



# Office of Command Counsel Newsletter

February 2002, Volume 02-01

## CLE 2002

The annual AMC Continuing Legal Education Program is scheduled for 21-24 May 2002 at the Grosvenor Hotel, Lake Buena Vista, Florida.

The CLE Planning Committee is in full swing after compiling suggested topics and speakers from AMC field legal offices.

The CLE Planning Committee is chaired by **Steve Klatsky**. Members of the committee are **COL Dave Howlett, Dave Harrington, Vera Meza, Lisa Simon, Mike Lassman** and, of course, **Holly Saunders**.

This year our CLE theme is **AMC Attorneys: Supporting the Objective Force**.

This is a highly visible mission for AMC and one of **General Kern's** main thrusts.

The CG will address us subject, of course, to his availability.

The Pentagon has new leadership and we hope to

have JAG and DA OGC representation.

The Awards Program is always a CLE highlight, and the nomination package is on its way to Chief Counsels. Please carefully consider personnel and recognize outstanding legal work and initiative.

Several suggestions were raised asking that we address the future--DA realignment and the impact on AMC. We agree this is on the mind of everyone. We will see where we are as we get closer to the CLE to determine whether important information is available.

We are designing the program for a mixture of plenary sessions, electives--with the goal of matching last year's total of 15, and legal focus sessions devoted to Acquisition, Employment, Intellectual Property and Environmental.

Much more information to come soon.

## Korte Receives 30 year pin...see Faces in the Firm

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# Miscellaneous

## LINKING, FRAMING and CACHING: Internet Law and More

**Linking** permits Web users to click their way from one Web site to another.

**Framing** permits a Web site user to view material from another Web site within a "frame" on the original site.

**Caching** is the creation of a copy of a Web site by storing data on a computer.

To learn about Internet Addresses, permission and privacy issues, infringement, and copyright hyper-link infringement, and other neat stuff you rarely see good information about, we have enclosed an excellent discussion by CECOM counsel **Raymond Ross**, DSN 992-9792 (Encl 1)

## Mountain Warfare School: Between Law School and Combat

"It began in February 2001 when I read an article in *The Warrior*, a Soldier Systems Center publication, describing the challenges posed by the Vermont Army National Guard Mountain Warfare School. (MWS) <http://www.natick.army.mil/warrior/01/janfeb/soldpers.htm>.

The article, depicting the mental and physical demands of the course, appealed to my innate sense of adventure. Since I had previously participated in an Army "greening" program, I was especially captivated by one sentence describing the "greening" as a "walk in the park" compared to MWS. "

So starts the interesting saga of Natick counsel **Srikanti Dixit**, DSN 256-5971 (Encl 2).

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Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

# Acquisition Law Focus

## Introduction to CRADAs, Etc.

Although Cooperative Research and Development Agreements (CRADAs), Grants, Cooperative Agreements and Other Transactions have been available for use for some time now, if you don't use them often you may feel a little ill at ease when a customer asks you a question concerning them (Encl 3).

To help avoid these moments, this article includes brief descriptions of the circumstances in which each of these types of vehicles might be appropriate.

This note is not intended to be exhaustive or highly refined. It will, however, allow you to give a quick summary to your customer subject to expansion and refinement later.

### CRADA

A "cooperative research and development agreement" is an arrangement authorized by 15 USC §3710a. It does not include procurement contracts, grants, cooperative agreements (these have a similar name but are different vehicles) or other transactions.

It is an agreement between one or more Federal

laboratories and one or more non-Federal parties under which the Government provides personnel, services, facilities, equipment or other resources with or without reimbursement (but NOT funds to non-Federal parties) and the non-Federal party provides funds, personnel, services, facilities, equipment or other resources toward the conduct of specified research or development efforts consistent with the mission of the laboratory. (NOTE: A CRADA must be entered into by a Federal Laboratory. )

A similar description is supplied for Grants, Cooperative Agreements and Other Transactions.

### Other Transactions

An "other transaction" is a contract, other than a procurement contract, cooperative agreement or grant, whereby the Government purchases R&D or prototypes. It is outside the FAR and DFARS and certain procurement statutes and has associated with it certain reporting and other requirements.

