Course (5F-F10).
6-10 December	1999 Government Contract Law Symposium (5F-F11).	March 2000	
13-15 December	3rd Tax Law for Attorneys Course (5F-F28).	13-17 March	46th Legal Assistance Course (5F-F23).
2000		20-24 March	3rd Contract Litigation Course (5F-F102).
January 2000		20-31 March	13th Criminal Law Advocacy Course (5F-F34).
4-7 January	2000 USAREUR Tax CLE (5F-F28E).	27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).
10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).	April 2000	
10-21 January	2000 JAOAC (Phase II) (5F-F55).	10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
17-28 January	151st Basic Course (Phase I-Fort Lee) (5-27-C20).	10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
18-21 January	2000 PACOM Tax CLE (5F-F28P).	12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).	17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).
28 January-	151st Basic Course (Phase II-	May 2000	
		1-5 May	56th Fiscal Law Course (5F-F12).

1-19 May 43rd Military Judge Course
(5F-F33).

8-12 May 57th Fiscal Law Course (5F-F12).

For further information on civilian courses in your area, please contact one of the institutions listed below:

June 2000

5-9 June 3rd National Security Crime and Intelligence Law Workshop (5F-F401).

5-9 June 160th Senior Officers Legal Orientation Course (5F-F1).

5-14 June 7th JA Warrant Officer Basic Course (7A-550A0).

5-16 June 5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).

12-16 June 4th Senior Legal NCO Course (512-71D-CLNCO).

12-16 June 30th Staff Judge Advocate Course (5F-F52).

19-23 June 11th Senior Legal NCO Management Course (512-71D/40/50).

19-30 June 5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).

26-28 June Professional Recruiting Training Seminar

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

3. Civilian-Sponsored CLE Courses

1998

4-6 September ICLE 9th Annual Urgent Legal Matters
The Cloister
Sea Island, Georgia

10 September ICLE Cyber Crime
Atlanta, Georgia

11 September ICLE Nuts and Bolts of Family Law
Atlanta, Georgia

11 September U.S. Supreme Court Update
Marriott Gwinett Place Hotel
Atlanta, Georgia

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252	NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300	NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664	NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250	NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272	PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080	PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227	TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837	TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
MICLE:	Institute of Continuing Legal Education 1020 Greene Street Ann Arbor, MI 48109-1444 (313) 764-0533 (800) 922-6516	UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100	UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968

VCLE: University of Virginia School of Law
 Trial Advocacy Institute
 P.O. Box 4468
 Charlottesville, VA 22905.

New Mexico prior to 1 April annually
 North Carolina** 28 February annually
 North Dakota 30 June annually

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September 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	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 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** Group 1: 30 April
 Group 2: 31 August
 Group 3: 31 December
(Note: this is a recent change)
 Rhode Island 30 June annually
 South Carolina** 15 January annually
 Tennessee* 1 March annually
 Texas Minimum credits must be completed by last day of birth month each year
 Utah End of two-year compliance period
 Vermont 15 July annually
 Virginia 30 June annually
 Washington 31 January triennially
 West Virginia 30 June biennially
 Wisconsin* 1 February biennially
 Wyoming 30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1998 issue of *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center

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

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile.

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

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

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

Contract Law

- | | |
|------------|--|
| AD A301096 | Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs). |
| AD A301095 | Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs). |
| AD A265777 | Fiscal Law Course Deskbook, JA-506-93 (471 pgs). |

Legal Assistance

- | | |
|-------------|--|
| *AD A345826 | Soldiers' and Sailors' Civil Relief Act Guide, JA-260-98 (226 pgs). |
| AD A333321 | Real Property Guide—Legal Assistance, JA-261-93 (180 pgs). |
| AD A326002 | Wills Guide, JA-262-97 (150 pgs). |
| *AD A346757 | Family Law Guide, JA 263-98 (140 pgs). |
| AD A283734 | Consumer Law Guide, JA 265-94 (613 pgs). |
| *AD A345749 | Uniformed Services Worldwide Legal Assistance Directory, JA-267-98 (48 pgs). |
| *AD A332897 | Tax Information Series, JA 269-97 (116 pgs). |
| AD A329216 | Legal Assistance Office Administration Guide, JA 271-97 (206 pgs). |
| AD A276984 | Deployment Guide, JA-272-94 (452 pgs). |

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

AD A326316 Model Income Tax Assistance Guide, JA 275-97 (106 pgs).