POC is CECOM's **Mike Zelenka**, DSN 992-4112

## List of Enclosures

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# Acquisition Law Focus

## Funding and Cancellation Dates in Multiyear Contracts-Lessons Learned in FY 02

A multiyear contract, as defined in FAR section 17.103, is "... a contract for the purchase of supplies or services for more than 1, but not more than 5, program years.... The key distinguishing difference between multi-year contracts and multiple year contracts is that multi-year contracts, defined in the statutes cited at [FAR] 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first."

Further, "[a] multi-year contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to the contractor if appropriations are not made."

It is this provision that performance is contingent upon the appropriation of funds, together with delayed and reduced funding during

repeated continuing resolutions, that has caused unanticipated problems this year.

Among the many requirements

The lessons learned concern the date(s) selected for funding of the subsequent program years in multiyear contracts.

Failure of the government to obligate the total amount of funds by the date(s) specified in the multiyear contract will result in complete cancellation of all subsequent (unfunded) program years of the contract unless the contractor agrees to extend the date(s) via a bilateral contract modification. Unfortunately, the agreement to change the date(s) is entirely at the contractor's discretion, and the government has little or no "leverage." (This is true especially in a sole source contractor situation.)

Other lessons learned and practice ideas are presented in this article by AMCOM's **Diane Beam**, DSN 788-0545 (Encl 4).

## Affirmative Duty to Report Inventions

At TACOM-ARDEC the Intellectual Property Law Team prepared and distributed a notice to alert the scientific and technical staff concerning their duty to report inventions and also to raise the level of awareness of inventive contributions so that patents can be obtained as one of the mission functions.

This awareness is considered to be an important aspect of the culture of TACOM-ARDEC in maximizing the benefit and recognition of the way we perform our mission for the soldier as a research and development organization for munitions and weapon systems.

POC is **John Moran**, DSN 880-6590 (Encl 5).

## Acquisition of Information Technology Commercial Items

The procedures of FAR Part 12 for acquisition of commercial items are an important tool for acquiring reliable, fully developed information technology (IT) in a comparatively speedy and simple manner. Therefore, acquisition-professionals who regularly buy IT products, as well as their attorneys, should be familiar with the commercial item acquisition procedures.

This paper discusses those procedures, along with some examples of practices followed by the CECOM Acquisition Center-Washington (CAC-W) in such procurements

Authority for commercial item acquisition is found in the Federal Acquisition Streamlining Act (FASA) of 1994 (P.L. 103-355, Oct. 13, 1994), and in the Clinger Cohen Act of 1996 (formerly known as the Federal Acquisition Reform Act) (P.L. 104-106, Feb. 10, 1996). These statutes are implemented by FAR Part 12 and its DFARS and AFARS supplementation. FAR Part 12 is to be used in

conjunction with FAR Parts 13, 14, or 15, as appropriate. (FAR 12.102(b).)

A lengthy definition of “commercial item” is set forth in FAR 2.101. It is important to note that “item” includes commercial services as well as concrete objects such as equipment and supplies.

An item of equipment or supplies is deemed to be commercial if it is customarily used for non-governmental purposes, or if it has evolved from such an item through advances in technology or performance, even if it is not yet available in the marketplace, although it will be available to meet the Government’s delivery requirements.

This article includes an excellent discussion of the law and statutory design, defines and explores the term “market research” and has loads of other practical information.

POC is CECOM’s **Richard McGinnis**, DSN 221-5981, and **Percival Park** DSN 221-3304 (Encl 6).

## Process for Maintaining Our Patent Portfolio

As part of the harmonization of the US patent system to make it more in line with the patent systems of European countries, a requirement of periodic payment of fees was introduced so that only valuable patents are kept in force. Under the provisions of 35 USC 41(b), three separate fees must be paid to maintain a patent in force.

The fees are due 3 years and 6 months, 7 years and 6 months, and 11 years and 6 months from the date of issuance of the patent. Failure to pay these maintenance fees results in the lapse of the patent.

As it is DA policy to maintain in force only those Army-owned patents in which an Army agency or activity has a substantial interest and for which a clear commercial potential can be demonstrated, TACOM-ARDEC utilizes the enclosed memorandum to ensure timely payment of fees.

POC is TACOM-ARDEC’s **Kathryn Vander Sande**, DSN 880-3449 or **John Moran**, DSN 880-6590 (Encl 7).