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

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

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

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

Administrative and Civil Law

AD A328397 Defensive Federal Litigation, JA-200-97 (658 pgs).

AD A327379 Military Personnel Law, JA 215-97 (174 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (90 pgs).

*AD A347157 Environmental Law Deskbook, JA-234-98 (424 pgs).

AD A338817 Government Information Practices, JA-235-98 (326 pgs).

*AD A344123 Federal Tort Claims Act, JA 241-98 (150 pgs).

AD A332865 AR 15-6 Investigations, JA-281-97 (40 pgs).

Labor Law

AD A323692 The Law of Federal Employment, JA-210-97 (290 pgs).

AD A336235 The Law of Federal Labor-Management Relations, JA-211-98 (320 pgs).

Developments, Doctrine, and Literature

AD A332958 Military Citation, Sixth Edition, JAGS-DD-97 (31 pgs).

Criminal Law

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

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

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

International and Operational Law

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

Reserve Affairs

*AD A345797 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-98 (55 pgs).

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

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

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

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

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

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

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

National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army.*

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

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

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

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

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

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

forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

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

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

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

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

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

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

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

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

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

b. Access to the LAAWS BBS:

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

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

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

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

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

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

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

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

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

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

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

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

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

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

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

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

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for

daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

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

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

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

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

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

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

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

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

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

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

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

your last hope.

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

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

(2) Client Server Users.

- (a) Log onto the BBS.
- (b) Click on the "Files" button.
- (c) Click on the button with the icon of the diskettes and a magnifying glass.
- (d) You will get a screen to set up the options by which you may scan the file libraries.
- (e) Press the "Clear" button.
- (f) Scroll down the list of libraries until you see the NEWUSERS library.
- (g) Click in the box next to the NEWUSERS library. An "X" should appear.
- (h) Click on the "List Files" button.
- (i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).
- (j) Click on the "Download" button.
- (k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."
- (l) From here your computer takes over.
- (m) You can continue working in World Group while the file downloads.

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

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable for-

mat. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

4. 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>
3MJM.EXE	January 1998	3d Criminal Law Military Justice Managers Deskbook.
4ETHICS.EXE	January 1998	4th Ethics Counselors Workshop, October 1997.
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.
21IND.EXE	January 1998	21st Criminal Law New Developments Deskbook.
22ALMI.EXE	March 1998	22d Administrative Law for Military Installations, March 1998.
42LA_V1.EXE	June 1998	42d Legal Assistance Course (Main Volume), February 1998.
42LA_V2.EXE	June 1998	42d Legal Assistance Course (Tax Volume-Minus Chapter M), February 1998.
42LA_V3.EXE	June 1998	42d Legal Assistance Course (Tax Volume-Chapter M), February 1998.

46GC.EXE	January 1998	46th Graduate Course Criminal Law Deskbook.	98JAOACD.EXE	March 1998	1998 JA Officer Advanced Course, Administrative and Civil Law, January, 1998.
51FLR.EXE	January 1998	51st Federal Labor Relations Deskbook, November 1997.	137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide	145BC.EXE	January 1998	145th Basic Course Criminal Law Deskbook.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	ADCNSCS.EXE	March 1997	Criminal law, National Security Crimes, February 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	ALAW.ZIP	June 1990	<i>The Army Lawyer/ Military Law Review</i> Database ENABLE 2.15. Updated through the 1989 <i>The Army Lawyer</i> Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.	CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.	EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.	FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
98JAOACA.EXE	March 1998	1998 JA Officer Advanced Course, Contract Law, January 1998.			
98JAOACB.EXE	March 1998	1998 JA Officer Advanced Course, International and Operational Law, January 1998.			
98JAOACC.EXE	March 1998	1998 JA Officer Advanced Course, Criminal Law, January 1998.			

FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.	JA262.EXE	January 1998	Legal Assistance Wills Guide, June 1997.
			JA263.EXE	June 1998	Legal Assistance Family Law Guide, May 1998.
JA200.EXE	January 1998	Defensive Federal Litigation, August 1997.	JA265.EXE	June 1996	Legal Assistance Consumer Law Guide, June 1998.
JA210.EXE	January 1998	Law of Federal Employment, May 1997.	JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA211.EXE	January 1998	Law of Federal Labor-Management Relations, January 1998.	JA267.EXE	June 1998	Uniformed Services Worldwide Legal Assistance Office Directory, May 1998.
JA215.EXE	January 1998	Military Personnel Law Deskbook, June 1997.	JA269.DOC	March 1998	1997 Tax Information Series (Word 97).
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.	JA269(1).DOC	March 1998	1997 Tax Information Series (Word 6).
JA230.EXE	January 1998	Morale, Welfare, Recreation Operations, August 1996.	JA271.EXE	January 1998	Legal Assistance Office Administration Guide, August 1997.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.	JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
			JA274.ZIP	August 1996	Uniformed Services Former Spouses' Protection Act Outline and References, June 1996.
JA234.EXE	June 1998	Environmental Law Deskbook, June 1998.	JA275.EXE	June 1998	Model Income Tax Assistance Guide, June 1998.
JA235.EXE	March 1998	Government Information Practices, March 1998.	JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA241.EXE	May 1998	Federal Tort Claims Act, April 1998.	JA281.EXE	January 1998	AR 15-6 Investigations, December 1997.
JA250.EXE	May 1998	Readings in Hospital Law.	JA280P1.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, LOMI, March 1998.
JA260.EXE	May 1998	Soldiers' and Sailors' Civil Relief Act Guide, April 1998.			
JA261.EXE	January 1998	Real Property Guide, December 1997.			

JA280P2.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Claims, March 1998.	JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
			JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
JA280P3.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Personnel Law, March 1998.	NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
JA280P4.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Legal Assistance, March 1998.	OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
			RCGOLO.EXE	January 1998	Reserve Component General Officer Legal Orientation Course, January 1998.
JA280P5.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Reference, March 1998.	RCJAINFO.EXE	June 1998	Reserve Orientation for Judge Advocates, May 1998.
JA285V1.EXE	June 1998	Senior Officers Legal Orientation Deskbook (Volume I), June 1998.	TAXBOOK1.EXE	March 1998	1997 Tax CLE, Part 1.
			TAXBOOK2.EXE	January 1998	1997 Tax CLE, Part 2.
JA285V2.EXE	June 1998	Senior Officers Legal Orientation Deskbook (Volume II), June 1998.	TAXBOOK3.EXE	January 1998	1997 Tax CLE, Part 3.
			TAXBOOK4.EXE	January 1998	1997 Tax CLE, Part 4.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.	TJAG-145.DOC	January 1998	TJAGSA Correspondence Course Enrollment Application, October 1997.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.	WRD97CNV.EXE	June 1998	Word 97 Converter
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.	Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.		
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.			
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.			
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.	Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).		
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.			

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

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

5. *The Army Lawyer* on the LAAWS BBS

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

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

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

(2) Double click on "Files" button.

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

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

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

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

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

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing software application, you can select "c:\

wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

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

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

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

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

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

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

PKUNZIP AUGUST.ZIP

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

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

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

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

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

6. Article

The following information may be useful to judge advo-

cates:

Gordon L. Vaughan, *United States v. Scheffer: A Review of the Opinion of the United States Supreme Court*, 27 POLYGRAPH. 21 (1998).

7. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the reception-

ist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

8. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are 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 purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.