# Employment Law Focus

## Guide to Adverse Actions....

The Civil Service Reform Act, at 5 USC Chapter 75, provides the legal framework for formally addressing employee misconduct problems. Misconduct includes, but is not limited to, actions violating laws, regulations, and Department policies.

Some examples of actionable misconduct include: violation of criminal statutes; abuse of leave; falsification of travel vouchers, time and attendance records, or other official documents; making false statements; misuse of Government time or property; violation of Standards of Conduct; disruptive behavior; disrespectful conduct; failure to follow instructions; and insubordination.

An employee may be disciplined only for such cause as will promote the efficiency of the service. This means that the employee's misconduct interferes with the Department's ability to carry out its mission.

Chapter 75 relates specifically to adverse actions, that is, suspensions of 14 days or less, suspensions of 14 days or more, removals, and reductions in grade or pay.

This short Guide is not intended to be all-inclusive. Applicable laws, rules and regulations may change, and case law further defines the requirements (Encl 8).

## Automation Tools of Interest

Lots of great internet sites for CSRS & FERS calculations, employee/applicant issues, travel information, and other miscellaneous sites of interest.

Thanks to HQ AMC IP Counsel **Bill Adams** who found this useful resource. Originally from Gloria Johnson, Ft. Myer TDS paralegal. Enclosure 9

## ...& Guide to Performance Problem Issues...in the Workplace

The Civil Service Reform Act, at 5 USC Chapter 43, provides the legal framework for monitoring and evaluating employee performance, and for taking corrective action if an employee's performance is unacceptable.

If an employee's performance is unacceptable, the Department may remove or reduce in grade the employee, following appropriate procedures.

The Department's OPM-approved General Performance Appraisal System (GPAS) forms the basis for taking action against an employee for unacceptable performance. The GPAS provides the means for a supervisor to monitor and evaluate an employee's work.

This short Guide is not intended to be all-inclusive. Applicable laws, rules and regulations may change, and case law further defines the requirements (Encl 10).

### Supreme Court on EEOC Authority to Seek Victim-Specific Relief

The United States Supreme Court held 6-3 (opinion by Stevens; dissent by Thomas) that an employment agreement to arbitrate employment-related disputes does not limit the authority of the Equal Employment Opportunity Commission (EEOC) to bring suit in federal court.

In June 1994, Eric Baker completed a job application with Waffle House in Columbia, South Carolina. The application contained an agreement for the applicant to submit to binding arbitration.

Eventually, Baker started working at another Waffle House in West Columbia without signing a new application. Baker was terminated in September 1994, after suffering a seizure. Waffle House in its termination letter determined that, for the safety of guests and co-workers, it was proper for Baker to be let go.

#### EEOC

EEOC filed suit on behalf of Baker to "correct unlawful

employment practices on the basis of Baker's disability."

Specifically, the employee sought injunctive relief, backpay-reinstatement and punitive damages.

#### 9th Circuit

The Ninth Circuit held that when an employee signs a mandatory arbitration agreement, the EEOC is limited to injunctive relief because federal policy in favor of enforcement of the agreement outweighs the public interest of the EEOC to proceed in federal court to enforce a private interest.

#### Supreme Court

The Supreme Court reversed, holding that the private agreement does not bar the EEOC from seeking victim-specific remedies. It determined that the Title VII of the Civil Rights Act of 1964 authorizes the EEOC to enforce the ADA.

EEOC v. Waffle House, Inc

The number of computers and technology-related devices has increased exponentially in the Federal workplace and these devices have become an indispensable part of our daily work routine. Less than twenty years ago, a personal computer (PC) was a luxury reserved for high-ranking officers and civilians. Now, virtually every employee has a PC on his or her desk, or has access to one.

Moreover, the advent of communications technologies such as pagers, cell phones, e-mail and the Internet have provided us with the unprecedented ability to communicate instantaneously and efficiently with people over vast distances.

At the same time the explosive growth in computer usage has brought along with it a wide range of problems and concerns.

The unique nature of the computer and more particularly the Internet, is such that the ability to commit certain crimes has actually increased. POC is CECOM's **CPT Michael Stephens**, DSN 992-9813 (Encl 11).

# Environmental Law Focus

## John German Joins the Environmental Law Team: New Team--New Assignments

We are very pleased to announce that the new Headquarters AMC Environmental Law Specialist (ELS), **John German**, is on board. John is generally familiar with our command having worked on a variety of AMC related environmental issues in his capacity as the former chief of the Army Environmental Center.

The AMC ELS responsibilities will be divided as follows:

### **Compliance:**

RCRA/CAA/CWA/SDWA  
NEPA/ESA/NHPA  
Conventional & Chemical Munitions  
Unexploded Ordnance  
Safety/Radiological  
Pollution Prevention

### **Restoration**

### **Real Estate**

### **Litigation Support**

### **Primary**

Stan Citron  
John German  
Stan Citron  
John German  
Stan Citron  
John German  
John German  
Stan Citron  
John German

### **Backup**

John German  
Stan Citron  
John German  
Stan Citron  
John German  
Stan Citron  
Stan Citron  
John German  
Stan Citron

If you have any questions, please do not hesitate to contact **Stan Citron** (DSN 767-8043) or **John German** (DSN 767-8082).

## DOD Land Use Control Workshops

DoD will be holding three regional workshops to better acquaint DoD personnel with Land Use Controls Associated with Environmental Restoration Activities. These workshops will focus on issues such as the implementation and management of land use controls at active

and BRAC installations, the land use control tools, as well as future direction in the national land use control issues. The workshop dates and locations are as follows:

- February 26-27, 2002 - Dallas, Texas
- April 16-17, 2002 - Charleston, South Carolina

- May 21-22, 2002 - Seattle, Washington

To learn more details about the workshops and to register, please visit the following website - <http://www.denix.osd.mil/LUCsWorkshop>. POC is **Stan Citron**, DSN 767-8043.

# Environmental Law Focus

## Miscellaneous Metal Parts and Plastic Parts Air Standards

The EPA is developing National Emission Standards for Hazardous Air Pollutants (NESHAPs) for Miscellaneous Metal Parts/Products and Plastic Parts/Products.

While these rules are not expected to take effect until May 2005, they are likely to have a significant impact on the AMC mission capabilities.

These NESHAPs are likely to regulate the painting of most Army materiel, including tactical vehicles, ground combat vehicles, and munitions. AMC is currently investigating different ways to reduce the impact of these rules (about \$300M in one time capital expenditure and

an annual maintenance cost of \$60M), including participating in the NESHAP rule-making process and developing new HAP-free materials and processes.

AMC will be requesting each MSC to develop a plan to comply with the NESHAPs for each of its installations. Note - Resources necessary to resolve NESHAP issues must be put into the budget process this year in order to execute either a control or prevention solution.

The HQ, AMC POC is Mr. **George Terrell**, Director, Army Acquisition Pollution Prevention Support Office, DSN 767-9488.

## Endangered Species and Emergencies

Expedited procedures for conducting emergency consultations are outlined in 50 CFR Part 402, Section 402.05 and the USFWS's ESA Section 7 Consultation Handbook, Sections 8.1 and 8.2. The emergency consultations can be accomplished in about 48 hours. Essentially, this

streamlined procedure allows the action to take place with notification and lets the installation proceed with formal consultation after the action is taken. The key step is early notification of the local USFW Ecological Services Office. Please contact **Bill Woodson** at (703) 693-0680.

## Historic Preservation: Extension of Emergency Standards

Emergency situations affecting historic properties are addressed at 36 CFR 800.12. Prior to the Advisory Council's 26 October 2001 decision, this provision was applicable only to undertakings implemented within 30 days following the formal declaration of emergency. However, due to the nature of the current emergency, the Council has extended the period of applicability for use of its emergency provisions "until further notice."

Emergency undertakings must be directly associated with the continuing and immediate threat of further attacks as stated in the presidential declaration. Installations need not make a formal request to operate under these provisions.

For further information, please contact **David Berwick**, Army's Advisory Council Liaison, at (202) 606-8531.

# Frequent Flyer Benefits--Retaining the Benefit

It is official now. Section 1116 of the National Defense Authorization Act for Fiscal Year 2002, signed into law on December 28, provides for employees (among others) to retain promotional items (such as frequent flyer miles) received as a result of government travel.

These changes have been reflected in the Joint Travel Regulations.

The text of Section 116 includes :

“To the extent provided under subsection (c), a Federal employee, member of the Foreign Service, member of a uniformed service, any family member or dependent of such an employee or member, or other individual who receives a promotional item (including frequent flyer miles, upgrade, or access to carrier clubs or facilities) as a result of using travel or transportation services obtained at Federal Government expense or accepted under section 1353 of title 31, United States Code, may retain the promotional item for personal use if the promotional item is obtained under the same terms as those of-

ferred to the general public and at no additional cost to the Federal Government.”

There are exceptions and limitations of course that will require interpretation and rulings (Encl 12).

The Per Diem, Travel and Transportation Allowance Committee issues a memo on 31 December that contains a great deal of useful information (Encl 13).

Additionally, the DA Standards of Conduct Office has promulgated guidance on a host of issues related to this important development.

### Implementing Regulations

The statute has been implemented by the following applicable regulations. For DoD military and civilian personnel, the Joint Federal Travel Regulation and Joint Travel Regulation, respectively, have been revised and can be found at <http://141.116.74.201/regchgs.htm>.

The Joint Ethics Regulation, DoD 5500.7-R, has been changed as of January 10,

2002, to be consistent with the Act. The change will be posted shortly on the SOCO web site under the Joint Ethics Regulation and is also attached below.

### Application to 31 U.S.C. 1353

P.L. 107-107 states that promotional benefits that result from travel accepted pursuant to 31 U.S.C. 1353 (official travel paid by a non-Federal entity) may be retained by the employee. The Joint Travel Regulation and Joint Federal Travel Regulation no longer address this issue, and the Joint Ethics Regulation does not offer additional guidance. Thus, provided that the entity that paid for the travel does not object, Federal military and civilian personnel may retain frequent flyer miles that are derived from such travel.

There are other interesting issues such as taxability of the benefit and supervisory challenges--sure to impact employment law practice (Encl 14).

POC is **Bob Garfield**

# Application of Ethics Laws to IPAs

For those of you whose agencies utilize state and local government employees under the Intergovernmental Personnel Act (IPA), the FY 2002 DOD Authorization Act, section 1117 extends the reach of ethics laws to detailees.

Section 1117 amends 5 USC 3374(c)(2), making the Ethics in Government Act and the Procurement Integrity Act applicable to detailees to the Federal government agency under the IPA.

This amendment means agencies now have the authority to require detailees to file financial disclosure reports and to attend annual ethics training.

# Acceptance of Travel Expenses: Teaching, Speaking, and Writing Activities

On 30 November 2001, OGE issued its final rule amending 5 CFR 2635.807(a) to allow employees, other than noncareer employees, to accept from outside sources travel expenses incurred in connection with certain outside teaching, speaking, and writing activities considered "related to official duties" under the rule.

The amendment brings the cited regulation into conformity with the decision in *Sanjour v. Environmental Protection Agency*, 56 F.3d 85 (D.C.Cir. 1995) (*en banc*), clarified on remand, 7 F.Supp.2d 14 (D.D.C. 1998).

Section 2635.807(a) generally prohibits employees from accepting compensation from any source other than the Federal government for teaching, speaking, or writing that "relates to the employee's official duties."

The amendment is intended to allow those identified employees who are involved in teaching, speaking, or writing *in their private capacities* to accept travel reimbursements incurred in connection with those activities. The intent is not to facilitate official travel.

See Federal Register at 66 FR 59673 (30 November 2001).

# Status of Trustees of a Private Trust under 18 USC 208

In DAEOgram DO-01-029 dated 19 December 2001, the Office of Government Ethics (OGE) calls attention to a recent Office of Legal Counsel (OLC), Department of Justice opinion concerning the application of 18 USC 208 to individuals serving as trustees of a private trust.

OLC opines the mere fact that a trustee is technically the legal owner of the trust property under the common law of trusts, does not give the trustee a personal financial interest in particular matters affecting the trust property.

The example given is the spouse of an employee who serves as trustee of a trust for the benefit of a neighbor. The spouse does not automatically have a financial interest in particular matters affecting the stock holdings of the trust.

For this reason, the employee would not invariably be disqualified from participating in particular matters that directly and predictably affect the holdings of the trust for which the spouse serves as trustee.

# Legal Assistance Page

Two excellent items from CECOM's Pamela McArthur, DSN 992-4760.

## Transitional Compensation Program

Military and civilian families alike can face the issues of spousal or dependent abuse. No one likes to be faced with that situation, talk about it, admit it, or deal with its consequences.

Sometimes, the loss of financial and medical benefits to the military family is a disincentive for that family to report the abuse. The family members sometimes choose to suffer with the abuse; they avoid seeking medical treatment and never report the situation to avoid financial "penalty" associated with the service member's potential discipline or discharge.

Fortunately, Congress has provided some relief to military families that are confronted with this difficult and often debilitating circumstance.

Congress established the Transitional Compensation (TC) program for abused dependents of military personnel in order to counter economic barriers and increase the likelihood that family members will report the abuse.

The legislation authorized temporary payments, at the rate specified for Dependency and Indemnity Compensation (DIC), for families in which the service member has been (1) discharged administratively or by court-martial for a dependent-abuse offense or (2) been sentenced to a forfeiture of all pay and allowances by a court-martial for a dependent-abuse offense after November 29, 1993. Dependent abuse offenses include, but are not limited to, sexual assault, rape, sodomy, assault, battery, murder and manslaughter.

Benefit entitlement begins on the date the administrative separation is initiated or the court-martial sentence is approved. Payments are for a minimum of 12 months or until the soldier's ETS date, whichever is longer, but may not exceed a maximum of 36 months. The current monthly DIC rate is \$911 for a dependent spouse and \$229 for each dependent child in the care of the spouse. Other benefits include retention of

the family member ID card, access to exchanges and commissaries, and medical, dental and TRICARE enrollment (for the purposes of abuse-related care only) for one year following the service member's discharge(Encl 15).

## FAQ re Wills & Estates

The passing of a loved one is an emotionally difficult time under the very best of circumstances. The prospect of going through the probate or administration process only aggravates an already overwhelming situation. First and foremost, "probate" is not a dirty word. It is simply the proving of the validity of a will. Second, by planning ahead, having a will and other documents in order, and understanding the basics of the process, you can ease some of your fears and your fears for your beneficiaries and loved ones (Encl 16).

# The Lexis Corner

## **New LEXLink™ Feature:**

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If you would like to have access to LEXLink, contact your DoD Account Team of **Corrin Gee-Alvarado** at (202) 857-8236 or **Rachel Hankins** at (202) 857-8258.

# Faces In The Firm

## Hello & Goodbye

### HQ AMC

**Gail Barham** joined the General Law Division as legal assistant. Gail most recently assisted in the transition of AMC Commander General Coburn.

**John German** is a new environmental counsel and part of the Environmental Law team. John recently retired from a distinguished career in the Judge Advocate General's Corps.

### CECOM

**Barbara Lamb** has recently joined the Legal Services Branch as a Claims Examiner. Barbara comes to the Legal Office from the CECOM Research, Development and Engineering Center.

### CECOM

**Cruz Febres-Ferrer** is retiring from the Federal Service after twenty-two years as an attorney-advisor.

During her tenure, Cruz successfully handled hundreds of complex matters in the acquisition and contract administration areas of the CECOM Legal Office, and most recently served as agency counsel in a number of Labor/EEO actions.

Over the years, Cruz has gained a reputation for her professionalism, friendliness and cooperativeness and will be sorely missed.

### HQ AMC

**Sam Shelton** is returning to work at the Army Research Laboratory, where he worked before assuming an employment law position at HQ AMC.

## Awards & Recognition

### HQ AMC

**Major Ed Beauchamp** was presented with the Army Commendation Medal for his outstanding fiscal law work and the Army Achievement Medal for his work on the LOGCAP Program.

**Debbie Arnold** received the Commander's Award for Civilian Service for her work supporting both the Protest Litigation Division and the Intellectual Property Law Branch.

**Lisa Simon** received the Commander's Award for Civilian Service for her contributions to the Future Combat Systems Program.

**Ed Korte** was recognized for 30 years of government service.

## Promotion

### CECOM

**LTC Donna Wright**, Staff Judge Advocate, was recently selected for promotion to Colonel. The actual pin-on date will be sometime this spring.